

MODEL PROTECTION OF CHARITABLE ASSETS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-TWENTIETH YEAR
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WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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MODEL PROTECTION OF CHARITABLE ASSETS ACT

TABLE OF CONTENTS

PREFATORY NOTE..... 1

SECTION 1. SHORT TITLE 11

SECTION 2. DEFINITIONS..... 11

SECTION 3. AUTHORITY OF [ATTORNEY GENERAL] TO PROTECT CHARITABLE
ASSETS 14

SECTION 4. REGISTRATION..... 19

SECTION 5. ANNUAL REPORT 31

SECTION 6. NOTICE TO [ATTORNEY GENERAL] OF REPORTABLE EVENT..... 37

SECTION 7. NOTICE TO ATTORNEY GENERAL OF ACTION OR PROCEEDING 40

SECTION 8. WAIVER OF FILING OF REGISTRATION [OR ANNUAL REPORT]..... 42

SECTION 9. FEES 43

SECTION 10. COOPERATION WITH OTHER OFFICIAL..... 44

[SECTION 11. PUBLIC RECORDS] 44

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND
NATIONAL COMMERCE ACT 45

SECTION 13. REPEALS 45

SECTION 14. EFFECTIVE DATE..... 45

MODEL PROTECTION OF CHARITABLE ASSETS ACT

PREFATORY NOTE

The Model Protection of Charitable Assets Act (the “Act”) states and clarifies the role of the Attorney General¹ in the protection of charitable assets. In addition, the Act requires some persons² holding charitable assets to register with the Attorney General, file annual reports, and provide notice of certain fundamental changes or significant events. These requirements apply only to persons with assets above a threshold amount and exemptions further limit the number of persons subject to these duties. These registration and reporting requirements will facilitate performance of the Attorney General’s responsibility to protect the public interest in charitable assets.

The Charitable Sector. American charities provide a wide variety of services and benefits through a range of charitable purposes, from art and health care to education and environmental protection. The sector also helps to relieve poverty through a variety of social services. The sector continues to grow, with the reported total number of U.S. charities in 2009, 1,581,111, representing a 31.5% increase in 10 years. *See* Urban Institute, National Center for Charitable Statistics, Number of Public Charities in the United States, 2010, <http://nccsdataweb.urban.org/PubApps/profile1.php>. Charities manage substantial funds in conjunction with carrying out their charitable purposes, over \$3 trillion in assets in 2010. *See id.* at <http://nccsdataweb.urban.org/PubApps/profileDrillDown.php?state=US&rpt=PC>; <http://nccsdataweb.urban.org/PubApps/profileDrillDown.php?state=US&rpt=PF>. Charities carry out important functions, improving the quality of life for many people and in many cases supplementing or complementing government programs.

Charitable organizations are formed and operate under state law. Although some are large and operate across state lines, most are local or regional in nature. These local charities provide a significant opportunity for the public to participate in the improvement of local community life. They represent an integral component of our culture.

Public confidence in charities maintains the vibrancy of the charitable sector. If potential donors worry that charities will misuse contributed funds, donors are unlikely to contribute. The good work charities do will suffer if reports of abuse, fraud, or other types of misbehavior reduce public confidence in the sector.

The regulation of charities remains minimal, and yet the importance of public confidence in the sector points to the need for some modicum of protection for the assets entrusted to charities. In the charitable sector, self-regulation has always been and will continue to be important. *See* Panel on the Nonprofit Sector: Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations (2007), www.nonprofitpanel.org/Report/principles/Principles_Guide.pdf (outlining 33 recommendations for good governance by charitable organizations).

The Internal Revenue Service (“IRS”) has begun to increase its role in charitable

¹ The term “Attorney General” is used to mean the office, division or section in each state that is charged with protecting charitable assets.

² “Person” as used in these Comments has the legal meaning given that term in Section 2(3) of the Act.

supervision, and in 2008 the IRS redesigned its Form 990 (Return of Organizations Exempt from Income Tax), which must be filed annually by certain charitable organizations, to request more governance information. The IRS, however, does not have the authority, the resources, or the ability to oversee these myriad charitable entities. Historically, the states have had that authority. The goal of this Act is to acknowledge and protect the role of the states with respect to charitable assets, by clarifying the role of the state Attorney General.

Attorneys General in states that take an active role in protecting charitable assets report the need for information so they can do their jobs. Providing information about charitable assets in other states will allow the Attorneys General in those states to do a better job. Examples of problems with charitable assets demonstrate the need for the Act in states that do not yet have reporting requirements.

The Attorney General in Massachusetts identified charities that needed to establish and follow conflict of interest policies. The Attorney General helped Suffolk University develop a conflict of interest policy and procedures for following the policies. *See* <http://www.mass.gov/ago/docs/nonprofit/suffolk-university-070909.pdf>. The Attorney General investigated a charity called Angel Flight and required independent directors so those in control of the organization were not in a position to benefit financially. *See* <http://www.mass.gov/ago/news-and-updates/press-releases/2010/ag-coakleys-office-and-angel-flight-of-new.html>. The Massachusetts Attorney General also investigated problems with a charity called Touched By Angels. The founder and the charity were indicted for fraud, embezzlement, and labor violations. *See* <http://www.mass.gov/ago/news-and-updates/press-releases/2011/founder-of-defunct-charity-indicted.html>.

Newspaper stories from August 2011 demonstrate the need for oversight of charitable assets. Many more examples exist, and these stories, all posted within a three-day period, merely provide a snapshot of the problems. Concerns about the Kauai Independent Food Bank focused on alleged mismanagement of funds and a conflict of interest that resulted from its purchase of food from a for-profit company owned by members of the food bank. The for-profit company allegedly benefitted by marking up food before selling it to the food bank. *See* http://www.midweek.com/content/columns/justthoughts_article/kauai_food_bank_misuses_779000/. In Oregon, a jury convicted Pete Seda for fraud for using a charity, Al-Haramain USA, to launder money being sent to Saudi Arabia. *See* <http://special.registerguard.com/web/newslocalnews/26695741-41/seda-judge-trial-government-hogan.html.csp>.

Described as a “criminal enterprise of mammoth proportion,” U.S. Navy Veterans Association raised millions of dollars in several states but did little for veterans. Attorneys General in Florida, Hawaii, Minnesota, Missouri, New Mexico, Ohio, Oregon, and Virginia brought actions against the founder, an employee, companies soliciting on behalf of the organization, and the organization itself. *See* <http://www.tampabay.com/news/courts/criminal/key-player-in-navy-vets-scam-to-be-sentenced-today/1185227>.

Many charities fall victim to embezzlers. In Pennsylvania, the office manager of the York Symphony Orchestra wrote checks to herself and disguised them as payments to vendors and guest artists. She was charged with embezzling \$58,000. *See*

http://www.pennlive.com/midstate/index.ssf/2011/08/woman_charged_with_embezzling.html. The director of administration of a New York charity, the Abert Eliss Institute, was accused of embezzling \$2.5 million by shifting funds into bank accounts he controlled. *See* <http://philanthropy.com/blogs/philanthropytoday/former-chair-of-n-y-nonprofit-board-accused-of-embezzlement/38427>. The Gilroy Dispatch, from Gilroy California, reports that a consultant allegedly embezzled \$52,000 from the South County Collaborative. *See* <http://www.gilroydispatch.com/news/278138-nonprofits-keenly-aware-of-money-trail>. In Hartford, Connecticut, the Mark Twain House and Museum struggled to survive while an employee embezzled \$1 million. *See* http://articles.courant.com/2011-08-10/news/hc-ed-twain-house-bleeding-20110810_1_nonprofits-museum-restitution. A bookkeeper at Anderson Ranch Arts Center in Snowmass, Colorado embezzled \$700,000. *See* <http://www.snowmasssun.com/article/20110810/NEWS/110819997/1064&ParentProfile=1039>, and in Wyoming \$100,000 disappeared from the Genesee Falls Fire Department books. *See* http://thedailynewsonline.com/news/article_63cfbe64-c2ff-11e0-8261-001cc4c03286.html.

These examples, just a sample of the problems that can arise, indicate the need for protection of charitable assets. For more examples of wrongdoing committed against charities and charitable assets, see Marion R. Fremont-Smith and Andras Kosaras, *Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995-2002*, THE EXEMPT ORGANIZATION TAX REVIEW, October 2003, Vol. 42, No. 1.

The Role of the Courts and the Attorney General under Existing Law. The courts, using their broad equity powers, have long played an important role in determining the scope of charitable purposes and powers in the United States. MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 302-3 (2004). The duty of the Attorney General to protect assets held for charitable purposes “is stated in the legal texts as an absolute duty and is recognized in almost all of the states either by statute or judicial decision.” *Id.* at 306. As Professor Fremont-Smith explains: “Both the enforcement power, exercised by the attorney general, and the regulatory power, exercised by the courts, extend to all assets dedicated to charitable purpose, regardless of the legal form – corporation, trust, or voluntary association – in which they are held.” *Id.* at 301.

Thirty-seven states have statutes related to the Attorney General’s duty with respect to charitable assets. In a few states – Florida, Mississippi, Missouri, Nebraska, and Wyoming -- the statutory authority is limited to corporate transactions of nonprofit corporations, and in Indiana the authority of the Attorney General is limited to petitioning for a trust accounting. In all six of those states, the power to enforce charitable trusts is recognized in the case law. *See id.* at 306. When the Supreme Court of Virginia held that the Attorney General did not have power to enforce charitable corporations but only to enforce charitable trusts, *Virginia v. The JOCO Foundation*, 558 S.E.2d 280 (Va. 2002), the legislature responded quickly to clarify that the assets of a charitable corporation “shall be deemed to be held in trust for the public” and “[t]he attorney general shall have the same authority to act on behalf of the public with respect to such assets as he has with respect to assets held by unincorporated charitable trusts and other charitable entities, including the authority to seek such judicial relief as may be necessary to protect the public interest in such assets.” VA. CODE ANN. §2.2-507.1 (2011). The legislature confirmed that the courts had jurisdiction over charitable corporations as well as other charitable entities. VA. CODE ANN. §17.1-513.01 (2011). In Louisiana, no case or statute describes the Attorney General’s role with respect to charitable assets, although the statute providing for cy

pres proceedings requires notice to the Attorney General. In all other states the duty to protect charitable funds exists either in the Attorney General or in another public official. *See* FREMONT-SMITH, *supra*, 306-7 (2004).

The states have generally provided minimal resources for the protection of charitable assets. According to one source, in 2007 attorneys staffing state offices (generally those of the Attorneys General) varied from 20.5 attorneys in New York, to 12 in California and Pennsylvania, to no attorneys assigned to this function in 17 states. Some 79% of the states had one or fewer full-time equivalent attorneys devoted to charitable oversight. Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1128-1129 (2007). These officials are dedicated professionals but the limited number of these officials and the limited information available in most states make it difficult, if not impossible, to focus on cases warranting attention, or even to respond to complaints. State charity officials have formed the National Association of State Charity Officials (NASCO), which provides an important means of exchanging information, promoting professional education, and upgrading procedures. In addition, the Charities Regulation and Oversight Project of the National State Attorneys General Program at Columbia Law School provides a resource to state attorneys general in fulfilling their responsibilities with regard to charities and charitable assets. Among other things, the project facilitates communication among attorneys general and institutionalizes the dialogue between attorneys general, the regulated communities, and legal scholars specializing in charities and nonprofit studies.

Members of NASCO participated actively in the work of the Drafting Committee for this Act, providing invaluable advice and information based on their experiences. The regulators and charitable organizations, which also played an active role in the work of the committee, represent the key components necessary to a healthy and productive charitable community in our states. Organizations holding charitable assets are typically creatures of state law, subject to state law requirements and expectations. Without more attention to these issues at the state level, increased regulatory activity on the federal level is likely. A healthy federal system requires the states to clarify and exercise their responsibilities over charitable assets. This Act is designed to provide a minimal statutory framework necessary to this effort. States can enhance these requirements as their experiences dictate.

Private rights of action are not addressed in this Act and are left to other statutes and common law. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 94 (T.D. No. 5, 2009). The rights and the duties of trustees of charitable trusts and directors and officers of nonprofit corporations and unincorporated associations are the subject of other recent products of the Uniform Law Commission (“ULC”) (also known as the National Conference of Commissioners of Uniform State Laws or NCCUSL), notably the Uniform Trust Code (2000) and the Uniform Prudent Management of Institutional Funds Act (2006). Important new efforts by the American Law Institute concerning state law are contained in the new Restatement (Third) of Trusts and Principles of the Law of Nonprofit Organizations (partly now in draft).

The authority of the Attorney General to protect charitable assets exists in some form throughout the country, but a procedure for reporting the existence of charitable assets and providing identifying and contact information for persons holding such assets has been lacking in many states. In 1954 the ULC approved the Uniform Supervision of Trustees for Charitable Purposes Act (“1954 Act”), an attempt to rectify the problem by creating registration and

reporting requirements. The 1954 Act defines “trustee” to mean anyone, including a corporation, holding assets for charitable purposes. The 1954 Act excluded government agencies, and, in an alternative provision, excluded charities organized and operated exclusively for educational or religious purposes. The Act provided that all covered charities (with no threshold amount) had to register and provide annual reports. The Act also gave the Attorney General authority to investigate charities and request information from the persons managing them.

Arkansas, California, Illinois, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Washington all have registration statutes separate from solicitation statutes. *See* ARK. CODE ANN. § 4-28-401 (2011); CAL. [GOV’T] CODE § 12580 et seq. (West 2011) (no threshold amount; exempts religious organizations, educational institutions, hospitals, health care service plans, and cemetery corporations); 760 IL. COMP. STAT. 55/1 et seq. (2011) (more than \$4,000 in assets); MASS. GEN. LAWS ch. 12, § 8E (2011) (no threshold amount); MICH. COMP. LAWS § 14.251 et seq. (2011) (no threshold amount; exempts religious organizations, educational institutions, and hospitals); MINN. STAT. § 501B.33 et seq. (2011) (assets of \$25,000 or more; exempts religious associations, split-interest trusts); N.H. REV. STAT. ANN. § 7:19 (2011) (no threshold amount); N.Y. [EST. POWERS & TRUSTS] LAW § 8-1.4 (2011) (total receipts or total assets more than \$25,000); OHIO REV. CODE ANN. § 109.26 (West 2011) (no threshold amount; exempts charitable remainder trusts and agricultural societies); OR. REV. STAT. ANN. § 128.610 et seq. (2011) (no threshold amount; exempts religious organizations, cemeteries, and certain child care agencies); 10 PA. CONS. STAT. ANN. § 379 (2011) (\$25,000 or more of contributions a year or program service revenue equal to or exceeding \$5 million; exempts religious institutions and organizations forming an integral part of a religious institution); R.I. GEN. LAWS § 18-9-6 (2010) (no threshold amount); WASH. REV. CODE ANN. § 11.110.051 (2011) (no threshold amount; exempts religious organizations and educational institutions with programs of instruction comparable to Washington public schools and universities).

Although Idaho does not require registration, it provides by statute that the Attorney General has the duty to supervise any person holding property subject to a charitable or public trust and to enforce the purpose of the trust. IDAHO CODE ANN. § 67-1401 (2011). Idaho also provides that each person holding charitable assets is subject to examination by the Attorney General “to ascertain the condition of its affairs and to what extent, if at all, said trustee or trustees may have failed to comply with trusts said trustee or trustees have assumed or may have departed from the general purpose for which it was formed.” *Id.* *See also* NEV. REV. STAT. ANN. § 82.536 (West 2010); N.H. REV. STAT. ANN. § 7:24 (2011); S.D. CODIFIED LAWS § 55-9-5 (2010); TEX. [GOV’T] CODE ANN. § 402.021 (Vernon 2011) (*See Hill v. Lower Colo. River Auth.*, 568 S.W.2d 473 (Tex. Civ. App. 1978) for case law that affords the Texas Attorney General authority to protect public charity trusts); VT. STAT. ANN. tit. 9, § 2479(b) (2011); WYO. STAT. ANN. § 17-19-170 (2010).

Many states require charities to register if they intend to solicit charitable contributions. Alabama: ALA. CODE § 13A-9-71 (2011); Alaska: ALASKA STAT. § 45.68.010 (2010); Arizona: ARIZ. REV. STAT. ANN. § 44-6552 (2011); Colorado: COLO. REV. STAT. ANN. § 6-16-104 (West 2011); Connecticut: CONN. GEN. STAT. § 21a-190b (2011); Florida: FLA. STAT. ANN. § 496.405 (West 2011); Georgia: GA. CODE ANN. § 43-17-5 (West 2011); Hawaii: HAW. REV. STAT. § 467B-2.1 (2011); Illinois: 225 ILL. COMP. STAT. 460/2 (2011); Kansas: KAN. STAT. ANN. § 17-1761 (2010); Kentucky: KY. REV. STAT. ANN. § 367.657 (West 2010); Maryland: MD. CODE

ANN., [BUS. REG.] § 6-401 (West 2011); Maine: ME. REV. STAT. ANN. tit. 9, § 5004 (2010); Massachusetts: MASS. GEN. LAWS ch. 68, § 19 (2011); Michigan: MICH. COMP. LAWS § 14.303 (2011); Minnesota: MINN. STAT. § 309.52 (2011); Mississippi: MISS. CODE ANN. § 79-11-503 (West 2010); Missouri: MO. ANN. STAT. § 407.462 (West 2011); New Jersey: N.J. STAT. ANN. § 45:17A (West 2011); New Mexico: N.M. STAT. ANN. § 57-22-6 (West 2011); New York: N.Y. [Executive] LAW § 172 (2011); North Carolina: N.C. GEN. STAT. ANN. § 131F-5 (West 2010); North Dakota: N.D. CENT. CODE § 50-22-02 (2009); Ohio: OHIO REV. CODE ANN. § 1716.01 et seq. (West 2011); Oklahoma: OKLA. STAT. ANN. tit. 18, § 552.3 (West 2011); Pennsylvania: PA. CONS. STAT. ANN. 10 P.S. § 162.1 et seq. (West 2011); Rhode Island: R.I. GEN. LAWS § 5-53.1-1 et seq. (2010); South Carolina: S.C. CODE ANN. § 33-56-10 et seq. (2010); Utah: UTAH CODE ANN. § 13-22-1 et seq. (West 2011); Virginia: VA. CODE ANN. § 57-48 et seq. (West 2011); Washington: WASH. REV. CODE ANN. § 19.09.010 et seq. (West 2011); West Virginia: W. VA. CODE ANN. § 29-19-1 et seq. (West 2011); Wisconsin: WIS. STAT. ANN. § 440.42 (West 2011).

A few states require professional fundraising firms that solicit for charities, but not the charities themselves, to register. Indiana: IND. CODE § 23-7-8-2(a) (West 2011); Iowa: IOWA CODE § 13C.2 (2011); Louisiana: LA. REV. STAT. ANN. §51:1901.1 (2011) (the charity must furnish information to substantiate claims that it is charitable if requested by the Attorney General, *id.* at § 51:1902); Oregon: OR. REV. STAT. ANN. § 128.802 (West 2011).

Registration is a common requirement for charities in the United Kingdom and the Republic of Ireland. The laws relating to the registration and administration of charities acts in these jurisdictions have all been redone in the past ten years. In addition to broad registration requirements, with certain exceptions they require detailed financial accounts to be filed with a central regulatory agency that is separate from the taxing authorities. In England and Wales, the Charities Act of 2006 is the governing statutory authority, Scotland has the Charities and Trustee Investment Act of 2005, Northern Ireland has the Charities Act of 2008, and the Republic of Ireland has the Irish Charities Act of 2009. These jurisdictions maintain arrangements for informal cooperation since many charities in the British Isles operate across regulatory boundaries. In essence, these jurisdictions require all charities to keep proper accounting records, to publish annual statement of accounts, and to register with the relevant regulator. There are income thresholds applicable in England and Wales for the filing of annual reports and accounts, and the requirement for accounts to be independently examined by a lay examiner applies only for charities with higher levels of activity. Higher thresholds are required for full audits in each of these jurisdictions. *See, generally, Cross-Border Issues in the Regulation of Charities Experiences from the UK and Ireland*, 11 INTERNATIONAL JOURNAL FOR NOT FOR PROFIT LAW, Issue 3 (May 2009).

Goals of the Act. The Model Protection of Charitable Assets Act articulates and confirms the role of the state Attorney General in protecting charitable assets. The Attorney General's existing authority is broad and this Act does not limit or narrow that authority. In some states, however, the scope of the authority is unclear. In the great majority of states, the Act will provide a helpful statutory articulation of that authority.

The Act adopts registration, reporting, and notice requirements that will enable the Attorney General to fulfill the responsibility of that office to represent the public interest by protecting charitable assets. The requirements are designed so as not to overburden either the Attorneys General or those with the duty to report. The Act is based on a minimalist or basic

platform.

It is useful to remember that the Attorney General has an educational role and a facilitative role in addition to the responsibility to protect charitable assets from waste, diversion, or mismanagement. Currently, many Attorneys General educate charities and work with charities to help them become more efficient and more effective. The Attorney General will be better able to perform these roles with more adequate information about the charities operating in the state.

Model v. Uniform Act. Because some states have substantial statutes in this area of the law, while others have little or no statutory authority with respect to the protection of charitable assets, the prospect of uniformity in statutory language is limited. The approach of this Act is to create a model, all or part of which would be useful to all of the states. As a whole, it is designed to produce a minimalist structure for those states without significant structures presently in place. While uniformity is desirable, adoption by states presently without significant legislation in this area will foster uniform understanding of the role of the Attorney General and ways in which that role can be supported. It should also enhance cooperation among the states.

Who Does the Act Cover? The Attorney General of a state has a duty to protect charitable assets located and used in the state and all charitable assets held by entities incorporated or organized in the state, so the Act has broad applicability. However, certain sections of the Act (registration, reporting, and notice) apply more narrowly due to threshold amounts or exemptions based on policy. The threshold amounts that apply to the duty to register, to file an annual report, and to provide notices are in brackets, indicating that a state can change the amounts to apply the duties more broadly or to limit the duties to fewer organizations. The Act does not cover assets held by governmental bodies or entities. It does not cover private businesses, except to the extent that those entities hold charitable assets. The Act does not use the term “charity,” because that term has a variety of meanings in statutes and common parlance so using the term with a definition specific to the Act could be confusing.

General Authority of the Attorney General. The Act states the broad duty of the Attorney General to represent the public interest in the protection of charitable assets. The Act states that the Attorney General may enforce the use of charitable assets for the purposes for which the assets were given; may take action to prevent or correct a breach of a fiduciary duty in connection with the administration of the entity holding the assets or with respect to the charitable assets; and may intervene in an action brought to correct a misapplication of charitable assets, a departure from the purpose of the entity holding the charitable assets, or a breach of a fiduciary duty.

Registration. The Act provides that a person that holds, or within the preceding 12 months has received, charitable assets with a value in the aggregate of more than a suggested \$50,000 must register with the Attorney General within a specified period of time after the charity initially receives property. The information required for the registration is brief but will provide the Attorney General’s office with basic information about the organization (name, address, statutory agent, federal identification number, and contact person) and information about the charitable purpose of the organization. Section 4 contains several exemptions from the registration requirement, including exemptions for a government or governmental subdivision, agency or instrumentality, and an organization the primary purpose of which is to influence

elections. Section 4 further contains, in brackets, exemptions for the states to consider, including alternatives dealing with churches and religious organizations and an exemption for an organization that has as its primary activity advocacy on issues of public or governmental policy. The Comments to Section 4 include a one-page registration form.

Annual Reports. An organization with charitable assets or receipts above the threshold amount and that is required to register under Section 4 must file an annual report with the Attorney General. The annual report will provide basic information and requires that the charity attach a copy of any report the charity files with the IRS (e.g., a Form 990, Form 990-EZ, or Form 990-PF). The Comments to Section 5 include a two-page annual report form. If an organization holds charitable assets above the threshold amount but was exempt from registration under Section 4, the person is not required to file an annual report.

Notice of “Life Events.” One of the concerns the Act seeks to address was the problem that occurs when an Attorney General learns about the loss of charitable assets after a person holding the assets disposes of them. The Act requires a person holding charitable assets to file a notice with the Attorney General of certain planned events, a specified number of days before the event is to occur. Events that require notice represent fundamental changes and include the following:

- A dissolution or termination;
- The disposition of all or substantially all of its property;
- A merger, conversion, or domestication;
- A removal of the charity or of significant charitable assets from the state.

The transfer of assets without providing notice or, after providing notice, before the passage of the time prescribed in the Act, will be considered a violation of the Act unless the person receives written consent from the Attorney General or notice that the Attorney General will take no action with respect to the event. Approval by the Attorney General is not required, but the Act provides the Attorney General the opportunity to determine whether there is a need to take action to protect charitable assets before the event occurs.

In addition, if a decedent’s estate or a revocable trust after the settlor’s death involves the distribution of property to a person holding charitable assets, the personal representative of the estate or the trustee of the trust must send the Attorney General a copy of the will or a description of the charitable interests in the trust. A person holding charitable assets must also send notice to the Attorney General of revocation or modification of its federal, state, or local tax exemption.

Any person who asserts a claim in a proceeding involving charitable assets or a person holding charitable assets must give written notice to the Attorney General. This may be the charitable person itself or some other person. The notice must include a copy of the initial pleading. The proceedings that require notice are the following:

- An action seeking to enforce a term relating to a gift of a charitable asset;

- An action seeking to enforce the use of charitable assets or involving the breach of a duty owed to the person holding charitable assets;
- A proceeding seeking instructions relating to the management, use, or distribution of charitable assets;
- A proceeding to construe a document under which charitable assets are held or to modify the terms under which charitable assets are held;
- A proceeding to remove, appoint, or replace a trustee of a charitable trust;
- A proceeding involving a trust or decedent's estate in which matters affecting charitable assets may be decided; or
- A proceeding for bankruptcy or receivership.

Waiver of Filing Requirements. The Act addresses concerns about excessive filing requirements in two ways. First, the Act limits registration and annual report requirements to persons holding more than a suggested \$50,000 of assets. This threshold is significantly higher than that used by existing state registration statutes and by the federal government and should serve to remove a significant number of persons from the reporting requirements of the Act.

Second, the Attorney General can decide to waive certain filing requirements under the Act. The goal is to limit the need to make duplicate filings. In a state with a solicitation statute, annual reports filed under that statute may contain information similar to that required under this Act. One filing may be sufficient for the purposes of the solicitation statute and the purposes of this Act, and the Attorney General may choose to waive the filing of annual reports under this Act. The Act does not attempt to coordinate with solicitation statutes, but a state may choose to do so.

The Attorney General may waive the registration requirement for a person holding charitable assets that is registered in another state under a law substantially similar to this Act and require instead the filing of a copy of the registration filed with the other state. If a person holding charitable assets is not required to register, it will not be required to file annual reports.

Cooperation with Other Officials. The Act permits the Attorney General to cooperate with any official of the state, another state, the United States, or a foreign government. The Attorney General can provide information or documents concerning an investigation or proceeding to the other official in connection with the official's role in the oversight of charities and charitable assets, but cannot provide information kept confidential by law. The Attorney General can also acquire information or documents from the other official.

Resources and Enactment. A state without the resources to manage the filings required under Sections 4-7 may want to adopt only Sections 1-3. The Act will still provide valuable guidance if the state adopts only Section 3, providing clarification of Attorney General authority. A state may also choose to require registration but not require annual reports. If a state adopts

only Sections 1-3, the state will want to delete Section 2(5), the definition of responsible person, used only in Sections 4 and 5.

MODEL PROTECTION OF CHARITABLE ASSETS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Model Protection of Charitable Assets Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Charitable asset” means property that is given, received, or held for a charitable purpose. The term does not include property acquired or held for a for-profit purpose.

(2) “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(3) “Person” means an individual, corporation, estate, trust, business trust, statutory trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(5) “Responsible individual” means an individual who, with respect to a person holding charitable assets:

(A) is generally familiar with the affairs of the person; and

(B) participates, directly or indirectly, in the control or management of the person.

(6) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

Comment

Subsection (1). Charitable Asset. The term “property” includes all interests in real property or tangible or intangible personal property, including cash, remainder interests, land, and conservation or preservation easements or restrictions. The remainder interest in a charitable remainder trust is property held for a charitable purpose, as is the current interest in a charitable lead trust, property held for ten years in a building fund, and property given to a charitable organization subject to a restriction on its use. Property held in a revocable trust that provides a remainder interest for a charitable purpose is not a charitable asset while the settlor is alive because the settlor can revoke or change the interest.

Property held with a for-profit purpose is not a charitable asset, even if the purpose is one that could be considered charitable if held on a nonprofit basis. For example, education is a purpose that has long been considered a charitable purpose. Many colleges operate as nonprofits and their educational purpose is considered charitable, but some educational institutions -- University of Phoenix is an example -- operate on a for-profit basis. A for-profit university is not operating for a charitable purpose even if its purpose is educational. The same is true for a for-profit hospital. The second sentence to the definition is included to avoid any misunderstanding that somehow a business purpose could be considered a charitable purpose.

The word “asset” does not have the meaning it would have in an accounting context, for example on a balance sheet.

Subsection (2). Charitable Purposes. The definition of charitable purposes follows that of Uniform Trust Code § 405, Restatement (Third) of Trusts § 28 (2003), and Uniform Prudent Management of Institutional Funds Act § 2(1) (2006). This long-familiar standard in U.S. trust law derives from the English Statute of Charitable Uses, enacted in 1601. As used in this Act the definition means the definition of charitable purpose that has developed under the common law. A charitable purpose is a nonprofit purpose (and not a purpose for private benefit) that benefits an indefinite class of the public.

The definition includes purposes “beneficial to the community” because that concept is part of the traditional definition of charitable purposes. The definition means purposes considered charitable and not merely beneficial. Many activities and organizations, such as social welfare organizations, cooperative associations, and business entities, benefit the community. Nonetheless, these organizations and the activities they carry on are not charitable within the meaning of the Act because their earnings inure to the benefit of private persons such as members or shareholders. *Attorney General v. Weymouth Agricultural & Industrial Society*, 400 Mass. 475, 479, 509 N.E.2d 1193, 1195 (1987). The definition of charitable has long been limited to those beneficial purposes that fit within one of the other categories of charitable, for example educational, that relate to the relief of poverty, or that provide some general good such as improvement of the environment. By using the standard definition, the Act intends to include the case law that has developed around the term “charitable” in trust law.

Case law has distinguished between purposes that are charitable and those that are merely beneficial. For example, in *Shenandoah Valley National Bank v. Taylor*, 192 Va. 135, 63 S.E.2d 786 (1951), a settlor attempted to create a trust to provide small amounts of money to children just before winter and spring holidays. The distributions were not restricted in their purpose and

were not limited based on the financial need of the recipients. The court concluded that the purpose was beneficial and not charitable. As the court explained, “charitable” means either distributions in response to financial need or distributions that support an educational purpose or one of the other identified charitable purposes.

Something that is now considered charitable but does not fit neatly in one of the other delineated categories is environmental protection. Thus, for example, organizations that protect watersheds, wildlife habitat, or biodiversity will be considered charitable even though they do not provide for the relief of poverty, the advancement of education or religion, the promotion of health (except, perhaps, tangentially), or the promotion of a governmental purpose (although governments may become involved in the protection of such resources), because achievement of its purpose will be beneficial to the community. The phrase “beneficial to the community” as used in the definition of “charitable purpose” allows some development of the term “charitable” in the case law, but the phrase should not be read to mean that anything that is beneficial to some people benefits the community and is charitable for purposes of this Act. An activity with a charitable purpose is one that benefits a sufficiently large and indefinite class of persons—the community and not just a fortunate few--and the earnings from the activity cannot be distributed to private persons. *Attorney General v. Weymouth Agricultural & Industrial Society*, 400 Mass. at 479, 509 N.E.2d at 1195. 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).

Some states have created statutory definitions of charitable purpose for various reasons. *See, e.g.*, 10 Pa. Cons. Stat. § 162.3 (2005) (defining charitable purpose within the Solicitation of Funds for Charitable Purposes Act to include “humane,” “patriotic,” “social welfare and advocacy,” and “civic” purposes). The definition in subsection (2) applies for purposes of this Act and does not affect definitions of charitable purpose in other legislation. If a state has another definition of charitable purpose, the state may consider substituting the other definition for the definition in the Act. However, because definitions in different contexts serve different purposes, the state should consider any substitution carefully. For example, some states have narrowed the definition of charity for tax purposes, but protection of assets devoted to a charitable purpose might be appropriate even if the purpose does not qualify for tax exemption under state law. *Weymouth Agricultural & Industrial Society*, 400 Mass. at 477 n.3, 509 N.E.2d at 1194.

Subsection (3). Person. Person is defined using the standard ULC definition and includes individuals as well as entities. Charitable entities organized as nonprofit corporations, charitable trusts or unincorporated associations are included within this definition.

Subsection (4). Record. Record is defined using the standard ULC definition. The term allows the use of one word instead of several when the act deals with traditional forms of paper, as well as information in electronic form.

Subsection (5). Responsible Individual. This term describes someone the Attorney General could contact for information about the charity. Often the Attorney General will be able to resolve a question about a charity’s use of assets informally, and having someone identified as a contact person for the charity will make that informal discussion more efficient and effective. A responsible individual should be someone who is generally familiar with, among other things,

how the charity is managed, but the person need not be a director or trustee. The definition is based on one in the Uniform Law Enforcement Access to Entity Information Act (2009).

SECTION 3. AUTHORITY OF [ATTORNEY GENERAL] TO PROTECT CHARITABLE ASSETS.

(a) The [Attorney General] shall represent the public interest in the protection of charitable assets and may:

(1) enforce the application of a charitable asset in accordance with:

(A) the law and terms governing the use, management, investment, distribution, and expenditure of the charitable asset; and

(B) the charitable purpose of the person holding the asset;

(2) act to prevent or remedy:

(A) the misapplication, diversion, or waste of a charitable asset; or

(B) a breach of fiduciary or other legal duty in the governance, management, or administration of a charitable asset; and

(3) commence or intervene in an action to:

(A) prevent, remedy, or obtain damages for:

(i) the misapplication, diversion, or waste of a charitable asset; or

(ii) for a breach of fiduciary or other legal duty in the governance, management, or administration of a charitable asset;

(B) enforce this [act]; or

(C) determine that an asset is a charitable asset.

(b) If the [Attorney General] has reason to believe an investigation is necessary to determine whether action is advisable under this [act], the [Attorney General] may conduct an investigation, including exercising administrative subpoena power under [law of this state providing for administrative subpoena power].

(c) This [act] does not limit the powers and duties of the [Attorney General] under law of this state other than this [act].

(d) The [Attorney General] shall promulgate rules to implement [this [act]] [Sections 4(a) and (e), 5(a), 6, 7(b), and 8.

Legislative Note: *States that detail Attorney General subpoena power in statutes dealing broadly with Attorney General power will not need to add provisions regarding subpoena power to Section 3. States that do not provide specific statutory authority for the Attorney General will need to add a subsection to do so. States that provide in their statutes for Attorney General civil subpoena power specifically in connection with another Attorney General function (such as consumer protection) may want to add that language to Section 3 with any necessary adaptations.*

Comment

One of the major goals of the Act is to articulate the Attorney General’s duty to represent the public interest in the protection of charitable assets. The duty exists in the common law and in statutes in many states, but the scope of the duty is sometimes uncertain. The Act declares and clarifies the scope of the duty and what the Attorney General is authorized to do to fulfill it, although the Act does not limit the authority or powers that already exist.

The Attorney General’s duty has sometimes been described as the “parens patriae” power – the duty to protect the public interest in property that has been committed to charitable purposes. Unlike a private corporation or a private trust, no shareholder or private beneficiary has a financial incentive to supervise the proper management of assets held for charitable purposes. A donor or charitable beneficiary may be interested in the management of the assets, but under the common law the Attorney General has standing to sue or take action to protect the public’s interest in charitable assets. A Massachusetts statute, first enacted in 1847, describes the duty as the duty to “enforce the due application of funds given or appropriated to public charities . . . and prevent breaches in the administration thereof” MASS. GEN. LAWS ch. 12, §8. A court in Pennsylvania recently explained:

The Commonwealth has parens patriae standing whenever it asserts quasi-sovereign interests, which are interests that the Commonwealth has in the well-being of its populace. Here, the Commonwealth's interest in the well-being of the public that Citizens was created to serve is a clear example of such a quasi-sovereign interest. In fact, “*in every proceeding which affects a charitable trust, whether the action concerns invalidation, administration, termination or enforcement, the attorney general must be made a party of record because the public as the real party in interest in the trust is otherwise not properly represented.*” In *re Pruner's Estate*, 390 Pa. 529, 532-33, 136 A.2d 107, 110 (1957) (emphasis added). It is the duty of the Attorney General to ensure that the purpose of the charity remains charitable.

Commonwealth v. Citizens Alliance for Better Neighborhoods, Inc., et al., 983 A. 2d 1274, 1278 (Pa. Cmwlth. 2009). See also JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT

ORGANIZATIONS 226 (4th ed. FOUNDATION PRESS 2010) (stating, “the attorney general represents the state and the public, promoting accountability by charities and fiduciaries”).

The Attorney General’s authority over charitable assets does not depend on the organizational form of the person holding the assets. Charitable assets may be held by nonprofit corporations or unincorporated associations, as well as by trustees of charitable trusts, and the Attorney General will protect the interests of the public in these assets, however held. In a recent case a defendant tried to distinguish between cases involving charitable trusts and the defendant’s organization, a nonprofit corporation. Applying Massachusetts law, the court simply noted: “Charitable corporations and trusts are both considered ‘public charities’ under Massachusetts law and, as such, are subject to the Attorney General’s supervisory authority.” *Lifespan Corp. v. New England Medical Center*, 2010 WL 3718952, at 3 (D.R.I. Sept. 20, 2010). The Attorney General’s authority also extends over charitable assets held by for-profit entities.

The Attorney General protects the public interest in charitable assets, but assets held by a charitable organization are not converted to public (governmental) assets. Restrictions imposed by donors and the governing documents of the organization control the use of the assets and the government cannot take over and manage the organization. Rather, the Attorney General may take appropriate action to enforce the restrictions and to prevent self-dealing and mismanagement of the property. In *Dartmouth College v. Woodward*, the U.S. Supreme Court held that the constitutional restriction on the impairment of contracts applied to the “contract” that created Dartmouth College – the granting of its corporate charter by the Crown. The opinion by Justice Marshall explains that because Dartmouth College is a charitable organization the legislature cannot change the use of the funds held by the trustees. The fact that the government had granted the charter did not make the college a government-controlled entity. A concurrence by Justice Story explains:

A private donation, vested in a trustee, for objects of a general nature, does not thereby become a public trust, which the government may, at its pleasure, take from the trustee, and administer in its own way. . . . The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration, through the means of equitable tribunals, in cases where there would otherwise be a failure of justice. *Dartmouth College v. Woodward*, 17 U.S. 518, 697-98 (1819).

Thus, the role of the state in protecting charitable assets has long been recognized. The state cannot substitute its own judgment as to how an organization should be managed or who should manage it, and the legislature cannot convert charitable assets to government assets, but the state can, and should, protect assets from mismanagement, misapplication, diversion, or waste. The Attorney General is charged with this authority. If the Attorney General finds a breach of fiduciary duty or identifies mismanagement of charitable assets, a court can impose sanctions.

Subsection (a). Duty of Attorney General and Powers. Subsection (a) states the duty of the Attorney General concerning charitable assets. This subsection follows existing law in most states and may serve as a declaration of the role of the Attorney General in states in which the duty has not been stated explicitly. Subsection (a) states the duty to preserve and protect charitable assets and ensure their proper use and administration and lists the powers within the

discretion of the Attorney General. To carry out the duty to protect charitable assets, the Attorney General may take action to enforce the purposes or terms for which an asset was given to a charity and may act to prevent or remedy a breach of a duty owed to a charity by a fiduciary or by another person. The Attorney General may begin or intervene in an action to protect charitable assets.

Donor Restrictions. Subsection (a)(1)(A) provides that the Attorney General may enforce the terms governing a gift of charitable assets. These terms include provisions in a gift agreement specifying the charitable purpose of the gift or the terms of its administration. UPMIFA § 2(3), reflecting thoughtful case law, provides that written documents used at the time of a gift, including solicitation materials or organizational documents, can be considered part of a “gift instrument” creating the terms of a gift. Subsection (a)(1)(A) uses “terms of the gift” with the UPMIFA definition in mind and also with the intent to incorporate other state law regarding donor restrictions on gifts. The doctrines of *cy pres* and deviation, for example, provide rules for modifying restrictions imposed by the donor at the time of a gift.

The Act does not directly address the question of whether an entity holding charitable assets can change its purposes and thereby change the way it uses unrestricted donations already received. It seems likely that a donor who contributes money or other property to an organization expects the organization to use the gift for the purposes for which the entity is organized and operating at the time the gift is made, even if the donor does not enter into a formal gift agreement. An entity organized as a nonprofit corporation can, however, change its purposes by amending its articles of incorporation and bylaws. Accordingly, a question arises as to whether an organization can apply unrestricted gifts received before a change in its corporate purpose to its new or expanded purpose. Some courts have held that unrestricted gifts are “impressed with a charitable trust” and must be used in a manner consistent with the charity’s purpose at the time the gift was made. *See, e.g., Queen of Angels Hosp. v. Younger*, 66 Cal. App. 3d 359, 365 (Ct. App. 1977); *Holt v. College of Osteopathic Physicians and Surgeons*, 61 Cal. 2d 750, 755 (1964). Other courts have similarly held, even though the unrestricted gifts were not deemed to technically be held in trust. *See, e.g., Attorney Gen. v. Hahnemann Hosp.*, 494 N.E. 2d 1011, 1020-21 (Mass. 1986) (in which the court stated that the nonprofit corporation could broaden its purposes by amending its articles, but the hospital could not use unrestricted donations received prior to the amendment for the new purposes).

Whether the governing documents of a nonprofit corporation impose purpose restrictions on otherwise unrestricted gifts may depend on evolving case law. The draft ALI Principles of the Law of Nonprofit Organizations take the position that a charity can change the purpose to which unrestricted assets are devoted by amending its governing documents to change its corporate purpose, regardless of the extent of the change. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGS. §400, cmt. (d)(3) (The American Law Institute Preliminary Draft No. 5 2009) (stating, “a facially unrestricted gift made to a charity having a single, narrow purpose is not viewed as a restricted gift. Rather, a donor’s desire that the gift be used for a specific purpose must be expressed, in writing, in order for the recipient charity to be bound to use that gift for that purpose.”).

Whether an Attorney General will object to the application of unrestricted gifts received before a change in the organization’s corporate purpose to the organization’s new or expanded purpose will depend on specific facts. An Attorney General is not likely to seek to enforce the

use of the gifts for the original purpose where the change in the organization's governing documents is minor or necessary to comply with changing laws. For example, an Attorney General might not be concerned about donor intent when a charitable hospital established to provide acute care is expanded to add sub-acute care. However, the court in *Hahnemann* notes a different sort of example: "As the Attorney General, colorfully, but no doubt correctly, observes in his reply brief, 'those who give to a home for abandoned animals do not anticipate a future board amending the charity's purpose to become research vivisectionists.'" Attorney Gen. v. *Hahnemann Hosp.*, 494 N.E. 2d 1011, 1021 n. 18 (Mass. 1986).

The Attorney General protects charitable assets whether held by an entity organized for charitable purposes or by an entity or individual not so organized. Although subsection (a)(1)(B) refers to the charitable purpose of the person holding the assets, a non-charitable entity or an individual will not have a charitable purpose. A separate fund managed by a business corporation might have a charitable purpose, such as when assets are sold with the representation that a percentage of the proceeds will be used for a charitable purpose. That fund should be administered in accordance with that charitable purpose. The fact that a business entity or an individual does not have a charitable purpose means that the reference to the "charitable purpose of the person" will not apply in those cases.

Subsection (b). Power to Investigate. Subsection (b) states the authority of the Attorney General to conduct an investigation under the Act. The Attorney General must have a reason to believe the investigation is necessary to determine whether further action under the Act is appropriate. In conducting investigations, an Attorney General will also be limited under the Fourth Amendment to issuing administrative subpoenas sufficiently limited in scope, relevant in purpose, and specific in direction so that compliance will not be unreasonably burdensome. *Becker v. Kroll*, 494 F.3d 904, 916 (7th Cir. 2007).

Oftentimes, the Attorney General will be able to resolve an issue with a charity through the exchange of information followed by discussion without the need for a court proceeding. The Attorney General's authority to investigate will make non-judicial resolution of matters involving charities more likely, so that more assets will be preserved for charitable purposes. Of course, if the Attorney General and the charity cannot agree on appropriate steps, a court will be the final arbiter.

Subsection (c). Other Authority. Subsection (c) reflects the intention that the Act not replace any common law or other statutory powers the Attorney General may have. For example, some states regulate charitable solicitation through other statutes.

Subsection (d). Regulations. The Attorney General may need to issue regulations to carry out the terms of this Act and to provide guidance about compliance. If an Attorney General is not otherwise authorized to promulgate regulations, a state will want to include this subsection, giving the Attorney General that authority.

Investigative Authority. States vary with respect to process and procedure relating to Attorney General's investigative authority. In many states the Attorney General has civil jurisdiction but another agency has criminal jurisdiction. For example, the Connecticut Attorney General is the civil charitable regulator but if the Attorney General wishes to initiate a criminal proceeding, the Attorney General must do so through the chief state's attorney. In other states

(e.g. Maryland), the county state’s attorney has general criminal jurisdiction. For examples of state statutes that provide for the power to issue subpoenas or orders with the effect of subpoenas in connection with investigations of charitable organizations, see HAW. REV. STAT. § 467B-9.3 (2010); MASS. GEN. LAWS Ch. 12, § 8 H (2010); MICH. COMP. LAWS § 400.291 (2010); N.H. REV. STAT. ANN. § 7:24 (2011).

Relators. A few states provide for the use of relators. A relator is a private person who is authorized to sue a charitable organization on behalf of the Attorney General. A California statute permits persons granted relator status by the California Attorney General to sue a charitable organization on behalf of the Attorney General. CAL. CORP. CODE §5142(a)(5) (2011). Pursuant to the regulations, Cal. Code Regs. Tit.11 §§ 1-10 (2011), a private person can notify the Attorney General of abuse by the charity or its fiduciaries. The suit must be one that the Attorney General could have brought, and the Attorney General must authorize the suit before the relator can proceed. The private relator pays the court costs, but the attorney general remains in control of the action. The Act does not provide for relators, but states are free to add such provisions.

Standing of Others. The Act does not, either expressly or by implication, affect existing law concerning the rights of persons other than the Attorney General to standing in connection with a matter involving charitable assets. As stated in the Prefatory Note, in some states courts or legislatures have recognized limited standing for someone other than the Attorney General. For example, the Uniform Trust Code grants standing to settlors of charitable trusts. UNIF. TRUST CODE § 405(c). *See also*, RESTATEMENT (THIRD) OF TRUSTS § 94 (T.D. No. 5, 2009).

Religious Organizations. The Act does not exclude trusts held for religious purposes from oversight by the Attorney General. Due to Constitutional protections, the Attorney General would not determine whether an organization used property for a religious purpose. For example, if a rabbi kept paintings in the offices used by the rabbi and others, it would not be appropriate for the Attorney General to try to determine whether the paintings had religious significance and were used for religious purposes. In contrast, if a religious body decided to divide into two and a dispute developed between the two factions about property owned by the original body, the Attorney General might be involved to ensure that the property stayed with the two successor organizations and did not end up in private hands. The Attorney General is properly concerned that property committed to religious purposes not be taken for an individual’s personal purposes. *See Sherri Buri McDonald, CEO Wrongly Enriched, Judge Says, THE REGISTER GUARD, Dec. 15, 2011* (The Oregon Attorney General has been involved in a case brought by members of a Sikh religious community against administrative leaders who unjustly enriched themselves by transferring a business held by the religious community to themselves for a grossly undervalued amount.).

SECTION 4. REGISTRATION.

(a) The [Attorney General] shall establish and maintain a public registry of persons registered under this section.

(b) Except as otherwise provided in subsection (c), a person is required to register if the

person holds, or within the preceding 12 months received, charitable assets with a value in the aggregate exceeding \$[50,000] and:

(1) is formed under the law of this state or, if the person is a trust, has its principal place of administration in this state;

(2) has its principal place of business in this state;

(3) holds charitable assets with a value in excess of \$[50,000] in this state other than assets held primarily for investment purposes; or

(4) subject to subsection (d), conducts activities in this state for a charitable purpose.

(c) The following are exempt from the requirement in subsection (b) to register:

(1) a government or governmental subdivision, agency, or instrumentality;

(2) an organization the primary purpose of which is to influence elections or legislation;

(3) with respect to charitable assets that belong to another person, a financial institution, attorney's trust account, investment company, licensed escrow agent, or storage facility;

(4) a [personal representative] of a decedent's estate that holds a charitable asset, during the period of administration of the estate; [and]

(5) a trustee of a revocable trust that becomes irrevocable because of the settlor's death, during a period of administration following the settlor's death not to exceed two years[.][;]
[; and]

[(6) a person that has as its primary activity advocacy on issues of public or governmental policy][.][; and]

Alternative A

[(7)] a religious organization, an organization operated, supervised, or controlled by or in connection with a religious organization, or an officer or director of, or a trustee that holds property in an official capacity for an organization described in this paragraph.]

Alternative B

[(7)] a [church][house of worship], a convention or association of [churches][houses of worship], or an integrated auxiliary of a [church][house of worship].]

Alternative C

[(7)] a religious organization as defined by [insert statute].]

Alternative D

[(7)] a person that holds assets for the advancement of religion and is not required to report to the Internal Revenue Service, to the extent of those assets.]

End of Alternatives

(d) The following activities, without more, do not constitute conducting activities in this state for a charitable purpose:

- (1) maintaining, defending, mediating, arbitrating, or settling an action or proceeding;
- (2) holding a meeting of trustees, directors, or members;
- (3) maintaining an account in a financial institution or an investment account;
- (4) holding real or personal property;
- (5) engaging in an isolated activity that is not in the course of similar activities;

[and]

- (6) making a grant, scholarship, or award to a person in this state[.]; and
- (7) soliciting or accepting contributions.]

(e) Unless the [Attorney General] grants a waiver under Section 8(a), a person required

by this section to register shall register with the [Attorney General] not later than [three] months after the date charitable assets held by the person exceed the value of \$[50,000].

(f) The registration required by subsection (b) must provide:

(1) the name and address of the person;

(2) the name and address of the statutory agent of the person for service of process or the individual on whom service of process may be made;

(3) the name and contact information of a responsible individual of the person;

(4) the federal employer identification number, if any, for the person; [and]

(5) information concerning the federal tax status of the person[.];[;]; and]

[(6) a copy of the record, however denominated, that describes the charitable purposes of the person and the use and administration of charitable assets held by the person[.]

[; and

(7) the name under which the person has registered under [the state's solicitation statute] and the registration number, if any.]

(g) A registration pursuant to subsection (b) is terminated on the filing with the [Attorney General] by the person registered of:

(1) a written notice of termination of registration that states the person no longer holds a charitable asset and has no reasonable expectation it will hold charitable assets with a value in the aggregate exceeding \$[50,000] in the next 12 months; and

(2) an annual report for the current year.

Legislative Note: *If the state has a solicitation statute, the state should include Section 4(f)(7) and may include the optional Section 4(d)(7). If the state does not have a solicitation statute, the state should not include those sections.*

Comment

The Act requires persons holding charitable assets to register with the Attorney General so the Attorney General will have basic information about the charitable assets the Attorney

General has a duty to protect. The Act directs the Attorney General to maintain a registry of the persons who must register, and the registry will serve as a resource for the public as well as for the Attorney General. The registration requires minimal information to avoid overburdening either charitable organizations or Attorneys General. The hope is that states will be able to move to an electronic system for registration and reporting, thereby reducing some of the burden on persons required to register. While a large organization that operates in many states will likely have an obligation to register in multiple states, the Act's move toward uniformity will minimize the burden of multiple registrations. Electronic registration, when it comes, will further ease the burden. These Comments include a statutory form of registration to enable states to adopt a requirement that is consistent across states.

Registration is important for several reasons. First, the list of registered entities can serve as a quick resource of information for the Attorney General and for the public. If the Attorney General receives a question from a member of the public, the Attorney General may be able to answer the question simply by reviewing the information provided in the registration. No further inquiry may be necessary, and both the Attorney General and the registered entity will save time and expense.

Second, a potential donor may consult the list of registered entities to determine whether an organization requesting a donation is current in its filings with the Attorney General. If the organization is not registered, the donor will want to investigate further before making a donation. If the organization has consistently made the required filings, that information suggests the organization is more likely to be well managed by fiduciaries who comply with their duties.

Finally, the requirement to register serves as a reminder to someone organizing an entity to hold charitable assets of the seriousness of the fiduciary duties an individual undertakes when acting as a director or trustee. If the individual does not want to assume the duties associated with managing charitable assets, the individual can give the assets to an existing organization or start a donor advised fund.

Subsection (b). Who Must Register. Subsection (b) limits registration in a number of ways, creating both a threshold amount for registration and limiting registration to organizations with significant contacts with the state.

The threshold created by subsection (b) applies whether a person "holds, or within the preceding 12 months received" assets above the threshold amount. The duty to register will apply after an organization passes the threshold amount and holds assets in that amount, and the duty will also apply if an organization raises money, uses it for charitable purposes, and then raises more money. After the total amount raised by the organization exceeds the threshold, the duty to register applies, even if the organization uses the assets raised and does not hold more than the threshold amount at any one time.

Subsection (b). Threshold Amount. Persons holding charitable assets in money or value in excess of the amount fixed in the adopting legislation must register under the Act. The Act suggests \$50,000 as the floor for requiring registration, but places that amount in brackets to indicate that a state may use a larger or smaller number.

The threshold for filing Form 1023, Recognition of Exempt Status, with the IRS is \$5,000. The information required to register with the Attorney General is significantly less detailed than the information required to complete a Form 1023, so an organization required to file with the IRS should not face an undue burden if required to register with the Attorney General. The advantage of a threshold as low as \$5,000 is that a smaller organization may be more likely than a larger organization to encounter difficulties due to the lack of adequate checks and balances within the organization or lack of expertise on the part of the founding directors. The Attorney General can provide education and other assistance that may be particularly beneficial for smaller organizations.

The Act has \$50,000 rather than \$5,000 as the suggested figure to minimize the burdens on smaller charities and in recognition of the limited resources in some Attorney General offices. The committee chose \$50,000 because that number is the threshold at which organizations must file significant financial information with the IRS (charities with annual gross receipts of \$50,000 or less must file an on-line e-postcard called 990-N with the IRS; charities with receipts over \$50,000 must file Form 990-EZ, Form 990, or Form 990-PF).

The National Center for Charitable Statistics reports that in 2008, 1,071,851 charities had registered with the IRS. Of that number, fewer than half (458,963) filed annual returns reporting financial information. See <http://nccsdataweb.urban.org/PubApps/reports.php?rid=35>. In 2008, the filing threshold for reporting financial information was \$25,000, so with the increase in the threshold to \$50,000, the number of returns that contain significant financial information should decrease. The National Center for Charitable Statistics reports the number of charitable organizations filing returns by state, so a state can determine the number of potential filers by examining that data. Illinois, which currently requires annual returns for persons holding charitable assets in excess of \$4,000, receives about 26,000 returns a year from entities operating in Illinois.

Of the states that have registration requirements apart from solicitation requirements, California, Massachusetts, Michigan, New Hampshire, Oregon, Rhode Island and Washington have no threshold amount. Illinois requires registration when a charity has more than \$4,000 in assets; Minnesota requires registration when assets exceed \$25,000; New York requires registration when assets or receipts exceed \$25,000; and Pennsylvania requires registration when contributions exceed \$25,000. Registration requirements in England and Wales, Scotland, the Irish Republic and Northern Ireland generally require registration without regard to annual receipts. See Prefatory Note.

A state enacting Section 4 and the other sections requiring reports to the Attorney General (Sections 5-7) should make its decision on the appropriate threshold amount by considering the resources available in that state for managing the filings. States should be aware that the \$50,000 amount in the Act is a higher number than the number used in existing statutes.

Fair Market Value. The valuation of assets held for charitable purposes, should be made based on the fair market value of the assets, reasonably determined. The Act does not use the term “fair market value” because the Drafting Committee did not want to suggest that appraisals were required to determine value. A person holding charitable assets can estimate the value, as long as the estimate is reasonable. Because the determination of value is used only for deciding whether a person meets the thresholds for registration and reporting, a reasonable

estimate of value is sufficient. The value determined for purposes of the Act should be the value to the charitable organization and not the value on the market, and should be based on the value of the property assuming its use is not restricted. For example, a parcel of land given to an organization to be used as a nature preserve, or artwork given to a museum to be displayed and not sold or loaned, should be valued for registration purposes at its unrestricted value (what a willing buyer would pay a willing seller for the land or artwork assuming it was not subject to a use restriction). The value of a conservation easement for registration purposes should be the difference between the fair market value of the subject property encumbered and unencumbered by the easement.

Subsection (b). Significant Contacts. The Act requires registration of only those organizations that have significant contacts in the state. The inclusions and exclusions strike an appropriate balance between the risk of overburdening entities that have little contact with a particular state and the need for the Attorney General to be alerted to the existence of charitable organizations and assets in the state.

Although the types of contact listed in subsection (b) are not limited by the terms “substantial” or “significant,” the intention is that a negligible level of activity or other contact not be considered sufficient to cause an Attorney General to assert protection powers. The state constitution will control the level of activity necessary for Attorney General protection.

Subsection (b)(1). A nonprofit corporation must register in its state of incorporation, even if the nonprofit corporation conducts all of its activities in another state (the nonprofit will also need to register in the other state). A trust must register in its principal place of administration. A trust’s principal place of administration is typically where the trustee is located. If the trust has trustees located in more than one jurisdiction, then other factors, including the location of assets and activities, will be used to determine the principal place of administration. *See* UNIF. TRUST CODE §108, cmt. (2010). UTC §108 provides that the terms of a trust can name the place of administration, so long as the trustee’s principal place of business or residence is in the state named or all or part of the administration of the trust occurs in that state. If a trustee moves the principal place of administration, the trustee will have to register in the new state.

The trustee of an irrevocable trust with a charitable organization as a beneficiary must register. For example, the trustee of a charitable remainder trust or a charitable lead trust must register if the value of the charitable interest exceeds \$50,000. The charitable organization named in the trust is not required to register because the trustee, and not the organization, is the person holding the charitable assets.

Subsection (b)(2). The term “principal place of business” is used to mean principal place of administration, governance, activities, and operation. Although using the term “business” for charitable activities sounds odd, the term is used to bring with it the substantial case law connected with the term.

Subsection (b)(3). If a person holds investment assets located in a state and has no other contacts with the state, the person need not register. If a person holds assets used for its charitable purposes, however, the person must register. In most cases, if the person holds assets for its charitable purposes it will also be conducting charitable activities in the state. For

example, an entity organized in Chicago might own land in Wisconsin that it uses as a summer camp for disadvantaged children.

If an organization holds an asset in a state only until the asset can be sold and the proceeds used for charitable purposes, the asset will not trigger the duty to register. For example, an organization operating in Illinois might be given land in Michigan. If the organization continues to hold the land as an investment, subsection (b)(3) applies and that asset will not create a duty to register. If the Illinois organization holds the land only until it can be sold, subsection (b)(3) does not require registration even though the organization is not holding the land as a long-term investment.

Subsection (b)(4). If an organization conducts its principal activities in one state but also conducts activities in another state, the organization must register in both states (under (b)(2) and (b)(4)). An organization with minimal contacts in a state does not need to register there, but if the organization conducts significant activities, the organization should register. For example, an organization incorporated in Philadelphia might operate homeless shelters in Philadelphia and across the state border in New Jersey. The organization would register in Pennsylvania and New Jersey. If the organization purchased property in Delaware to use for a homeless shelter but was not yet operating a shelter there, the organization would not need to register in Delaware under subsection (b)(4) because subsection (d)(4) provides that holding property, without more, will not be considered conducting activities. Of course, if the value of the property exceeded the threshold in subsection (b)(3), and if the property was acquired for charitable activities (eventual use as a shelter) and not for investment, then subsection (b)(3) would require registration.

Subsection (c). Exemptions. Subsection (c) exempts a number of entities and individuals from the registration requirement.

Subsection (c)(1). Governmental Subdivisions. The Attorney General already represents government subdivisions, so the Act excludes government subdivisions and agencies from registration. This exemption applies even if a government agency holds a fund for charitable purposes that are not usually governmental purposes, for example a scholarship fund. If a separate organization supports a government activity, for example an education fund created by a community to support local schools, that separate organization will register, even if under federal tax law it qualifies as a supporting organization to the government subdivision.

Subsections (c)(2) and (c)(6). Political, Lobbying and Advocacy Groups. Organizations created primarily to influence elections, to lobby, or as political advocacy organizations are not primarily charitable organizations. These exclusions may be unnecessary, because these organizations would not be included under (b) in most circumstances. These exclusions are provided in the Act to clarify that organizations engaged primarily in these activities are not required to register, even if they hold assets for a charitable purpose.

Subsection (c)(3). Financial Institutions. Financial institutions and investment companies are not included within the definition by virtue of having accounts owned by charitable organizations. If a bank or trust company serves as trustee for a trust holding charitable assets, the trustee must register based on the other subsections of Section 4(b).

Subsections (c)(4), (c)(5). Wills and Revocable Trusts. If an individual provided a gift

to a charitable organization under a will or through a revocable trust that acts as a will substitute at death, the personal representative of the decedent's estate or the trustee of the trust must notify the Attorney General after the individual's death under Section 6, but they do not need to register under Section 4. The exclusion for a decedent's estate applies for the period of administration of the estate, and the exclusion for a revocable trust applies for two years from the date of the settlor's death. Because a revocable trust does not have an identifiable period of administration, the two-year time period serves as an approximation of the time needed for administration.

Subsection (c)(7). Religious Organizations. Charitable assets held by religious organizations fall within the scope of the Attorney General's duty to protect charitable assets, but a state may decide not to require religious organizations to register or report. A state can require religious organizations to register or choose one of four exceptions to exclude religious groups or organizations. Defining which organizations to exclude proved difficult, so the Act provides four alternatives for the exclusion. A fifth alternative appears in these Comments.

Alternative A creates a broad exemption that includes religious organizations as well as organized religions. Under Alternative A, a United Church of Christ congregation, a Jewish synagogue, a Buddhist temple, and a Muslim mosque would all be exempt, as would a K-12 school, food pantry, or homeless shelter operated by any religious organization. This broad definition is not limited to organized worship. It excludes significant assets, particularly with respect to education.

Alternative B tracks the concept and language of the Internal Revenue Code. Although there is concern about using the word "church" to mean groups of people practicing a religion and the assets used in doing so, Alternative B is drafted to match the language the IRS uses. Obviously, "church" excludes a lot of religions practiced in the U.S. IRS publication 1828 titled "Churches and Religious Organizations" explains its use of the term:

The term church is found, but not specifically defined, in the Internal Revenue Code (IRC). The term is not used by all faiths; however, in an attempt to make this publication easy to read, we use it in its generic sense as a place of worship including, for example, mosques and synagogues. With the exception of the special rules for church audits, the use of the term church throughout this publication also includes conventions and associations of churches as well as integrated auxiliaries of a church. Because special tax rules apply to churches, it is important to distinguish churches from other religious organizations. Therefore, when this publication uses the term "religious organizations," it is not referring to churches or integrated auxiliaries. Religious organizations that are not churches typically include nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion.

Alternative B provides "house of worship" as an option, but that term is problematic as well. Either "church" or "house of worship" might exclude something like a mickva – a ritual bath used by Orthodox Jews. *See Combined Congregations of District of Columbia v. Dent*, 140 F.2d 9, 10 (C.A.D.C. 1943) ("Since the statute [pertaining to a property tax exemption] refers to the building rather than to the institution it is difficult to see how a structure which contains only a ceremonial bath can come within the ordinary meaning of the word 'church' or 'synagogue'"). The terms do not mean merely a building, but instead require a group of people organized to

practice a religion (to qualify as a "church" or "house of worship" it is necessary to have a congregation or group). Therefore, "church" and "house of worship" are used as stand-ins for the idea of a group of people engaged in the practice of a religion.

Alternative B includes "integrated auxiliaries," a term that comes from the Internal Revenue Code and includes organizations that are closely tied to a particular church or churches, but does not include free-standing religious organizations without such ties. Thus, Alternative B would include a K-12 school run by a particular church but not a free-standing religious school.

Alternative C suggests that a state use its own state definition of religious organization or cross-reference that definition.

Alternative D was added to link the exclusion to the Internal Revenue Code's definition while avoiding the use of the word "church." Yet another alternative that attempts to reach the same result as Alternatives B and D, would be "a religious corporation, association, or society." *See Mordecai F. Ham Evangelistic Ass'n v. Matthews*, 189 S.W.2d 524, (Ky. 1945) (referring to "an association or body of [religious] communicants ... usually meeting in some stated place for worship or for instruction, or organized for the accomplishment of religious purposes such as instruction or dissemination of some tenet or particular faith or otherwise furthering its teachings"). A state could also consider New Mexico's version: "A church, organization or group organized for the purpose of divine worship or religious teaching or other specific religious activity or any other organization that is formed in association with or to primarily encourage, support or promote the work worship, fellowship, or teaching of the church, organization, or group." N. M. Stat. Ann. § 57-22-3.

All of the alternatives are intended to include a corporation sole in a state that has that organizational form. Corporations sole are legal entities intended to promote continuity between office holders of a corporation, usually a religious organization. This structure allows an organization to maintain nonprofit status without establishing bylaws or maintaining a Board of Directors. *See* <http://www.irs.gov/charities/article/0,,id=128736,00.html>.

The Internal Revenue Code does not require houses of worship to register with the Internal Revenue Service. I.R.C. § 6033. However, this section does not exempt religious organizations that are not houses of worship, conventions or associations, or integrated auxiliaries from filing for recognition of their exempt status and making annual reports.

The Constitutional protections of the free exercise of religion mean that the government cannot interfere with the exercise of tenets of religious doctrine. The Constitution does not prohibit registration and reporting by religious organizations.

Subsection (d). Minimal Activities. This subsection lists a number of activities a charitable organization might engage in that do not rise to the level of activity that requires registration. The goal is to limit registration to states in which the organization has sufficient activity or assets for the Attorney General to be concerned about proper administration. Even if an organization engages in several of these activities, the organization need not register unless required to do so for another reason. Each charitable organization will register in at least one state because the organization will register in the state in which it is formed or, if a trust, administered.

For example, a university located in Connecticut would register in Connecticut. The university might hold alumni events throughout the country, and registration in other states would depend on the activity and on the event's organizer. A one-time event held in another state would not require registration, because subsection (d)(5) excludes isolated activities. If the alumni events were held every year, the organization holding the event might need to register. The alumni association, rather than the university itself, might be the organization conducting activities in the state, or a state alumni organization might be the responsible organization. Registration will depend on the extent of the activities. Subsection (d)(7) excludes mere solicitation, but social activities that include solicitation could trigger the duty to register.

Subsection (e). Time for Registration. The duty to register depends on the date the person's charitable assets exceed the value set in the enacted statute (the Act suggests \$50,000). The person must register within three months of that date. Even if the person holding charitable assets does not hold the value set at any one time, if the person receives assets that total the set figure in a 12-month period, the person must register.

Subsection (f). Registration Information. The Act requires minimal registration information. Some states that currently provide for registration of persons holding charitable assets ask for more information. If a state wants to consider more extensive registration requirements, the state can look at California, Illinois, Massachusetts, or New York for examples. *See* CAL. [GOV'T] CODE § 12580 et seq. (West 2011); 760 IL. COMP. STAT. 55/1 et seq. (2011); MASS. GEN. LAWS ch. 12, § 8E (2011) (no threshold amount); N.Y. [EST. POWERS & TRUSTS] LAW § 8-1.4 (2011).

Subsections (f)(1)-(3). The registration must include an address, which can be the address of the organization and need not be the address of an individual. In addition to the statutory agent, the organization must provide the name of a "responsible individual" who can answer questions about the organization. If the Attorney General has a question or receives a complaint, the Attorney General can often resolve the issue with a phone call if the Attorney General is able to reach a person who is knowledgeable about the organization. Resolving issues quickly in this way saves time and resources for both the Attorney General and the organization.

Subsection (f)(4). The registration includes the federal employer identification number of the person holding charitable assets. This number should be the EIN for the person (the nonprofit corporation, charitable trust, or other organization) and not for an individual associated with the person. If the person for some reason does not have an EIN, the individual filing the registration should so indicate and should not provide a social security number.

Subsection (f)(5). Most new organizations will need to register before they receive their determination letters from the IRS indicating that they are tax exempt. The registration can state that the organization has applied for recognition of its tax-exempt status and the request is pending.

Subsection (f)(6). This subsection is in brackets to indicate that some states may not want to include this provision. Subsection (f)(6) requires the person registering to provide documents that describe its charitable purposes and how it will use and administer its assets. Most persons registering will provide articles and bylaws or a copy of the trust instrument.

Organizing documents are not specifically required because those documents depend on the organizational structure of the person, and because not all persons who hold charitable assets are nonprofit corporations or trusts. The intent is for the person holding charitable assets to provide documentation indicating the charitable purposes for the assets and any restrictions on use of the assets so the Attorney General will have notice of the purposes for which they were solicited or given.

If a person holding charitable assets is a business corporation that has set aside assets in a charitable fund, the business need only furnish the portions of its documents that relate to the charitable assets. The business corporation need not provide its articles and bylaws in their entirety because most of the content of those documents will not apply to the charitable assets. The same is true for a trust if part of the trust applies to private beneficiaries and part has a charitable purpose. Only the portions of the trust applicable to the charitable assets need be provided and the rest of the trust instrument can be redacted.

Subsection (f)(7). If a state has a solicitation statute that requires registration, the registration filed under this Act should include information that will enable the state to link the two registrations. This Act requires registration of all organizations that meet the threshold requirements, whether or not the organization solicits, so a solicitation statute by itself does not address the need for this Act.

Subsection (g). A person holding charitable assets will continue to be registered until the person dissolves, but if an entity holding charitable assets is not a charitable organization, the entity may want to terminate its registration once the charitable assets have been used. For example, a business corporation might create a scholarship fund for students at a local high school. If the fund had more than \$50,000 the corporation would register, file annual reports, and provide notices required under Section 6. If after several years the corporation distributed all the money and closed the fund, the corporation would provide that information to the Attorney General and might want to terminate its registration. If the corporation did not terminate its registration, the corporation would have an ongoing duty to provide notices under Section 6, even though it no longer held charitable assets.

Website Benefits. An organization required to register in a state may benefit from posting its registration on its website. Although registration by itself does not indicate Attorney General approval, knowing that an organization is registered and current with its annual reports may make potential donors more likely to contribute.

Form. A form for registration appears in these Comments. The form can be reproduced on one page. The committee encourages states to use this form so persons registering can use one form for multiple filings. Because a person holding charitable assets may need to register in multiple states, having the same form used in all states will save time and expense.

REGISTRATION UNDER PROTECTION OF CHARITABLE ASSETS ACT

Name of Organization: _____

Federal Employer Identification Number (EIN): _____

Street Address: _____

City, State, and ZIP Code: _____

Phone number: _____ Website: _____

Name of Statutory Agent or Individual on Whom Service of Process May Be Made:

Street Address: _____

City, State, and ZIP Code: _____

Name of Responsible Individual to Contact: _____

Street Address: _____

City, State, and ZIP Code: _____

Phone number: _____ E-mail address: _____

Tax-Exempt Status

Which of the following describes the organization's tax-exempt status application with the Internal Revenue Service? Please note that an application for tax-exempt status is different from an application for an employer identification number.

- The organization holds IRS tax-exempt status.
- The organization applied for tax-exempt status on ____/____/____ but a determination letter has not been received from the IRS.
- The organization has not applied for tax-exempt status. Explain the reason for not applying on an attached page.
- The organization applied for tax-exempt status and the IRS denied the application.

[Registration Under Charitable Solicitation Act

If the organization is registered under [the state's solicitation statute]:

Name registered: _____ Registration number: _____]

[Required Documents

Attach to this registration form a copy of the document (articles of incorporation, bylaws, articles of association, trust agreement, or other document) that describes the organization's charitable purpose and the use and administration of its charitable assets.]

SECTION 5. ANNUAL REPORT.

(a) [Unless the [Attorney General] grants a waiver under Section 8(b),] [A] [a] person required to register under Section 4 which holds charitable assets with a value exceeding \$[50,000] at the end of the person's most recent annual accounting period or receives charitable assets with a value in the aggregate exceeding \$[50,000] during the period shall file with the

[Attorney General], not later than the later of four months and 15 days after the end of the period or the date authorized for filing an informational return with the Internal Revenue Service, including all extensions, an annual report providing [and verifying][and certifying the accuracy of] the following information:

(1) the name and address of the person;

(2) the name and address of the statutory agent of the person for service of process or the individual on whom service of process may be made;

(3) the name and contact information of a responsible individual of the person during the period;

(4) a description of the person's most significant charitable activities, not exceeding three, during the period;

(5) whether during the period the person:

(A) engaged in an event described in Section 6(a) or (b);

(B) entered into a contract, loan, lease, or other financial transaction with an officer, director, trustee, or other fiduciary of the person, or a [family member] of an officer, director, trustee, or other fiduciary of the person, either directly or with an entity in which the officer, director, trustee, other fiduciary, or [family member] had a material financial interest;

(C) became aware of an embezzlement, theft, or diversion of a charitable asset of the person;

(D) became aware of use of a charitable asset of the person to pay a penalty, fine, or judgment;

(E) became aware of the payment by an officer, director, trustee, or other fiduciary of the person of a penalty, fine, or judgment with respect to the person;

(F) became aware of the use of restricted funds of the person for a

purpose other than the charitable purpose specified in the restriction; or

(G) received notice of revocation, modification, or denial of its federal or [state][local] charitable [income] tax exemption;

(6) an explanation of an affirmative answer reported under paragraph (5)[.][:]; and]

[(7) the person’s total revenue relating to its charitable assets for the period; [and]

(8) the value of the person’s charitable assets as of the last day of the period[.][:]; and]

[(9)] a change to any information provided under Section 4 [.][:]; and

(10) the name under which the person has registered under [the state’s solicitation statute] and the registration number, if any.]

(b) If a person required to file an annual report under subsection (a) is required to file a federal information return with the IRS, the person shall attach to the annual report a copy of the publicly available part of the most recently filed return.

Legislative Note: In subsection (a)(5)(B), “family member” is not a precise term, and a state may want to use a specific definition here or refer to a definition in other law in the state. For example, the state may want to clarify whether the term includes, with respect to an individual, a spouse, descendants, ascendants, siblings, spouses of family members, an unmarried domestic partner, or step-relatives.

In subsection (a)(5)(G), “income” is in brackets to indicate that a state may want to limit reporting to situations in which action taken involves an organization’s exempt status for income tax purposes or may want to expand the reporting requirement to include action taken with respect to exempt status for other state taxes, such as a state or local property tax or sales tax. A state should choose “state” or “local” to reflect the taxes the state has and wants to include in the reporting requirement.

Comment

A person with charitable assets in excess of the amount a state provides or that receives assets in excess of that amount during the accounting period, must file an annual report providing basic information about its revenue, assets, and activities during the year. The Act requires that each person that meets the filing threshold file a short annual report and attach a copy of the person’s federal tax filing. The annual report form filed in addition to the federal form should

allow the Attorney General to review quickly the information provided by the person filing the form. The annual report requires minimal information, and if states adopt the annual report form uniformly, the burden on persons required to file in multiple states will be reduced. The report is due four months and 15 days after the end of the accounting period -- the due date for the annual reporting to the IRS. The Act adds “or such later date as the Attorney General authorizes” because many organizations receive extensions for filing their annual forms with the IRS. The assumption is that the Attorney General will authorize extensions for state filings to match due dates for federal filings.

The annual report should cover the organization’s total revenue, assets, and activities and not just those in the state. The Attorney General will be concerned about charitable assets in the state, but it is not necessary for the organization to separate out the information on a per-state basis. The organization will be able to use the same information for federal purposes as well as in each state in which the organization needs to report.

The reporting requirement can encourage good governance. The annual report can serve an educational purpose, providing a reminder of some of the duties owed with respect to charitable assets. The Attorney General needs to receive information in a timely fashion to be able to address problems before charitable assets are lost. The registration and reporting requirements are important in promoting appropriate protection of charitable assets. Further, timely filing of annual reports will give the public confidence that an organization is being managed properly.

The filing threshold for the annual report is consistent with the threshold for registration. Although some committee members noted that small organizations are often the ones that suffer most from improper management, the committee decided on the \$50,000 threshold to minimize the impact on organizations and the Attorneys General. If a state decides to lower the threshold for registration, the state can choose to keep the threshold for the annual report at \$50,000 or lower it. Some states with current registration and reporting statutes have different thresholds for the two requirements. For example, in Illinois the threshold to register is \$4,000 and the threshold to file an annual report is \$25,000. 760 IL. COMP. STAT. 55/7 (2011).

States that require annual reporting under a statute that regulates charitable solicitation may want to coordinate the report required here with the report required by the solicitation statute and may find the reporting requirement in Section 5 duplicative and unnecessary.

Subsection (a). Information to Report. Subsection (a) lists the items to be included in the report. The subsection begins with the person’s name, the name of a statutory agent, and the name of a responsible person. A state can decide what information to include in the report, but this Act recommends the inclusion of all the items in subsection (a). The committee used brackets on some of the items with the recognition that some states will want less information.

Subsection (a)(4) requires the person to describe the three (or fewer) most significant charitable activities during the reporting period.

Subsection (a)(5) asks the person to indicate whether the person engaged in certain activities or became aware of certain incidents, any of which might indicate a problem in the management or use of the charitable assets. The person checks “yes” or “no” on the annual

report form for each item, so in most cases this part of the report will take little time. If the person answers “yes” for any item, then subsection (6) asks the person to explain. The information will give the Attorney General a quick way to determine whether the Attorney General should take a closer look at something involving the person.

Subsection (a)(7) asks for the person’s total revenue for its most recent accounting period. The intention here is to have the person report the same number reported on line 12 of Part I of IRS Form 990, so that only one computation is necessary. Subsection (a)(8) asks for the asset value on the last day of the reporting period. The committee decided not to include a requirement to report disbursements because that information can be determined by comparing asset value from year to year.

Subsection (a)(9) requires the person to update the information provided on its registration. A state with a solicitation statute should include Subsection (10), which asks for the name under which the person registered under the other statute.

Subsection (b). Federal Information Return. Subsection (b) asks the person to attach to the annual report a copy of its federal filing. Although federal filings are public records and are eventually posted on Guidestar, obtaining a copy of the form immediately after it is filed can be difficult. The benefits to the Attorney General of having immediate access to the federal form outweigh the burden on charities of a requirement to file a photocopy of the federal form.

Form. A form of annual report that includes all the items listed in subsection (a) appears in these Comments. The form can be reproduced on one page, using both the front and the back of the page. The committee encourages states to use this form for the annual report to enable persons filing an annual report in more than one state to use one form for multiple filings. Because a person may need to file an annual report in multiple states, having the same form used in all states will save time and expense.

ANNUAL REPORT UNDER PROTECTION OF CHARITABLE ASSETS ACT

Name of Organization: _____

Federal Employer Identification Number (EIN): _____

Street Address: _____

City, State, and ZIP Code: _____

Phone number: _____ Website: _____

Name of Statutory Agent or Individual on Whom Service of Process may Be Made:

Street address: _____

City, State, and ZIP Code: _____

Name of Responsible Individual to Contact: _____

Street Address: _____

City, State, and ZIP Code: _____

Phone number: _____ E-mail address: _____

Check if:

- Change of name Change of address
- Change in statutory agent Change in individual to contact
- Amendment of document (articles of incorporation, bylaws, articles of association, trust agreement, or other document) changing charitable purpose or use and administration of charitable assets (attach copy of amendment)

[Registered Under Charitable Solicitation Act, Registration Number _____]

PART A – ACTIVITIES

For your most recent full accounting period beginning ____/____/____ and ending ____/____/____, list:

Total revenue: \$ _____ Total assets at end of period: \$ _____

Description of most significant program activities, not to exceed three:

PART B – STATEMENTS ABOUT ORGANIZATION DURING THE PERIOD OF THIS REPORT

Note: If you answer “yes” to any of the questions below, attach an explanation of each “yes” response. During this accounting period:

	Yes	No
1. Were there any contracts, loans, leases, or other financial transactions between the organization and an officer, director, trustee, or other fiduciary or family member of an officer, director, trustee, or other fiduciary of the organization, either directly or with an entity in which the fiduciary or family member had a material financial interest?	<input type="checkbox"/>	<input type="checkbox"/>
2. Did the organization become aware of any embezzlement, theft, or diversion of the organization’s charitable assets?	<input type="checkbox"/>	<input type="checkbox"/>
3. Did the organization become aware of the use of a charitable asset of the organization to pay any penalty, fine, or judgment?	<input type="checkbox"/>	<input type="checkbox"/>
4. Did the organization become aware of the payment by an officer, director, trustee, or other fiduciary of the organization of a penalty, fine, or judgment with respect to the organization?	<input type="checkbox"/>	<input type="checkbox"/>
5. Did the organization become aware of the use of restricted funds of the organization for a purpose other than the purpose specified in the restriction?	<input type="checkbox"/>	<input type="checkbox"/>

- 6. Did the organization dissolve? () ()
- 7. Did the organization terminate? () ()
- 8. Did the organization dispose of all or substantially all of its charitable assets? () ()
- 9. Did the organization leave the jurisdiction of this state? () ()
- 10. Did the organization remove significant charitable assets of the organization from this state? () ()
- 11. Did the organization enter into or begin the process of entering into a merger, conversion, or domestication? () ()
- 12. Did the organization receive notice of revocation, modification, or denial of its federal or state [income] tax exemption? () ()

I declare [under penalty of perjury] that I have examined this report, including accompanying documents, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature of authorized individual: _____

Name and Title: _____ Date: _____

SECTION 6. NOTICE TO [ATTORNEY GENERAL] OF REPORTABLE EVENT.

(a) A person required to register under Section 4 shall give notice in a record to the [Attorney General] not later than [20] days before any of the following events:

- (1) dissolution of the person;
- (2) termination of the person;
- (3) disposition by the person of all or substantially all of the charitable assets of the person;
- (4) removal of the person from the jurisdiction of this state;
- (5) removal of significant charitable assets of the person from this state; or
- (6) an amendment of the record that describes the charitable purposes of the person and the use and administration of charitable assets held by the person.

(b) A person required to register under Section 4 shall give notice in a record to the

[Attorney General] not later than [90] days before the consummation of a merger, conversion, or domestication of the person.

(c) A transfer of a charitable asset in connection with an event described in subsection (a) or (b) which occurs earlier than [20] days after giving the notice required by subsection (a) or earlier than [90] days after giving the notice required by subsection (b) is a violation of this [act] unless, before the transfer, the person receives from the [Attorney General] in a record consent to the event or notice that the [Attorney General] will take no action regarding the event.

(d) If a decedent's estate opened by a court in this state involves, or may involve, the distribution of property to a person holding charitable assets, unless the distribution is a nonresiduary devise with a value of less than \$[50,000] to a named person, the [personal representative] shall deliver to the [Attorney General] not later than [90] days after the date the [personal representative] is appointed:

- (1) a copy of the will;
- (2) a copy of the [application] [petition] for probate; and
- (3) a copy of the inventory or, if none is filed with the court, a statement of the

value of the estate.

(e) If a revocable trust becomes irrevocable because of the settlor's death, has its principal place of administration in this state after the settlor's death, and provides for a distribution of property to a person holding charitable assets, unless the distribution is a nonresiduary devise with a value of less than \$[50,000] to a named person, the trustee shall deliver to the [Attorney General] not later than [90] days after the date of the settlor's death:

- (1) a description of the charitable interests; and
- (2) a statement of the value of the trust assets.

(f) A person required to register under Section 4 shall give notice in a record to the

[Attorney General] not later than [20] days after receipt of a notice of revocation, modification, or denial of its federal or [state][local] charitable [income] tax exemption.

Comment

The Act requires notice to the Attorney General of a limited number of significant events that might occur in the life of a person holding charitable assets. The events that trigger the notice requirement are those that raise particular opportunities for misapplication of charitable assets. Notice is intended to give the Attorney General an opportunity to monitor the events in time to prevent problems or to correct problems that have already arisen. Some states require notice of certain proposed changes that could trigger concerns over breach of the Charitable Trust Doctrine but do not require a court proceeding. For example, the Attorney General of New Hampshire requires notice of certain proposed amendments to restrictions in conservation easements. *See* <http://clca.forestsociety.org/pdf/amending-or-terminating-conservation-easements.pdf>. States may wish to consider adding provisions to Section 6, but adequate staffing is a significant issue in many states so requiring additional notices may not be feasible. Any modification that requires a court proceeding, for example a *cy pres* proceeding, will necessitate notification under Section 7.

Some states require notice to the Attorney General of actions that may involve a breach of an organization's fiduciary duties in administering the conservation easements it holds. In Maine, the holder of a conservation easement that is organized or doing business in the state must file an annual report with the Executive Department's State Planning Office regarding the conservation easements it holds, and the State Planning Office must report to the Attorney General any failure of a holder disclosed by the filing or otherwise known to the office. *See* ME. REV. STAT. ANN. tit. 33, § 479-C. In addition, conservation easements in the state may not be terminated or amended in such a manner as to materially detract from the conservation values intended for protection without the prior approval of the court in an action in which the Attorney General is made a party, regardless of the manner in which the easements were acquired (as charitable gifts or by purchase, exaction, or otherwise). *See id.* § 477-A.2.B. Rhode Island has a similar statutory provision governing the termination or amendment of conservation easements, and further provides that the Attorney General, pursuant to his or her inherent authority, may bring an action in the superior court to enforce the public interest in conservation restrictions. *See* R.I. GEN. LAWS §§ 34-39-5(c), -3(d). Recognizing the status of many conservation easements as charitable gifts made for a specific purpose, the Attorney General of New Hampshire has requested that notice be provided to its Division of Charitable Trusts of certain proposed amendments to or the termination of conservation easements in the state. *See* <http://clca.forestsociety.org/pdf/amending-or-terminating-conservation-easements.pdf>. Given the importance of land use and land use planning to a state, as well as the status of conservation easements as unique and often irreplaceable charitable or public assets, states may wish to consider similar approaches, consistent with their resources.

Subsections (a) – (c). Disposition or Removal of All or Significantly All Assets. If an entity holding charitable assets will terminate, dispose of substantially all of its assets, or move to another state, the entity must notify the Attorney General before the entity gives up control of the assets or removes them from the jurisdiction. This notice provision gives the Attorney General time to review the proposed transaction and recommend changes if necessary while the

assets can still be reached. If the Attorney General objects to the proposed transaction, the Attorney General must deliver the objection to the entity in writing. These subsections give the Attorney General the information needed to work with the entity on an appropriate plan of distribution or other transfer. If the Attorney General and the entity cannot reach agreement, they can request a court determination to resolve the issue.

Subsection (d). Decedent's Estate. If a decedent's estate contains a gift to a charitable organization or creates a new organization through a gift under the will, the personal representative must notify the Attorney General. This notice is included to protect the charitable bequest because it could be adversely affected if an heir contests the will or if the personal representative or others take excessive fees in managing the estate. An exception exists for a nonresiduary bequest to a named charitable beneficiary in an amount less than \$50,000, because the named beneficiary will have an incentive to monitor the bequest. An exception for residuary gifts to named beneficiaries was not created because the Attorney General may need to monitor fees that would reduce the value of the residue. A beneficiary may be reluctant to challenge fees because of concerns about public goodwill or the hope of future gifts from the same family.

Subsection (e). Revocable Trust. Many property owners use a revocable trust rather than a will to distribute property at death. This subsection applies the same notice requirement that applies to property distributed under a will to property distributed through a revocable trust. Notice should be given to the Attorney General of the state in which the trust has its principal place of administration after the settlor's death. Upon the death of the settlor of a revocable trust, a new trustee typically is appointed or succeeds to the position, and if that trustee is in a different state, the place of administration may move. The appropriate state for notice is the state in which the trust will be administered during the period immediately following the settlor's death.

Subsection (f). Action Affecting Tax Exemption. The revocation of a federal or state tax exemption may signal problems that the Attorney General should consider. This subsection requires notice to the Attorney General of revocation or modification of an organization's exempt status for any tax purpose. A state may want to limit notice to actions affecting only a particular state tax exemption. In some states the important state tax exemption may be an income tax exemption, but in other states the property tax exemption may be of greater importance. The Attorney General may not need notification of action affecting every state tax exemption. The notification required under this subsection does not require notice of administrative proceedings prior to revocation of exemption of tax-exempt status, but Section 7 requires notice of the proceeding.

SECTION 7. NOTICE TO ATTORNEY GENERAL OF ACTION OR PROCEEDING.

- (a) This section applies to an action or proceeding in this state in a federal or state court:
- (1) by, against, or on behalf of a person holding a charitable asset in which the relief sought relates to a gift of a charitable asset;

(2) concerning the use of a charitable asset or a breach of duty or other obligation owed to a person holding a charitable asset;

(3) by, against, or on behalf of a person holding a charitable asset in which the relief sought includes:

(A) instruction, injunction, or declaratory relief relating to the management, use, or distribution of a charitable asset;

(B) construction of a record under which a charitable asset is held;

(C) modification, reformation, interpretation, or termination of the terms of a record under which a charitable asset is held;

(D) removal, appointment, or replacement of a trustee of a charitable trust; or

(E) a challenge to the administration of or a distribution from a decedent's estate or a trust in which matters affecting a charitable asset may be decided; and

(4) for bankruptcy under federal law, receivership under [state receivership statute] or a similar receivership statute of another state, or relief in any other insolvency proceeding.

(b) If an action or proceeding to which this section applies is commenced by or brought against a person in this state, the party seeking relief shall give notice in a record to the [Attorney General]. The notice must include a copy of the initial pleading. An order, decree, or judgment rendered in an action in which notice is required by this section is not binding on the [Attorney General] if the notice has not been given.

Legislative Note: *In states where the Attorney General is a necessary party to any of the actions addressed in this section, part or all of the section may be unnecessary.*

Comment

The Attorney General ought to be made aware of a wide range of proceedings that might

affect charitable assets or the structure or governance of a person holding charitable assets. The information will be beneficial to the Attorney General, but a state without the resources to receive and review all of the notices provided for in this section may not want to adopt every part of this section. At a minimum, states will benefit from requiring that the Attorney General be provided notice of and an opportunity to participate in *cy pres* or deviation proceedings or their equivalent in the state.

State law may already require notice to the Attorney General of some of the actions identified in this section. For example, the Uniform Prudent Management of Institutional Funds Act, adopted in all but two states, requires notice to the Attorney General before a charitable organization subject to UPMIFA modifies a donor-imposed restriction or asks a court to modify a restriction. UPMIFA §6. If other law requires notice to the Attorney General under certain circumstances, a state should modify the requirement of notice in this section accordingly but not remove the requirement entirely. For example, UPMIFA requires notice in certain circumstances, but applies only to those organizations that fall within its definition of “institution” and only to the “institutional funds” managed by those institutions.

The intention of this section is for the applicable statute of limitations, if any, to control. In some states, the common law bars the application of a statute of limitations to the Attorney General’s enforcement of fiduciary duties in connection with charities. *See, e.g., Lifespan Corp. v. New England Medical Center, Inc.*, 731 F.Supp.2d 232 (D.R.I. 2010), clarification order 2010 WL 3718952 (Sept. 20, 2010) (applying Massachusetts law); *Com. ex. rel. Corbett v. Citizens Alliance for Better Neighborhoods, Inc.*, 983 A.2d 1274, 1278 (Pa. Cmwlth. Ct. 2009). The equitable doctrine of laches also does not bar Attorney General enforcement of fiduciary duties in some states, *FDIC v. Gladstone*, 44 F. Supp. 2d 81, 90 (D. Mass. 1999), although it may apply in other states if the delay in bringing a suit is inexcusable and would significantly prejudice the defendant. *Com. ex. rel. Corbett*, at 1279.

SECTION 8. WAIVER OF FILING OF REGISTRATION [OR ANNUAL REPORT].

[(a)] The [Attorney General] may waive registration under Section 4 by a person required to register only under Section 4(b)(3) or (4) if the person is registered in another state under a law that is substantially similar to this [act] and files with the [Attorney General] a copy of the registration filed in the other state.

[(b)] The [Attorney General] may waive the requirement to file an annual report under Section 5 if the person required to make the filing files a report pursuant to [insert state charitable solicitation statute or other statute].]

Comment

Subsection a. Registration. If a person holds or has received during a 12-month period charitable assets with an aggregate value exceeding \$50,000, the person will need to register in its state of incorporation or administration and in the state in which it has its principal place of business. If the person holds charitable assets in another state or conducts activities in another state, the person will have to register in that other state, but the Attorney General in that other state can waive the duty to register and require the person to file instead a copy of the registration filed in the state of incorporation or principal place of business. Even if the Attorney General waives the duty to register, the person may be required to file annual reports under Section 5.

Subsection b. Annual Report. The Attorney General can agree to waive the filing of an annual report if a person holding charitable assets files a report with similar information in the same state. For example, in a state that requires an annual report in connection with solicitation, that filing may provide the same information required under Section 5. If so, the Attorney General can waive the duty to file an annual report. This Act does not attempt to coordinate with solicitation statutes, but a state may choose to do so. Even if the Attorney General waives the duty to file annual reports, the organization will still be required to register under Section 4, unless subsection (a) of this Section 8 applies, and will be required to file the notices provided for in Sections 6 and 7.

Additional Waivers. A state may choose to authorize the Attorney General to waive requirements under Sections 5, 6, and 7 by substituting for Section 8(a) the following: “The [Attorney General] shall waive the registration required under Section 4 and the filings required under Sections 5, 6, and 7, if a person required to register under Section 4 is registered in another state under a law that is substantially similar to this [act] and files with the [Attorney General] a copy of the registration filed in the other state.”

SECTION 9. FEES.

Alternative A

(a) A person required to register under Section 4 shall pay a fee of \$[15] with the registration and, if the registration is not filed timely, a late fee of \$[100].

(b) A person required to file a report under Section 5 shall pay a fee of \$[15] with the report and, if the report is not filed timely, a late fee of \$[100].

Alternative B

The [Attorney General] shall adopt rules in accordance with [this state’s administrative procedure act] setting fees for filing, and for late filing, of a registration under Section 4 and an annual report under Section 5.

End of Alternatives

Comment

The Act provides limited provisions for fees, and a state may want to delete these requirements or add more. The alternative provision directs the Attorney General to set fees. Some states with current registration statutes use a sliding scale based on gross support and revenue received during the fiscal year. *See* Mass. G.L. c. 12, § 8F.

SECTION 10. COOPERATION WITH OTHER OFFICIAL.

(a) The [Attorney General] may cooperate with an official of this state, another state, the United States, a foreign government, or a governmental subdivision, agency, or instrumentality of any of the foregoing charged with protecting charitable assets.

(b) The [Attorney General] may:

(1) notify an official described in subsection (a) of the commencement, status, or resolution of an investigation or proceeding pursuant to this [act];

(2) make available to the official information relating to a charitable asset which is relevant to the official's protection of charitable assets; or

(3) request from the official information relevant to an investigation pursuant to Section 3.

Comment

This section authorizes cooperation between a state Attorney General and relevant officials of other states, the federal government, and foreign governments. In some states a person holding charitable assets submits reports to the Secretary of State or to other state offices. This section allows the Attorney General to coordinate with any other state agency and provide information to other agencies as well as request information from other agencies.

[SECTION 11. PUBLIC RECORDS. A registration filed under Section 4 and an annual report filed under Section 5 are public records. The [Attorney General], on the written request of a person required to register under Section 4, shall withhold from public inspection any part of the person's registration or annual report which does not relate to a charitable purpose or charitable assets and is not otherwise a public record.]

Legislative Note: In some states, the state's Freedom of Information Act may require additional

statutory language in Section 11. In other states this section will be unnecessary because the state's Freedom of Information Act will apply without a provision in this statute.

SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 13. REPEALS. The following are repealed:

SECTION 14. EFFECTIVE DATE. This [act] takes effect