

August 4, 2011

Mr. Thomas R. Calcagni, Acting Director  
Division of Consumer Affairs  
Post Office Box 45027  
Newark, NJ 07101

**Re: Proposed revision to N.J.A.C. 13:48-11.2**

Dear Mr. Calcagni:

I am writing on behalf of the 400+ nonprofits represented in the Direct Marketing Association's Nonprofit Federation ("DMANF"). As you may know, DMANF is an advocacy group for nonprofit organizations that educate the public, advance their charitable missions, and raise funds through direct response marketing, particularly direct mail.

DMANF is writing to inform you of the views of its members on the proposed revisions to N.J.A.C. 13:48-11.2. The proposal would require nonprofits to notify potential donors, at the point of solicitation, that (a) they may designate the program(s) to which their donation must be allocated (including percentage allocations in the case of multiple programs) and (b) that any undesignated contribution may be used for any program or for "administrative and fundraising expenses."

The DMANF opposes this proposed revision for a host of reasons both legal and practical. We believe the proposal violates nonprofits' constitutional rights, we believe it unnecessary for accomplishing its stated aims, and we believe it imposes significant compliance burdens on responsible organizations that far outweigh any arguable salutary effects.

**First Amendment**

We believe this proposal squarely violates the First Amendment rights of nonprofits by compelling speech. The Supreme Court has ruled four times that charitable solicitations are core free speech protected by the First Amendment.<sup>1</sup>

As the Court noted in Riley, "mandating speech that a speaker would not otherwise make necessarily alters the content of the speech" and the First Amendment protects "the decision of both what to say and what *not* to say."<sup>2</sup> The Court went on to explain that "in reaching our conclusion, we relied on the principle that the right to speak and *the right to refrain from*

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<sup>1</sup> Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1979); Secretary of State of Maryland v. Joseph H. Munson Company, Inc., 467 U.S. 947 (1984); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) (hereinafter, "Riley"); and Illinois ex rel. Madigan v. Telemarketing Associates, Inc., 538 U.S. 600 (2003).

<sup>2</sup> Riley at 795-797, emphasis in original.

*speaking* are complementary components of the broader concept of individual freedom of mind.”<sup>3</sup>

The proposed regulation plainly compels speech. Specifically, it will force nonprofits to offer potential donors the opportunity to “earmark” funds for a particular purpose. As such, it will directly violate the nonprofits’ right to refrain from speaking. While many nonprofits offer donors the opportunity to earmark donations (and virtually all have systems in place to honor restrictions imposed by donors), it would violate the First Amendment rights of all nonprofits to *compel* them to make such an offer.

### **Necessity**

The proposal is simply not necessary. New Jersey donors, as do donors everywhere, have the force of law behind their desires for restricted gifts. A charity must either reject the offered gift or accept it with its restrictions. Presumably, this is a right the Attorney General would backstop. But this proposal sets out to *encourage* restricted giving.

By directing donors to restricted gifts, its apparent primary goal is to insulate them from nonprofits that would solicit for one purpose but use the funds for another (whether charitable or not). Such behavior by a nonprofit would constitute fraud. New Jersey already prohibits fraud, it is prohibited in the common law, and it is specifically prohibited in the context of charitable solicitations.<sup>4</sup> In short, the Attorney General already has the necessary tools she needs for punishing and discouraging “bait and switch” tactics.

Moreover, there is no evidence that this proposed requirement will prevent fraud at all. We believe that the malefactors that ignore New Jersey’s current laws against fraud will simply ignore – or skate around -- this new rule as well. It is not justifiable, we think, to put a legion of nonprofits to the costly task (see below) of implementing the proposal without anything other than hope that it might have some good effect.

The DMANF’s membership strongly supports aggressive enforcement of the fraud laws. We stand ready to aid New Jersey, and other states, to provide expertise that may – on occasion -- be required to do so. It is in our best interest to do so. Such enforcement protects the giving public and defends the reputation of good, law-abiding nonprofits.

### **Imposed Costs and Other Burdens**

If this proposed regulation comes into effect as currently written, it will impose short-term, mid-term, and long-term costs and burdens upon hundreds and hundreds of charities. Unfortunately, it is no exaggeration to say that, for larger organizations, the short-term costs alone would undoubtedly run to the thousands of dollars.

Prudent charities plan for the long-run. Among other things, this means printing quantities of promotional, fundraising, and informational materials that exceed present needs. Increased

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<sup>3</sup> Riley at 799 (internal quotations omitted and emphasis supplied) (citing to Miami Herald Publishing Co. v. Tornillo, 430 U.S. 241 (1974); Pacific Gas & Electric Co. v. Public Utilities Comm’n of California, 475 U.S. 1 (1986); Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985); Abood v. Detroit Board of Education, 431 U.S. 209 (1977); and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

<sup>4</sup> N.J. Rev. Stat. § 45:17A-32c (1) and (3).

quantity means decreased unit costs. For NJ-centric organizations, the advent of the proposed rule could render useless months and months of, now, non-complying stocks.

More certain would be the immediate need to align messages in all fundraising channels with the new rule. No moderate-sized charity survives in today's world with one letter and a reply device. Most charities would have to alter multiple letters and reply devices, newsletters, planned giving brochures, emails, web pages, and so on – possibly even telephone scripts. With the imperative of taking great care with copy, lay-out, graphics, and the like, the price tag would be considerable.

That's not the end of it. Increasing incidence of requests for gift restrictions inevitably means increased costs for gift processing, bookkeeping, and accounting. These costs will have to be absorbed by *every charity* coming under the proposed rule. On top of that, organizations raising funds nationally or regionally will instantly find themselves unable to use existing messages in NJ or their NJ messages elsewhere. The result will be increased production and management costs for *every donor communication* containing a fundraising message.

Fundraisers, schooled by experience and established practices, are wary of untested changes to their donor communications – especially drastic changes. The frank concern here is that *any* sudden shift, such as the one this rule would prescribe, will have a negative overall effect on fundraising. Simply put, no experienced fundraiser would accept the risk of widespread message change without careful and methodical testing. This is a risk the NJ rule would demand that charities swallow, heedless of the recession-stricken fundraising environment of the last several years.

Another hard-to-measure, long-term implication of the rule is its explicit endorsement of the public's knee-jerk opposition to charities' overhead costs. Obviously, the notion that "all of my donation should go to program" is a poorly considered pipedream. Does that donor believe that his request has been fielded by someone who isn't paid and is then guaranteed by other volunteers, none of whom impose any ancillary costs? We think reinforcing these notions is bad for the long-term health of the voluntary sector and runs squarely counter to the regulatory community's promotion of nonprofit transparency and accountability. We support these goals too. But, who is to pay for achieving them if not our donors?

Finally, the NJ rule would, sooner or later, create an inevitable collision with an organization's governance structure. For example, suppose a charity has been operating effective programs with efficient administration and a self-sustaining fundraising program by spending 20% of its revenues on administration and fundraising. Public perception notwithstanding, most experienced regulators would agree that – by the numbers – this is an admirable outcome.

But what if NJ's rule came into play and "worked"? What should the organization's board do when in, say, October, it became clear that restricted giving would dictate that only 15% of revenues would be available for admin and fundraising? Should it furlough the CFO for the rest of the year? The development director? Should it cancel next year's audit and apply the savings to this year's budget? Or what if donors, in favor of a vaccination program, had earmarked insufficient funds to the organization's well-digging program in a time of drought? Would the

AG involve herself to relieve these untenable situations? With due respect, this sort of problem solving, without regulator-created restraints, is what volunteer boards are for.

It is worth considering that worse still collisions could be created. Religious organizations are exempted from registration in NJ but not from other aspects of the registration law and attendant rules (like the proposal). For responsible religious organizations, donors' wishes will direct gifts, as with "civilian" charities. But, the allocation of raised funds can be subject to more complex demands than merely those anticipated by a single board's budget. Would the AG, absent fraud or other wrongdoing, have the political will -- or authority -- to redirect funds from, say, the care of ageing religious to a mission to Haiti? In this context, the proposal looks to us as if it invites the AG to a church-state collision, a place where she should not go.

We appreciate your consideration of our comments and we respect your concern for problems you perceive. However, we believe this proposal would impose so much cost and create so many difficulties that it should be withdrawn, lock, stock, and barrel.

Respectfully,

A handwritten signature in black ink that reads "Senny Boone". The signature is written in a cursive, flowing style.

Senny Boone, Esq.  
SVP, DMA Corporate and Social Responsibility  
Acting Exec. Director, DMANF