

CALIFORNIA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

FINAL STATEMENT OF REASONS

PROPOSED AMENDMENT OF REGULATIONS PURSUANT TO THE SUPERVISION OF
TRUSTEES AND FUNDRAISERS FOR CHARITABLE PURPOSES ACT
(GOVERNMENT CODE SECTION 12580, ET SEQ.)

SUBJECT MATTER OF

PROPOSED REGULATIONS:

Maintaining the confidentiality of donor information; designation of confidential information; clarification that fees may be used to enforce registration and reporting provisions

SECTIONS AFFECTED:

Title 11, Division 1, Chapter 4, California Code of Regulations **Sections 310 and 312**, and Title 11, Division 1, Chapter 15, California Code of Regulations **Section 999.1**

I. UPDATED INFORMATION

The Attorney General incorporates the Initial Statement of Reasons (ISOR), the Notice of Proposed Rulemaking Action published on December 11, 2015, and the Notice of Modifications to Text of Proposed Regulations by reference, with the following changes.

Update to the Initial Statement of Reasons

The information contained in the Initial Statement of Reasons (ISOR) remains unchanged except for the following:

1. The first paragraph of section “IV. Necessity” was updated in response to comments to include the statement, “Safeguarding donor information furthers the right to privacy.” These changes are for consistency and clarity. These changes are not a change of substance or policy.

IV. NECESSITY

Many of the reports filed with the Attorney General are subject to public inspection. (Gov. Code, § 12590.) The proposed amendments to Sections 310 and 999.1 codify the Attorney General’s historical and current practice that specific donor information will be exempt from public disclosure, and are not a change in policy or procedure. Safeguarding donor information furthers the right to privacy. The proposed amendments to Section 312 clarify that the Registry’s fund and annual registration and renewal fees will be used by the Registry to enforce registration and reporting provisions, and are not a

change in policy or procedure. (Gov. Code §12587.1) These regulations are consistent with existing law. The proposed amendments also correct typographical errors in the addresses listed for the Attorney General's San Francisco, Los Angeles, and Sacramento office locations. In addition, the proposed amendments correct an incorrect subdivision reference regarding notice requirements and provide that for transactions submitted under 999.2 through 999.5, the persons or organizations submitting confidential documents must separately designate and request that such documents not be maintained in the Public File.

2. Section 310, subdivision (a):

(a) The register, copies of instruments and the reports filed with the Attorney General, except as provided in subdivision (b) and pursuant to Government Code section 12590, shall be open to public inspection at the Registry of Charitable Trusts in the office of the Attorney General, Sacramento, California, at such reasonable times as the Attorney General may determine. Such inspection shall at all times be subject to the control and supervision of an employee of the Office of the Attorney General.

3. Section 310, subdivision (b)(3), has been deleted from the proposed text in response to comments raising concerns that disclosures pursuant to administrative subpoena do not require probable cause or judicial approval. This is a substantive change. On February 19, 2016, the notice of proposed modifications to text of proposed regulations provided an additional 15-day comment period to March 7, 2016. The modified proposed text of Section 310 is as follows:

(b) Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104 (d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:

(1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or

(2) In response to a search warrant.

4. Section 999.1, subdivision (a), corrects typographical errors:

Attorney General, Charitable Trusts Section
455 Golden Gate Avenue, Ssuite 11000
San Francisco, California 94102-7004

Attorney General, Charitable Trusts Section
300 Ssouth Sspring Sstreet
Los Angeles, California 90013-1230

Attorney General, Charitable Trusts Section
1300 I Sstreet
Pp.Oe. Bbox 944255

Written notices or requests shall be deemed filed with the Attorney General when the notices or requests are received at the Office of the Attorney General with the information required by sections 999.2(~~ef~~), 999.3(e), 999.4 and 999.5 of these regulations.

II. REQUIRED DETERMINATIONS

LOCAL MANDATED DETERMINATION: The proposed amendments do not impose a mandate on local agencies or school districts.

ALTERNATIVES DETERMINATION: No alternatives considered by the Attorney General would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The proposed amendments are the only regulatory provisions that accomplish the goal of codifying the Attorney General's practice of treating donor information as confidential and exempt from public inspection. As set forth and discussed in the summary and responses to comments, other alternatives proposed or otherwise brought to the Attorney General's attention were either beyond the scope of the regulatory action or rhetorical in nature.

III. SUMMARY AND RESPONSE TO COMMENTS

The Department of Justice accepted comments through January 25, 2016. A public hearing was held in Los Angeles on January 27, 2016, and in San Francisco on January 29, 2016.

On February 19, 2016, pursuant to Government Code section 11346.8, subdivision (c), the Department of Justice provided a 15-day notice of proposed modifications to the regulations and accepted public comments from February 19, 2016 to March 7, 2016. No substantive changes were made to the regulations in response to these additional comments.

All of the comments the Department of Justice received pertained to the proposed amendments to Title 11, Division 1, Chapter 4, California Code of Regulations Section 310. The proposed text of Section 310 codifies the Attorney General's historical and current practice of maintaining specific charitable donor information as exempt from public disclosure. No comments were received regarding the proposed amendments to Title 11, Division 1, Chapter 4, California Code of Regulations Section 312 or Title 11, Division 1, Chapter 15, California Code of Regulations Section 999.1.

All of the written comments received are attached hereto at the Public Comments Tab. An index identifying the authors of the written comments is attached as the first page of the Public Comments Tab.

A. 45-DAY WRITTEN COMMENT PERIOD

The Department of Justice received general supportive comments to the proposed amendments from:

1. Perlman & Perlman, Attorneys at Law
2. CalNonprofits, California Association of Nonprofits

The Department of Justice received general comments in opposition to the proposed amendments from:

1. Leadership Institute
2. Law Offices of Louis E. Michelson
3. Law Offices of Michael Boos
4. CalNonprofits
5. Americans for Prosperity Foundation
6. Alliance for Justice and Muslim Advocates
7. The National Rifle Association of America
8. Webster, Chamberlain & Bean
9. Wexler Law Group
10. Perlman & Perlman
11. Mark J. Fitzgibbons, American Target Advertising, Inc., reports that his comments were endorsed by 63 nonprofit organizations as well as 1400 individuals, each of which are listed from pages 6-42 of Mr. Fitzgibbons written comments dated January 25, 2016, and attached at the Public Comments Tab.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD FROM DECEMBER 11, 2015 THROUGH JANUARY 25, 2016, INCLUDING COMMENTS RECEIVED AT THE PUBLIC HEARING ON JANUARY 27, 2016

1. Perlman & Perlman, Attorneys at Law, and CalNonprofits, California Association of Nonprofits, expressed general support for the intent of the proposed regulations to preserve donor confidentiality by ensuring that donor information is exempt from public disclosure.

Response: The Department appreciates the supportive comments.

2. The Law Offices of Louis E. Michelson, Americans for Prosperity Foundation, and the National Rifle Association expressed the opinion that the Attorney General's collection of Schedule Bs compromises the ability of some registered charities to fundraise and creates a chilling effect on the First Amendment rights of donors. These commentators made the following comments:
 - Donors and potential donors are concerned that their support will be publicly disclosed.

- Disclosure of a charity's donors could risk the loss of future donations; Schedule B must be kept confidential.
- Disclosure would threaten the right and expectation of privacy of donors and potential donors.
- Disclosure of donor information, whether intentionally or not, will result in donors to certain causes being threatened and harassed and will cause those donors irreparable harm.

Response: No changes to the regulations are required to accommodate these comments. The Department views a number of the comments as rhetorical in nature and/or beyond the scope of the regulatory action. Nevertheless, the Department offers the following response: The Attorney General is authorized to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code section 12580, et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. The Attorney General collects Schedule B pursuant to that authority. The Attorney General's nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (Americans for Prosperity Foundation v. Harris (9th Cir. 2015)809 F.3d 536). Schedule B is a component of IRS Form 990. The commentators appear to have concerns regarding donor privacy. The proposed regulations address privacy concerns, as the regulations will codify the Attorney General's existing practice of maintaining the confidentiality of donor information. The proposed regulations specifically provide that donor information is exempt from public inspection and shall be maintained as confidential by the Attorney General.

3. The Law Office of Louis E. Michelson, Webster, Chamberlain & Bean, and the Wexler Law Group expressed the opinion that Schedule Bs could be subject to public records act requests under the California Public Records Act. These commentators raised the following points:
 - It is not clear that the exemption from disclosure in Government Code section 6254, subdivision (k), would preclude the disclosure of donor information in Schedule B.
 - There is a strong preference for public disclosure of official records, which are open to inspection.
 - There is no express provision exempting Schedule B data from disclosure under the California Public Records Act.
 - The Attorney General should propose and support legislation to preclude disclosure of donor information under the Public Records Act or the Supervision of Trustees for Charitable Purposes Act to provide a clear statutory basis for the regulation and to impose punishment for improper disclosures.

Response: No response is necessary since the comments are beyond the scope of the proposed regulatory action. Nevertheless, the Department responds as follows: The Attorney General is authorized to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code section 12580,

et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. The Attorney General collects Schedule B pursuant to that authority. The Attorney General's nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (Americans for Prosperity Foundation v. Harris (9th Cir. 2015)809 F.3d 536). Schedule B is a component of IRS Form 990. The purpose of the proposed regulations is to codify the Attorney General's existing practice of maintaining the confidentiality of donor information. The Attorney General's position regarding the commentators' statements is that Schedule B is not a public record and is not subject to production under the California Public Records Act pursuant to Government Code section 6254, subdivision (k).

4. The Law Offices of Louis E. Michelson, Mark J. Fitzgibbons, Americans for Prosperity Foundation, The National Rifle Association, The Wexler Law Group, and Perlman & Perlman expressed the opinion that there should be civil and/or criminal penalties for unauthorized disclosures of Schedule B included in the proposed regulations. These commentators state the following:
 - Because of the grave risks and concerns associated with exposure of confidential Schedule B information, and the potential for inappropriate and illegitimate uses, we propose adding criminal sanctions for misuse of Schedule B information in much the same way as the Internal Revenue Code restricts the Internal Revenue Service from sharing information.
 - To ensure the confidentiality of Schedule B, the regulation should include civil and/or criminal penalties for any violations of the confidentiality of a Schedule B, just as the IRS has put in place. Adequate penalties are necessary to deter violations of confidentiality.
 - A provision for adequate monetary or other remedies for any charities or donors injured as a result of public disclosure of their confidential information should be included in the regulation.
 - If such information is to be collected, strict controls as well as penalties and remedies for violating those controls, intentionally or involuntarily, should be in place to help assuage concerns donors and potential donors have.
 - The proposed regulation should cross-refer to pertinent Government Code provisions that impose discipline on the Office of the Attorney General's staff in case of a violation of confidentiality.

Response: This comment was rejected. The comments are also beyond the scope of the proposed regulatory action. Nevertheless, the Department responds as follows: Disclosing confidential information or the use of confidential information for private gain by an employee of the Department of Justice is prohibited by Government Code section 19990 and Civil Code section 1798.14 et seq. Department of Justice employees who violate Government Code section 19990 and/or Civil Code section 1798.14 et seq. may be subject to disciplinary action, including termination of employment, criminal prosecution, or civil sanctions as provided by Government Code section 19572 and Civil Code sections 1798.53-1798.57. As such, it is not necessary to include penalty provisions in the text of the proposed regulation.

5. The Law Offices of Louis E. Michelson, Mark J. Fitzgibbons, CalNonprofits, Americans for Prosperity Foundation, Alliance for Justice and Muslim Advocates, The National Rifle Association, Wexler Law Group, Leadership Institute, and Perlman & Perlman expressed the opinion that the Attorney General's Registry of Charitable Trusts should improve safeguards to protect Schedule B. The commentators statements include the following:

- The Attorney General should take measures to safeguard Schedule B information that has been or will be collected. These protections may include the use of multiple passwords and encryption and other security features.
- The proposed rule fails to provide safeguards and adequate protections to maintain confidentiality.
- We strongly request the state develop better security measures to ensure confidentiality and limit disclosure to only those who need to review it for purposes of charity enforcement.
- The safeguards are not adequate to truly guarantee confidentiality.
- The Attorney General lacks an adequate system for checking whether she has publicly disclosed Schedule Bs on her website.
- To ensure the confidentiality of Schedule Bs, an appropriate regulation would include the following measures: a prohibition on electronic copies of Schedule Bs, a requirement that the Attorney General implement safeguards that satisfy the IRS requirements for handling sensitive tax data, a requirement that the Attorney General search her website to ensure confidential information has not been inadvertently posted, civil and/or criminal penalties for violations of confidentiality of a Schedule B, a requirement to notify any charities or donors whose Schedule B information is disclosed, a provision for monetary or other remedies, and creation of an office or position devoted to enforcing compliance with confidentiality.

Response: No changes to the regulations are required to accommodate these comments. The Department views a number of the comments as rhetorical in nature and/or beyond the scope of the regulatory action. Nevertheless, the Department offers the following response: The Attorney General's Registry of Charitable Trusts has implemented new safeguards to maintain confidential records, including Schedule B.

6. The Law Offices of Michael Boos, Mark J. Fitzgibbons, Americans for Prosperity Foundation, Webster, Chamberlain & Bean expressed the opinion that the act of collecting Schedule B violates the First Amendment rights of charities and donors. The commentators provided the following comments:

- The connection between the state's purported interest and the additional information it might obtain from a charity's contributor list is tenuous at best and certainly does not pass muster under exacting or strict scrutiny.
- The demands by the California Attorney General for names and addresses of donors to charities and other nonprofit organizations violate the privacy and private right of association of donors.

- The Attorney General has no compelling law enforcement interest in requiring all registered charities to submit an unredacted Schedule B with their registration statements.

Response: No response is necessary since the comments are beyond the scope of the proposed regulatory action. The Department views a number of the comments as rhetorical in nature and/or beyond the scope of the regulatory action. Nevertheless, the Department offers the following response: The Attorney General has the authority to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code section 12580, et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. The Attorney General collects Schedule B pursuant to that authority. The Attorney General's nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (Americans for Prosperity Foundation v. Harris (9th Cir. 2015)809 F.3d 536). Schedule B is a component of IRS Form 990. Schedule B provides critical information for charity enforcement investigations and actions.

7. The Law Offices of Michael Boos, Americans for Prosperity Foundation, and the National Rifle Association expressed the opinion that damages should be paid to victims of donor confidentiality breaches. The comments included the following:
 - Victims of donor confidentiality breaches by the Registry should have the option of opting to receive either statutory damages determined by a set formula or proving actual damages.
 - A damages fund should be funded exclusively by the California taxpayers and not by registration fees paid by charities or others who are regulated under the Act.
 - Adequate penalties are necessary to deter violations of confidentiality. An appropriate regulation would have a provision for adequate monetary or other remedies for any charities or donors injured as a result of a public disclosure of their confidential information.

Response: This comment was rejected. The comments are beyond the scope of the proposed regulatory action. Nevertheless, the Department responds as follows: Disclosing confidential information or the use of confidential information for private gain by an employee of the Department of Justice is prohibited by Government Code section 19990 and Civil Code section 1798.14 et seq. Department of Justice employees who violate Government Code section 19990 and/or Civil Code section 1798.14 et seq. may be subject to disciplinary action, including termination of employment, criminal prosecution, or civil sanctions as provided by Government Code section 19572 and Civil Code sections 1798.53-1798.57. There is no statutory basis to pay damages for the disclosure of Schedule B.

8. The Law Offices of Michael Boos, Mark J. Fitzgibbons, CalNonprofits, Alliance for Justice and Muslim Advocates, Webster, Chamberlain & Bean, and Perlman & Perlman expressed the opinion that the proposed amendment to section 310, subdivision (b)(3),

the exception to disclose donor information in response to an administrative subpoena of another state agency, should be deleted. The comments included the following:

- This provision is of major concern because administrative subpoenas are generally issued by regulatory agencies on their own initiative without any requirement of independent judicial review to ensure that they are narrow in scope and based on probable cause as required by the 4th Amendment.
- To protect charities and donors against governmental overreach, the proposal should be amended to require that the Attorney General provide notice to the charity and donors in advance of disclosure and establish a mechanism for judicial review prior to the disclosure taking place.
- This proposed rule would allow other governmental agencies to obtain donor names from the Attorney General by issuing administrative subpoenas, which do not require probable cause or approval by judges, and will allow those other governmental agencies to obtain donor names without notice to the donors or the charities.
- This proposed rule does not contain appropriate safeguards on other governmental agencies to protect confidential information.
- We cannot comprehend why another administrative agency or other government official outside of charity enforcement would need to have Schedule B information. This is an end-run around the principles established by the Internal Revenue Code to protect donor confidentiality.
- The proposed regulations would reduce the confidentiality of donors' names and addresses by permitting disclosure of Schedule B to other California government agencies via an "administrative subpoena," presumably without notice to the charity in question or an opportunity for the charity to move to quash the subpoena.

Response: This comment was accepted. On February 19, 2016, the notice of proposed modifications to text of proposed regulations provided an additional 15-day comment period to March 7, 2016. The notice provided the text of modified regulations which deleted the following text from the proposed amendment to section 310, subdivision (b): "(3) In response to an administrative subpoena of an agency, bureau, or department of this state if the agency, bureau, or department agrees to maintain the confidentiality of information received consistent with this regulation."

9. Mark J. Fitzgibbons, Americans for Prosperity Foundation, and Perlman & Perlman expressed the opinion that it is illegal to require Schedule B as part of the registration process. The comments included the following:

- The demand for Schedule B is illegal under post-Watergate reforms to federal taxpayer information privacy laws and is neither required nor contemplated by California's charitable solicitation statute, nor needed for California's law enforcement purposes.
- Federal law protects against unauthorized disclosure and inspection by state officials. IRC sections 6103 and 6104 foreclose the AG's dragnet licensing

demands for private donor information because they are not expressly authorized.

- It is beyond the permissible scope of Government Code §12586(a) for the Attorney General to demand that charities submit an unredacted Schedule B as part of the periodic report they file each year.

Response: No changes to the regulations are required to accommodate these comments. The Department views a number of the comments as rhetorical in nature and/or beyond the scope of the regulatory action. Nevertheless, the Department offers the following response: The Attorney General is authorized to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code section 12580, et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. The Attorney General collects Schedule B pursuant to that authority. The Attorney General's nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (Americans for Prosperity Foundation v. Harris (9th Cir. 2015)809 F.3d 536). Schedule B is a component of IRS Form 990. Schedule B provides critical information for charity enforcement investigations and actions.

10. Mark J. Fitzgibbons and Americans for Prosperity Foundation expressed the opinion that charities and donors should be notified if their Schedule B information has been disclosed. They provided the following comments:

- Charities and donors must be notified of any Schedule B disclosures so they can assess the situation and take any necessary actions to minimize harm from public disclosure.
- Despite publishing hundreds of Schedule Bs, the Attorney General has never attempted to determine how many times each of these Schedule Bs was downloaded during the many years they were available online, or to notify a donor whose name and address was revealed publicly.
- The proposed rule fails to provide notice to victims of breaches, fails to provide remedies, and fails to provide penalties or discipline for employees of the AG's office who breach the confidentiality of donor names and addresses.

Response: This comment was rejected. The comments are also beyond the scope of the proposed regulatory action. Nevertheless, the Department responds as follows: There is no statutory requirement to notify charities or donors of such disclosures. Schedule B does not contain "personal information" as defined by Civil Code section 1798.29, subdivision (g), that would require disclosure under 1798.29, subdivision (a). The Schedule B form does not request donors to supply their social security numbers, driver's license number, account numbers, medical information or health insurance information. Further, the Attorney General's Registry of Charitable Trusts has implemented new safeguards to maintain confidential records, including Schedule B, and to prevent disclosures of such confidential information.

11. Americans for Prosperity Foundation expressed the opinion that the Schedule B requirement is itself an underground regulation. The comments included the following:

- The Attorney General has never adopted a rule or regulation requiring charities to submit Schedule B as part of their annual registration process.
- This understanding is consistent with the express, uniform, longstanding instruction of the IRS, ever since the inception of Schedule B, that charities “should not include their Schedule B (Form 990, 990-EZ, or 990-PF) in the attachments for the state, unless a schedule of contributors is specifically required by the State.”
- No California statute, rule, or regulation specifically names Schedule B as a necessary component of the requisite periodic report.
- The implementation of the Schedule B requirement necessitated a separate rulemaking proposal.
- The Schedule B requirement is clearly void because it is a generally applicable requirement that implements the law enforced by the Attorney General, yet it was adopted without adherence to the requisite procedures under the APA.

Response: No changes to the regulations are required to accommodate these comments. The Department views a number of the comments as rhetorical in nature and/or beyond the scope of the regulatory action. Nevertheless, the Department offers the following response: The Attorney General is authorized to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code section 12580, et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. The Attorney General collects Schedule B pursuant to that authority. The Attorney General’s nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (Americans for Prosperity Foundation v. Harris (9th Cir. 2015)809 F.3d 536). Schedule B is a component of IRS Form 990.

12. Webster, Chamberlain & Bean and Perlman & Perlman expressed the opinion that Schedule B should not be collected because it is not necessary for the Attorney General’s investigations. The following comments were provided:

- Your office has not been able to confirm that a single enforcement action has been initiated where Schedule B information, standing alone, was the basis for initiating the action, or to articulate that there could actually be such a case where Schedule B, standing alone, would aid the Attorney General in its enforcement efforts.
- Form 990 and its publicly available schedules offer more than sufficient information for enforcement, without the need for Schedule B.
- The Attorney General’s staff has testified that, in fact, the AG’s office rarely uses Schedule B in its investigations.
- The Attorney General has no compelling interest in requiring all registered charities to submit an unredacted Schedule B with their initial or renewal registration statements.

Response: No changes to the regulations are required to accommodate these comments. The Department views a number of the comments as rhetorical in nature and/or beyond the scope of the regulatory action. Nevertheless, the Department offers the following response: The Attorney General is authorized to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code section 12580, et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. The Attorney General collects Schedule B pursuant to that authority. The Attorney General's nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (Americans for Prosperity Foundation v. Harris (9th Cir. 2015)809 F.3d 536). Schedule B is a component of IRS Form 990. Schedule B provides critical information for charity enforcement investigations and actions.

13. The Wexler Law Group expressed the opinion that the historical and current practice of not disclosing Schedule B to the public could be construed as an underground regulation. The following comments were provided:

- The Initial Statement of Reasons does not reference any California authority for the asserted historical and current “practice” of not disclosing Schedule B to the public.
- The “practice” contradicts the plain language of 11 CCR 310 and 11 CCR 999.1, which indicate that the reports filed by registrants are to be disclosed to the public.
- The Initial Statement of Reasons could easily be construed to support a challenge to the “practice” as an underground regulation under Government Code 11340.5.

Response: No changes to the regulations are required to accommodate these comments. The Department views a number of the comments as rhetorical in nature and/or beyond the scope of the regulatory action. Nevertheless, the Department offers the following response: The Right to Privacy is protected under the California Constitution, Article 1, Section 1, and the Department's historical and current practice of protecting donor information is consistent with the California Constitution. The proposed regulations will address general privacy concerns, as the regulations will codify the Attorney General's existing practice of maintaining the confidentiality of donor information. The proposed regulations specifically provide that donor information is exempt from public inspection and shall be maintained as confidential by the Attorney General, subject to certain limited exceptions.

The Attorney General is authorized to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act (the Act), Government Code section 12580, et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. Government Code section 12598, subdivision (a), provides that the Attorney General has broad powers under common law and California statutory law to carry out charitable trust enforcement responsibilities. Further, the Attorney General has broad constitutional, common law and statutory powers under the state constitution to protect the public. (California Constitution, art. V, §13; D 'Amico v. Board of Medical

*Examiners (1974) 11 Cal.3d 1, 14-15.) Government Code section 12584 states that the Attorney General may conduct whatever investigation is necessary, and shall obtain from public records, court officers, taxing authorities, trustees, and other sources, whatever information, reports, and records are needed for the establishment and maintenance of the register of charitable corporations, associations, and trustees. Pursuant to Government Code section 12591 the Attorney General may institute appropriate proceedings to secure compliance with the Act and to invoke the jurisdiction of the court. Government Code sections 12591.1 and 12591.2 authorize the Attorney General powers including, but not limited to, the following: to issue cease and desist orders, to issue penalties, to apply to the Superior Court for injunctive relief for violations of the Act, and to accept a stipulated assurance of voluntary compliance in enforcement actions. The Attorney General's nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (*Americans for Prosperity Foundation v. Harris* (9th Cir. 2015) 809 F.3d 536). Schedule B is a component of IRS Form 990.*

Pursuant to the above authority, the Attorney General has broad enforcement rights, including the right to file lawsuits and conduct administrative proceedings. Schedule B is a critical component of the Attorney General's investigations and an essential tool for the prosecution of charitable trust enforcement actions. Schedule B provides critical information particularly with regard to charity fraud involving high-value noncash donations and unfair business practice actions. The Attorney General currently has open investigations wherein Schedule B has provided significant information related to inflated noncash donations; charities misrepresent the value of noncash gift in kind donations on their Schedule B to artificially inflate their revenues and program related expenses reported elsewhere in their IRS Form 990. By misrepresenting revenue in the IRS Form 990, donors, government regulators and other stakeholders are led to believe that the charities are operating with lower administration and fundraising margins, and engaging in and promoting robust charitable programs. When in reality, the Schedule B demonstrates that the charity is accepting noncash donations that have been artificially inflated in value or involve expired medications, perished food products, and other gifts in kind that do nothing to further the charitable program of the charity. Under Government Code section 12599.6, charities are prohibited from using unfair or deceptive practices that create confusion or misunderstanding. A charity is required to maintain adequate and correct records of account; Schedule B is a record of an account and provides information about the source and value of significant donations received by the charity. (Corp Code, § 6320.) Under Corporations Code sections 6215 and 6812, officers, directors, employees and agents are prohibited from making, issuing, delivering or publishing false reports respecting the corporation's assets, revenues, and accounts. Moreover under Corporations Code sections 6215 and 6812, directors and officers may be subject to both civil and criminal penalties for publishing false reports. Without being able to use Schedule B in litigation, the Attorney General will be hampered in being able to prove that in kind donations have been improperly reported in the Schedule B and as a result the charity's revenue has been artificially inflated in the IRS Form 990. As such, there is an operational need for the Attorney General to fully utilize Schedule B as an evidentiary document in court and/or administrative proceedings to prosecute charitable

trust enforcement actions based on misrepresentations made by the charity's directors, officers and agents in preparing, filing and distributing false and misleading IRS Form 990.

Section 310, subdivision (b), notifies the public that Schedule B may be disclosed in a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities.

Section 310, subdivision (b), notifies the public that donor information will be disclosed in response to a search warrant lawfully issued by the court. This is not a change from the Attorney General's historical policy or practice to comply with law enforcement agencies. Civil Code section 1798.24, subdivision (l), provides that a governmental agency may disclose personal information pursuant to a search warrant. Civil Code section 1798.24, subdivision (d), allows for the use of personal information by an agency's employees and attorneys when relevant and necessary for the performance of their official duties. Civil Code section 1798.24, subdivisions (e) and (f), further provide that personal information may be disclosed where necessary for an agency to perform its constitutional or statutory duties, and to the extent necessary for a governmental organization to conduct enforcement investigations.

14. Law Offices of Louis E. Michelson suggested that there should be a statement included in both the Notice and the Statement of Reasons that safeguarding donor information on Schedule B furthers the public policy of right to privacy and that the Office of the Attorney General respects the reasonable expectations of donors in maintaining the privacy and preventing the un-authorized disclosure of Schedule B information.

Response: This comment was accepted in part. The Final Statement of Reasons on page 1, No. 1 of the "Update to the Initial Statement of Reasons" incorporates language that safeguarding donor information on Schedule B furthers the right to privacy.

B. 15-DAY WRITTEN COMMENT PERIOD

The following written comments were received regarding the modified text of the proposed action during the 15-day written comment period that commenced February 19, 2016 and ended March 7, 2016.

The Department received neutral and/or supportive comments from:

1. Perlman & Perlman, Attorneys at Law
2. Association of Fundraising Professionals

The Department received comments in opposition to the proposed amendments from:

1. Mark J. Fitzgibbons, American Target Advertising, Inc.
2. Law Office of Michael Boos

3. Collectively, Mark J. Fitzgibbons, Michael Boos, Jeremiah Morgan, William J. Olson, and Mark Weinberg
4. Perlman & Perlman
5. Americans for Prosperity Foundation
6. Association of Fundraising Professionals

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD FROM FEBRUARY 19, 2016 THROUGH MARCH 7, 2016

1. Perlman & Perlman and Association of Fundraising Professionals expressed general support for the modifications to the proposed regulations. The supportive comments included the following:
 - We applaud the elements of the proposed regulations and relevant amendments that strive to protect donor confidentiality, which includes the amendment to prevent the disclosure of confidential donor information in the case of administrative subpoenas.
 - We applaud the intent of the proposed regulations to preserve donor confidentiality by ensuring that donor information exempt from public disclosure pursuant to the Internal Revenue Code be maintained as confidential by the California Attorney General and not publicly disclosed.
 - We further applaud the amendment to eliminate the ability to disclose confidential donor information in the case of administrative subpoenas.

Response: The Department appreciates the supportive comments.

2. Mark J. Fitzgibbons, Michael Boos, collectively Mark J. Fitzgibbons, Michael Boos, Jeremiah Morgan, William J. Olson, and Mark Weinberg, Perlman & Perlman, and Americans for Prosperity Foundation expressed the opinion that the revised proposed regulations fail to cure the problems with the proposed rulemaking, specifically that the Attorney General lacks authority to collect Schedule B and the proposed regulations fail to protect the confidentiality of Schedule B.

Response: These comments are not germane to the modification of the language of the proposed action and no response is required. However, to the extent those comments have been previously made, they were responded to above in the appropriate section.

3. Mark J. Fitzgibbons, collectively Mark J. Fitzgibbons, Michael Boos, Jeremiah Morgan, William J. Olson, and Mark Weinberg, Americans for Prosperity Foundation, and Association for Fundraising Professionals expressed the opinion that it is unlawful to collect Schedule B through the registration process.

Response: These comments are not germane to the modification of the language of the proposed action and no response is required. However, to the extent those comments have been previously made, they were responded to above in the appropriate section.

4. Mark J. Fitzgibbons and collectively Mark J. Fitzgibbons, Michael Boos, Jeremiah Morgan, William J. Olson, and Mark Weinberg expressed the opinion that the Internal Revenue Code provides the only method of inspection of donor names by states for administration of charitable solicitation laws. The comments included the following:
- Inspection and disclosure of confidential tax return information for the administration of state charitable solicitation laws is regulated under IRC 6104(c)(3). Disclosure by the IRS to the California Attorney General for the administration of state charitable solicitation laws may be authorized after a written request by the California Attorney General to the IRS.
 - The only authorized inspection of Schedule B donor names and addresses by state officials under IRC 7213A for administration of charitable solicitation laws arises after they are acquired from the Secretary of the Treasury.
 - Acquisition of Schedule B donor names and addresses using the charitable solicitation registration process is unauthorized by the Code, hence is unlawful under the explicit and rigid regime created by Congress for inspection and disclosure of federal tax return information in the administration of state charitable solicitation laws.
 - The proposed rule ignores the statutorily mandated role of the IRS in authorizing, supervising, and monitoring disclosure of Schedule B information to attorneys general, and subsequent inspection by employees in their offices.

Response: These comments are not germane to the modification of the language of the proposed action and no response is required. However, to the extent those comments have been previously made, they were responded to in the appropriate section. The Department further responds as follows: The Attorney General is authorized to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code section 12580, et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. The Attorney General collects Schedule B pursuant to that authority. The Attorney General's nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (Americans for Prosperity Foundation v. Harris (9th Cir. 2015)809 F.3d 536). Schedule B is a component of IRS Form 990.

5. Michael Boos, collectively Mark J. Fitzgibbons, Michael Boos, Jeremiah Morgan, William J. Olson, and Mark Weinberg, Perlman & Perlman, and Americans for Prosperity Foundation expressed the opinion that the proposed regulations should include remedies and/or criminal penalties for disclosure.

Response: These comments are not germane to the modification of the language of the proposed action and no response is required. However, to the extent those comments have been previously made, they were responded to above in the appropriate section.

6. Americans for Prosperity Foundation and Perlman & Perlman expressed the opinion that the Attorney General's Office has inadequate security measures in place to ensure the confidentiality of Schedule B.

Response: These comments are not germane to the modification of the language of the proposed action and no response is required. However, to the extent those comments have been previously made, they were responded to above in the appropriate section.

7. Perlman & Perlman object to disclosure of Schedule B in response to a search warrant. The comments include the following:

- The language of the proposed regulation suggests that a search warrant would be sufficient to warrant disclosure to non-charity enforcers.
- We cannot comprehend why another administrative agency or other government official outside of charity enforcement would need to have Schedule B information.
- Schedule B information is confidential and important trade secret information and must be kept confidential, except on an absolute need-to-know basis relating only to charitable activity enforcement.

Response: This comment was rejected. The proposed regulations will address general privacy concerns, as the regulations will codify the Attorney General's existing practice of maintaining the confidentiality of donor information. The proposed regulations specifically provide that donor information is exempt from public inspection and shall be maintained as confidential by the Attorney General. The Attorney General will comply with lawfully issued search warrants.

8. Perlman & Perlman and Association of Fundraising Professionals expressed the opinion that Schedule B information is confidential and important trade secret information. Their comments include the following:

- Schedule B information must be kept strictly confidential, except on an absolute need-to-know basis relating only to charitable activity enforcement.
- We fear that requiring the state's proposed collection of Schedule B will create serious vulnerabilities while doing little to assist with state enforcement of the sector.

*Response: These comments are not germane to the modification of the language of the proposed action and no response is required. However, to the extent those comments have been previously made, they were responded to in the appropriate section. The Department views a number of the comments as rhetorical in nature and/or beyond the scope of the regulatory action. Nevertheless, the Department offers the following response: The Attorney General is authorized to collect Schedule B pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code section 12580, et seq. and Title 11, Division 1, Chapter 4, California Code of Regulations, section 301. The Attorney General collects Schedule B pursuant to that authority. The Attorney General's nonpublic collection of Schedule B was upheld as facially constitutional by the United States Court of Appeals on December 29, 2015 (*Americans for Prosperity Foundation v. Harris* (9th Cir. 2015)809 F.3d 536). Schedule*

B is a component of IRS Form 990. The commentators appear to have concerns regarding donor privacy. The proposed regulations will address privacy concerns, as the regulations will codify the Attorney General's existing practice of maintaining the confidentiality of donor information. The proposed regulations specifically provide that donor information is exempt from public inspection and shall be maintained as confidential by the Attorney General.

9. Americans for Prosperity Foundation expressed the opinion that Schedule B is unnecessary to regulate charities properly. The following observations were noted:
- Forty-eight of the fifty other states do not specifically require charities to file Schedule B.
 - If Schedule B were truly important to preventing fraud or illegality by charities, then 48 other jurisdictions would not forgo collection of it.
 - Of the 33 other jurisdictions that require charities to annually file the IRS Form 990, only 9 do not distinguish between the Form 990 and the related schedules, and just one, Hawaii, is known to have asked for Schedule B.

Response: These comments are not germane to the modification of the language of the proposed action and no response is required. However, to the extent those comments have been previously made, they were responded to above in the appropriate section.

IV. AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of the Proposed Action, the Initial Statement of Reasons, the Notice of Modifications to Text of Proposed Regulations, the text of the regulations in underline and strikethrough were available on the Attorney General's website throughout the rulemaking process. Copies of the final text of the amended regulations can be accessed on the Attorney General's website at: www.oag.ca.gov/charities.

V. AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Copies of the Final Statement of Reasons may be obtained by contacting:

Jami L. Cantore, Deputy Attorney General
California Department of Justice
Charitable Trusts Section
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Fax: (213) 897-7605
Email: Jami.Cantore@doj.ca.gov