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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

*Compliance Review of Charitable Solicitation Contracts and Activities of Apogee Retail, LLC and Savers, LLC with True Friends Foundation, Lupus Foundation of Minnesota, Courage Kenny Foundation, and Vietnam Veterans of America, Inc.*

— THE OFFICE OF ATTORNEY GENERAL —  
**LORI SWANSON**

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2014

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*Review Conducted Pursuant to Minnesota Statutes Chapters 309, 501B, and 317A*

## **SECTION ONE: INTRODUCTION**

Americans gave \$316 billion to charitable organizations in 2012, of which approximately \$229 billion came from individuals.<sup>1</sup> Most of these donations were received by organizations that focus on religion, education, healthcare, arts, culture, environment, animals, and disaster relief.<sup>2</sup> Over 1.4 million soliciting charitable organizations have been granted tax-exempt status by the Internal Revenue Service (“IRS”).<sup>3</sup> In addition to contributions, charitable organizations generate over \$1.6 trillion in revenue from services, government grants, special events income, and sales of products.<sup>4</sup> Employees of nonprofits receive about 9.2 percent of the wages paid in the United States, and nonprofits provide approximately 13.5 million jobs.<sup>5</sup>

### **1.1 A Thumbnail History of Charities Law**

Over 1,000 years ago, charities began as organizations designed to provide emotional, spiritual, and material comfort for religious orders. The law of charities that governs organizations in the United States today developed primarily in medieval times when ecclesiastical courts and the secular government disputed jurisdiction over charitable bequests and distribution of property. At that time, ecclesiastical influence over law was strong, and the secular government was concerned that property and money was being diverted from feudal lords to the church. This tension resulted in the establishment of the Statute of Mortmain, a law

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<sup>1</sup> Mark Hrywna, *Giving Beat GDP Before Inflation: Religion is lagging in new \$316 billion Giving USA Estimates*, The Nonprofit Times (July 1, 2013), available at [http://www.thenonproffitimes.com/wp-content/uploads/2013/07/7-1-13\\_SR\\_GivingUSA.pdf](http://www.thenonproffitimes.com/wp-content/uploads/2013/07/7-1-13_SR_GivingUSA.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Paul Schmitz, *Look to Nonprofit Sector to Create Jobs*, CNN Opinion (October 19, 2012), <http://www.cnn.com/2012/10/19/opinion/schmitz-nonprofit-jobs/>.

<sup>4</sup> National Center for Charitable Statistics, *Quick Facts About Nonprofits* (2011), <http://nccs.urban.org/statistics/quickfacts.cfm>.

<sup>5</sup> *Id.*, PRNewswire, *Post-Recession, Nonprofit Sector's Confidence Continues to Recover, Reports Idealist.org's Nonprofit Survey* (July 30, 2012), <http://www.prnewswire.com/news-releases/post-recession-nonprofit-sectors-confidence-continues-to-recover-reports-idealistorgs-annual-nonprofit-survey-164235446.html>.

created in England in 1279 that prohibited land from being given to the church without royal license.<sup>6</sup>

Although the laws were developed to regulate charitable organizations and charitable giving, the regulations were not systemic and conflicts continued to arise. In 1601, the English parliament, under Queen Elizabeth I, enacted a law referred to as the “Statute of Elizabeth I,” which gave direction regarding charitable uses. The law, also known as the Charitable Uses Act 1601, became the precursor for modern charities regulation. It provides standards for acceptable charitable purposes, including the following elements: (1) the purpose had to be described in statute, (2) the entity had to be organized for a public benefit, and (3) the entity had to be exclusively charitable.<sup>7</sup> As the chief legal adviser to the Crown, the progenitor of the Attorney General was charged with enforcing provisions of the law in court. While the philosophy behind the Statute of Elizabeth I was carried to the United States, it was not until 1943 that New Hampshire became the first state to enact statutes that required charitable registration and reporting with the Attorney General, who was authorized to conduct investigations, serve administrative subpoenas, and take legal action to remedy violations.<sup>8</sup> Other states soon followed New Hampshire’s regulatory scheme in regulating charities and charitable fundraising.

## **1.2 Early Charitable Organizations**

Charitable giving evolved during the Enlightenment, a reformation movement that sought to improve society by, in part, creating mutual associations, initially religious in nature, for philanthropic purposes. One of the leaders of this movement was Captain Thomas Coram, a

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<sup>6</sup> Ernest Henderson, *Select Historical Documents of the Middle Ages*, 148-149 (1968).

<sup>7</sup> Nuzhat Malik, *Defining ‘Charity’ and ‘Charitable Purposes’ in the United Kingdom*, *The International Journal of Not-for-Profit Law* 11.1 (2008).

<sup>8</sup> New Hampshire Department of Justice Office of the Attorney General. <http://www.doj.nh.gov/charitable-trusts/>.

successful London ship builder who, by a Royal Charter signed on October 17, 1739, created the Foundling Hospital, which is reportedly the world's first incorporated charity. The purpose of the hospital was to provide a home for children whose parents could not provide for them.<sup>9</sup> The Foundling Hospital has become a museum, but the charity, known as Coram, continues to provide charitable services to vulnerable children.

The evolution of charities in the United States is exemplified by Catholic Charities USA, which began in 1727 when the French Ursuline Sisters created an orphanage in New Orleans, Louisiana. In 1845, the Society of Vincent St. Paul was formed in Saint Louis, Missouri. By the year 1900, over 800 Catholic charities were created to provide care to children, the elderly, the sick, and the disabled. In 1910, these organizations became the National Conference of Catholic Charities, now known as Catholic Charities USA.<sup>10</sup>

Similarly, in the mid-1800s, local societies of the Lutheran faith gathered to assist the elderly, children, widows, and the disabled. They eventually formed the Lutheran Services of America, an organization that coordinates the work of over 300 independent Lutheran health and human service organizations.<sup>11</sup>

In 1865, a Methodist minister, William Booth, founded The Christian Mission, which consisted of over 1,000 spiritual converts who were known as the "Hallelujah Army." In 1878, Rev. Booth prepared the organization's annual report, which referred to the organization as a "volunteer army." Rev. Booth crossed out the words "volunteer army" and replaced it with

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<sup>9</sup> Coram, *Our Heritage – the Foundling Hospital*, <http://www.coram.org.uk/about-us/our-heritage-foundling-hospital>.

<sup>10</sup> Catholic Charities USA, *History*, <http://catholiccharitiesusa.org/history/>.

<sup>11</sup> Lutheran Services in America, *Lutheran Social Ministry in the United States*, [http://www.lutheranservices.org/about\\_lutheran\\_social\\_ministry](http://www.lutheranservices.org/about_lutheran_social_ministry).

“Salvation Army,” thereby creating the organization known today as The Salvation Army.<sup>12</sup> Today, with over 1.5 million members in 126 countries, The Salvation Army provides basic life necessities and disaster relief to adults, children, and families. In 2004, The Salvation Army became the recipient of the largest known single contribution—\$1.6 billion—which was donated by McDonald’s benefactor, Joan Kroc.

By the end of the 19th century, secular charitable organizations were also sprouting up, supported in large part through the solicitation of contributions from the general public. For example, in 1881, Clara Barton organized a group to form the American Red Cross in Washington, D.C. to aid the military, deliver disaster relief services, and to provide peacemaking services. The American Red Cross received its Congressional charter in 1900, and it has since expanded its purpose to support tissue transplant programs, such as blood banks.<sup>13</sup>

In 1902, Edgar J. Helms established Goodwill by collecting used clothing and household goods from wealthy Boston, Massachusetts residents and used them to train residents living in low-income areas on how to mend clothing. Today, Goodwill receives over \$5 billion in revenue, of which 83 percent is reportedly spent on program services, including the operation of its 165 stores.<sup>14</sup>

### **1.3 A Brief Summary of Charitable Fundraising**

Fundraising for a charitable purpose has existed for over 1,000 years. From raising funds to build the ancient amphitheaters in Rome to the Buddhist temples in Nepal, fundraising was an efficient mechanism to advance philanthropy. Today, fundraising on behalf of charitable

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<sup>12</sup> The Salvation Army, *History of the Salvation Army*, <http://www.salvationarmyusa.org/usn/history-of-the-salvation-army>.

<sup>13</sup> American Red Cross, *A Brief History of the American Red Cross*, <http://www.redcross.org/about-us/history>.

<sup>14</sup> The Goodwill, *Our History*, <http://www.goodwill.org/about-us/>.

organizations is conducted using several mediums, including face-to-face and by telephone, posters, online, direct mail, and radio and television advertisements. Contributions are made by donating funds or by donating goods—also known as “in-kind” contributions—for purposes of direct donation to others or for re-sale in which the revenue is used for charitable purposes.

Many charitable organizations hire professional fundraisers, which are individuals or for-profit companies that are paid to solicit funds or goods on behalf of charitable organizations. Professional fundraisers are generally paid for their services either by percentage-based compensation or by fees unrelated to the amount of funds raised. Most states require professional fundraisers to register with the state, through offices like the Attorney General, before conducting a solicitation campaign. In Minnesota, professional fundraisers must file a registration statement with the Attorney General. *See* Minn. Stat. § 309.531, subd. 1 (2014) (Tab 1). For each charitable organization it represents, a professional fundraiser must provide a solicitation notice, a financial report, a copy of the contract, state the percentage of the total amount solicited from each donor that is received by the charitable organization, and provide written authorization from the charitable organization that the professional fundraiser may solicit on its behalf. *See* Minn. Stat. §309.531, subds. 2 and 3 (2014) (Tab 1). The professional fundraiser must disclose the total revenue and itemize all expenses incurred from each solicitation campaign. Minn. Stat. §309.531, subd. 4 (2014) (Tab 1).

#### **1.4 Regulation of Charitable Organizations**

Charities are subject to both state and federal laws. At the federal level, the Internal Revenue Code recognizes certain non-profit organizations as exempt from taxation. An organization must apply to the IRS for recognition of exempt status. Once recognized, a tax-exempt organization must annually file an informational return with the IRS, such as a Form 990, which provides information about the organization’s mission, programs, and

finances.<sup>15</sup> In general, a donor that contributes to a qualified tax-exempt organization may deduct the value of the charitable contribution from the donor's gross income on the donor's tax return.<sup>16</sup>

In Minnesota, certain charitable organizations and their professional fundraisers are required to register with the Attorney General's Office and must comply with the Minnesota Social and Charitable Organizations Act ("Act"), Minn. Stat. ch. 309, which regulates the registration of and reporting by soliciting charitable organizations. *See* Minn. Stat. §§ 309.52 and 309.53 (2014) (Tabs 2 and 3). Registration allows donors to educate themselves about charities by reviewing the public filings of charitable organizations and professional fundraisers.

Registrations and reports submitted to the Attorney General's Office by a charitable organization must generally provide information pertaining to the organization's incorporation, governance, mission, solicitation methods, and finances. *See* Minn. Stat. §§309.52, subd. 1 and 309.53, subds. 1 and 2 (2014) (Tabs 2 and 3). As noted above, professional fundraisers must file an annual registration statement and reports. *See* Minn. Stat. § 309.531, subd. 2(c)(3) (2014) (Tab 1).

Donors have limited opportunities to learn about fundraising costs. Registration provides a mechanism for donors to educate themselves about charities by reviewing charitable organizations' and professional fundraisers' public filings. The courts have long held that these disclosures are necessary for the state to exercise its police power to prevent fraud and safeguard the public welfare with respect to charitable solicitations and the activities of professional fundraisers. *See State v. Francis*, 95 Misc.2d 381, 385 (N.Y.S. 1978) ("...where a charitable organization is to receive but a small share of the total funds solicited in the name of a charity or

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<sup>15</sup> *See* 26 U.S.C.A. § 6033(a)(1) (2014).

<sup>16</sup> *See* 26 U.S.C.A. § 170(c) (2014).

a non-profit organization, the public solicited has a right to know these facts so that people may knowingly decide on that basis whether or not they wish to make their donations. The fact that [charitable organizations] agree to the terms of the contracts should not preclude the Attorney General from protecting the public's right. The contracts with the non-profit organizations are not merely bilateral, but rather establish a triangular relationship with the public as the third party whose interest should be protected.”); *Vill. of Schaumburg v. Citizens for a Better Env't et al.*, 444 U.S. 620, 638 (1980) (“Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.”); *Viguerie Co. v. Patterson*, 94 A.D.2d 672, 673 (N.Y.S. 1983) (In exercising its police powers to prevent fraud and protect public welfare, the state may reasonably require a professional fundraiser to disclose factual data about its operational practices.); *Caucus Distrib., Inc. v. Comm'r of Commerce*, 422 N.W.2d 264, 273 (Minn. Ct. App. 1988) (“The state has an interest in protecting citizens from abusive practices in solicitation of funds for charity...”); *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225, 1231-1232 (4th Cir. 1989) (“The information contained in the financial statements...is invaluable. A donor can use this information to determine if a particular solicitation is bona fide by ascertaining whether the solicitor is registered. A donor might also use this information to learn further about a solicitor's operations. Additionally, [financial statements] assist in preventing fraud. When comparative information is available, inaccuracies in inducements are less likely to occur. If they do occur, they are more likely to be discovered.”); *Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 214 (Tex.) 2011 (“A donor is not defrauded when a charity resells the goods she donates or expends capital to

facilitate that process; the evil occurs when a portion of the proceeds from a donation is diverted to a third-party, professional solicitor without the knowledge of the donor.”)

The Act prohibits deceptive practices, including the use of false pretenses and the use of misleading representations that would confuse the public. *See* Minn. Stat. §309.55, subd. 5 (2014) (Tab 4). The Act attempts to promote transparency by requiring organizations and their fundraisers to disclose during solicitations (1) the name and location of each charitable organization, (2) the tax deductibility of the contribution, (3) the charitable mission, and, if applicable, (4) that the solicitation is being conducted by a professional fundraiser. *See* Minn. Stat. § 309.556 (2014) (Tab 5).

Minnesota’s Supervision of Charitable Trusts and Trustee’s Act provides that assets, such as funds and in-kind donations held for a charitable purpose, are held in charitable trust and subject to a fiduciary relationship between the asset holder, or trustee, and the property. *See* Minn. Stat. §501B.35, subd. 3 (2014) (Tab 6). The fiduciary relationship requires the trustee to adhere to certain equitable duties, such as the duties of care and loyalty, in administering the property for a charitable purpose. *Id.* When the trustee fails to comply with these fiduciary obligations, such as using the property for private inurement, it is a breach of trust, and the trustee may be held accountable under the Supervision of Charitable Trusts and Trustees Act. *See* Minn. Stat. § 501B.41, subds. 6 and 7 (2014) (Tab 7).

### **1.5 Fraud in Charitable Fundraising**

The proliferation of charities led to sometimes fraudulent ventures, where unscrupulous individuals created charities to divert contributions for personal expenditures or solicited funds with no intention of using donations for charitable purposes. Fundraising fraud may take the form of using fake names, using the names of charities that sound similar to well-known causes, misrepresenting programs, or the submission of false documents. In more recent years,

prospective donors have begun scrutinizing the fees paid by charitable organizations to professional fundraisers. As a result, some organizations attempt to hide or minimize fundraising fees by reporting them as program expenses or through other tactics that lead donors to believe that a large percentage of revenue is spent on charitable purposes.

One of the earliest sham charities was conducted by George W. Ryder, who in New York City in 1918 pled guilty to mail fraud for soliciting contributions for his shell organization, Cripples' Welfare Society, and using those contributions for his personal gain.<sup>17</sup>

In 1989, the United States Court of Appeals found that a purported charitable organization, The Bible Speaks, obtained over \$5.5 million from a donor using undue influence to mislead the donor about how her contributions would be used, including convincing her to give money to purportedly free a captive missionary who, as it turned out, was not in captivity.<sup>18</sup>

In 1996, solicitors were found liable for violating the Federal Trade Commission Act when they sold, among other things, charity "honor boxes" that, when placed near a merchant's cash register, purportedly reaped profits of \$3,000 to \$4,000 per month. In turn, the merchant paid the solicitors a set monthly fee. Donations made to the boxes were never received by a charity and were kept as profit for the merchants.<sup>19</sup>

According to the *Tampa Bay Times* and the Center for Investigative Reporting, nearly 6,000 charitable organizations retain professional fundraisers to raise donations. Of these charities, the *Tampa Bay Times* and the Center for Investigative Reporting created a list of 50 charities that collectively paid their professional fundraisers nearly \$1 billion and directed

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<sup>17</sup> *Charity Fraud Pleads Guilty*, New York Times, Apr. 20, 1918 available at <http://query.nytimes.com/gst/abstract.html?res=9D02E2DD1F3FE433A25753C2A9629C946996D6CF&scp=2&sq=charity%20fraud&st>.

<sup>18</sup> *In re The Bible Speaks*, 869 F.2d 628 (Mass. Ct. App. 1989).

<sup>19</sup> *F.T.C. v. Wolf*, 1996 WL 812940 (S.D. Fla. 1996).

roughly 10 percent of raised funds to the charitable purposes identified in the solicitors' marketing efforts.<sup>20</sup>

### **1.6 The First Amendment and Charitable Solicitations**

In latter part of the 20<sup>th</sup> century, state regulators' attempts to curb excessive payments of charitable dollars to professional fundraisers were halted by a series of decisions by the United States Supreme Court. In *Village of Schaumburg v. Citizens for a Better Environment*,<sup>21</sup> for example, the Court decided that a village ordinance prohibiting solicitations by organizations that did not use at least 75 percent of their raised funds for charitable purposes was unconstitutionally overbroad. In tossing out the ordinance, the Court held that charitable solicitations are protected as free speech under the First Amendment because they are a vehicle to disseminate information about the charity's services.

In *Secretary of State of Maryland v. Joseph H. Munson Co.*,<sup>22</sup> the Court similarly rejected an ordinance that restricted fundraising costs to 25 percent of the funds raised. The Court held that the ordinance was not narrowly tailored to meet the government's regulatory interests and noted that high solicitation costs are not directly connected to fraud.<sup>23</sup>

Four years later, in *Riley v. National Federation of the Blind of North Carolina, Inc.*,<sup>24</sup> the Court struck down a North Carolina law that presumed that professional fundraiser fees in excess of 20 percent of the funds raised were unreasonable unless, depending on the amount retained by the professional fundraiser, the charitable organization could demonstrate that public

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<sup>20</sup> Kris Hundley & Kendall Taggart, *America's 50 Worst Charities Rake in Nearly \$1 billion for Corporate Fundraisers*, Tampa Bay Times, Jun. 6, 2013 available at <http://www.tampabay.com/topics/specials/worst-charities1.page>.

<sup>21</sup> *Schaumburg*, *supra*. at 620.

<sup>22</sup> *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

<sup>23</sup> *Id.* at 966.

<sup>24</sup> *Riley v. National Federation for the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

education or other “free speech” communication was being disseminated during the solicitations. The Court held that the state’s definition of unreasonable and excessive fees could not be sufficiently tied to a percentage-based test and that the proof required by the statute was unduly burdensome.<sup>25</sup> As a result, according to the Court, speech may be “chilled” because professional fundraisers would be unable to raise funds for certain charitable purposes, thereby preventing expression of ideas.<sup>26</sup>

In Minnesota, the federal District Court for the District of Minnesota considered in *Heritage Pub. Co. v. Fishman*<sup>27</sup> whether a Minnesota law could limit a professional fundraiser’s fees to 30 percent of the funds raised. The case was brought by an unlicensed Arkansas professional fundraiser, Heritage Publishing Company, Inc. (“Heritage”), who retained 85 percent of the funds it raised on behalf of the American Christian Voice Foundation. Heritage told prospective Minnesota donors that it was calling on behalf of the “Minnesota Child Abuse Program,” and its solicitations caused several residents to file complaints with the State.<sup>28</sup> At that time, professional fundraisers obtained licensure from the Minnesota Department of Commerce, which issued a cease and desist order against Heritage and, after it finally applied for licensure, denied the license. A hearing was held that affirmed the Commissioner’s order. Heritage challenged the Act in District Court claiming, in part, that the denial of licensure to professional fundraisers that receive fees in excess of 30 percent of funds raised unconstitutionally denied their First Amendment rights to free speech.<sup>29</sup> The Court upheld the standards set by the Supreme Court in *Schaumburg* and *Munson* and declared that the limits

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<sup>25</sup> *Id.* at 792-794.

<sup>26</sup> *Id.* at 794.

<sup>27</sup> *Heritage Pub. Co. v. Fishman*, 634 F. Supp. 1489 (D. Minn. 1986).

<sup>28</sup> *Id.* at 1492.

<sup>29</sup> *Id.* at 1497.

imposed by Minnesota laws on the amount fees retained by a professional fundraiser are unconstitutional.<sup>30</sup>

In 2003, the U.S. Supreme Court provided guidance with regard to fraud claims by states against professional fundraisers. In *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc., et al.*,<sup>31</sup> professional fundraisers were accused of misrepresenting to donors that a large portion of their contributions would be paid directly to a charity, VietNow National Headquarters, that they had no overhead expenses, and that contributions would assist veterans. The professional fundraisers allegedly knew that the charity would not receive a significant portion of the funds, because 85 percent of contributions were retained by them.<sup>32</sup> The Court held that the First Amendment does not bar fraud claims asserted under state law against a professional fundraiser where claims alleged that fundraisers made deceptive and false representations to donors about how contributions would be used. In other words, while states could not prohibit a professional fundraiser from retaining 85 percent of the charitable funds it collected, a state could regulate a professional fundraiser's misrepresentation to donors that a significant part of the donated funds go to a charitable purpose, when in fact the fundraiser kept 85 percent of the funds.

The above cases outline the boundaries of government regulation of charitable organizations and professional fundraisers. Consistent with these principles, the Minnesota Attorney General's Office works to regulate charitable organizations and their professional fundraisers, and to evaluate their compliance with the laws.

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<sup>30</sup> *Id.* at 1505.

<sup>31</sup> *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc., et. al.*, 538 U.S. 600 (2003).

<sup>32</sup> *Id.*

### **1.7 Purpose and Scope of the Office of the Attorney General's Compliance Report**

This Report is issued pursuant to Minn. Stat. chs. 309, 317A, and 501B. This Report reviews the contracts of Courage Kenny Foundation, Lupus Foundation of Minnesota, Vietnam Veterans of America, and True Friends with their professional fundraiser, Apogee Retail, LLC (“Apogee”) and its parent company, Savers, LLC, and their practices which affect their clients’ charitable activities.

The issues addressed in this Report primarily reflect the following concerns: (1) it appears that, in some cases, Apogee either commingles the clothing and household goods it accepts from donors, rendering it impossible to allocate the contributions as intended by the donors, and/or it does not take steps to ensure that donors’ intent is followed, (2) Apogee may be unjustly enriched by the manner in which it measures and reports the contributions it receives on behalf of charitable organizations, (3) it appears that the charitable organizations do not appropriately monitor the contributions and activities conducted by their fundraiser, (4) it appears that Apogee misleads donors with regard to the tax deductibility of “brica,” a company term used for everything that is not clothing, such as jewelry, toys, china, vases, furniture, televisions, and other household goods, (5) a comparison of Apogee’s store inventories to its reports to the charities suggests that Apogee may not fully report to the charities the total amount of contributions collected, and (6) Apogee’s parent company, Savers, LLC, participates in and directly benefits from Apogee’s solicitation campaigns without being registered as a professional fundraiser in Minnesota or indicating such a relationship exists on Apogee’s registration statements.

**SECTION TWO: BACKGROUND OF TVI, INC., APOGEE RETAIL, AND NONPROFIT ORGANIZATIONS**

**2.1 THE HOLDING COMPANY**

Apogee is owned by [REDACTED], which is a multinational, billion dollar holding company that does business through TVI, Inc., also known as Savers, LLC (hereinafter “Savers”). (Tab 8.) Savers was founded in 1954 in San Francisco, California by William Ellison, and its headquarters is located in Bellevue, Washington. (Tab 9.) As the largest for-profit thrift retailer in North America, Savers owns more than 290 retail stores that sell clothing, furniture, and household items. (Tab 10.) Its stores, generally operating under the names Savers, Unique, and Value Village, generated more than \$762 million in sales in 2010. (Tab 11, pg. 2.) Approximately 15 of these stores are located in Minnesota. (Tab 12.) Savers purportedly paid \$117 million to nonprofit organizations, which appears to be payments to acquire inventory for the millions in sales. (Tab 13, pg. 2.) Its gross profit margin appears to be due to the company acting as both seller and buyer of in-kind goods donated by taxpayers who, believing they are donating to nonprofit charitable organizations, deduct the cost of donated items from their income taxes. With annual revenue exceeding over \$1 billion, Savers projected that its revenue will increase by at least 15 percent annually. (Tab 11, pg. 2.)

In 2012, Savers was sold to TPG Capital (a private equity firm), Leonard Green & Partners, L.P. (a private equity firm), Thomas Ellison (Savers’ Chairman), and Savers’ management personnel. (Tab 10.) The transaction resulted in an approximately 40 percent ownership by the two private equity firms, approximately 40 percent ownership by Mr. Ellison, and the remainder owned by the management personnel. (*Id.*) Savers operates a number of separate companies which perform different functions, including professional fundraising, trucking to pick-up and deliver donations to retail stores, and retail store operations. (Tab 14.)

## **2.2 Apogee Retail, LLC**

In 2007, Apogee owned more than 20 national Unique and Valu Thrift stores. (Tab 15.) In 2011, Apogee sold 18 stores to Savers for \$180 million and became Savers' subsidiary. (Tab 11.) Ken Alterman is the Chief Executive Officer of both companies. (*Id.*) Apogee is registered with the Minnesota Attorney General's Office as a professional fundraiser for four charities: Courage Kenny Foundation, Vietnam Veterans of America, the Lupus Foundation of Minnesota, and True Friends.<sup>33</sup> (Tab 16.) Apogee solicits contributions on behalf of charitable organizations in Minnesota and 18 other states. (*Id.*)

## **2.3 Courage Kenny Foundation**

Courage Foundation, Inc. merged with Sister Kenny Foundation in 2013. (Tab 17.) Sister Kenny Foundation then changed its name to Courage Kenny Foundation. Courage Center merged with Allina Health System at the same time to establish the Courage Kenny Institute. Prior to the mergers, Courage Center contracted with Apogee to accept in-kind donations. In connection with the mergers, the Courage Center-Apogee agreement was assigned to Courage Kenny Foundation.

The Sister Kenny Institute was founded by an Australian nurse, Elizabeth Kenny, who radically changed the treatment regimen of polio patients. (Tab 18.) Prior to Sister Kenny's innovations, polio patients were placed in restrictive splints and casts to restrain and confine their limbs. Sister Kenny discovered that repeatedly using hot packs and exercising a patient's limbs preserved some of the motor capabilities and lessened the pain for victims of polio. Sister Kenny came to the United States in 1940, at 60 years of age, and her innovative treatment style was at first viewed with skepticism. In 1942, the clinic she established became the Sister Kenny

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<sup>33</sup> True Friends is formerly known as Friendship Foundation.

Institute which trained other providers to rehabilitate polio patients. In the beginning, the Sister Kenny Institute had a capacity of approximately 100 beds. The institute was funded by the Sister Kenny Foundation.

Sister Kenny's use of hot packs and physical therapy soon became the basis for a new field of medicine: rehabilitation medicine. After the polio vaccine eradicated polio in the 1950s, the Sister Kenny Institute expanded to include the general rehabilitation of patients. For fiscal year ending December 31, 2012, the Sister Kenny Foundation reported on its IRS Form 990 that it had \$832,053 in contributions, \$967,727 in total revenue, and \$907,402 in total expenses, for a net gain of \$60,325. (Tab 19.) The Sister Kenny Foundation also reported that it had \$8,370,000 in total assets, \$1,890 in total liabilities, and a net worth of \$8,368,110. (*Id.*)

The Courage Center was founded in 1928 as the Minnesota Society for Crippled Children and Adults. (Tab 20.) The organization is dedicated to meeting the needs of children and adults with disabilities, with an emphasis on advocacy and recreation as well as rehabilitation. In 1938, it opened the first camp specifically designed for people with disabilities near Hinckley, Minnesota.

For fiscal year 2012, the Courage Center was supported by the Courage Foundation. The Courage Foundation reported on its IRS Form 990 for fiscal year ending September 30, 2012 that it had total contributions of \$824,701, investment income of \$1,587,028, and total revenue of \$3,604,892. (Tab 21.) It also reported total expenses of \$10,670,413, for a net loss of \$7,065,521. Courage Foundation reported assets of \$61,485,384, total liabilities of \$10,936,615 and a net worth of \$50,548,769. (*Id.*)

Sister Kenny Rehabilitation Institute and Courage Center each enjoyed a premier reputation in the field of physical rehabilitation. In 1998, Courage Center and Sister Kenny Rehabilitation Institute partnered to create AXIS Healthcare, a new healthcare model for people

with disabilities. In 2013, the two rehabilitation programs merged under the umbrella of Allina Health System and now provide services as the Courage Kenny Institute. (Tab 18.)

#### **2.4 The Lupus Foundation of Minnesota**

The Lupus Foundation of Minnesota (“Lupus Foundation”) was founded in 1976. Lupus Foundation states that it supports research to improve the diagnosis and treatment of lupus. It also seeks to discover the cause and cure of lupus by providing education, support, and service to those impacted by the disease and the broader community. (Tab 22.) For fiscal year ending 2012, Lupus Foundation reported on its IRS Form 990 that it had total revenue of \$997,769 and total expenses of \$1,078,953, for a net loss of \$101,184. (Tab 23.) Lupus Foundation also reports that it had \$1,576,204 in total assets, \$536,040 from contributions, \$33,205 of investment income, \$408,524 in other revenue, \$161,073 in outstanding liabilities, and \$1,415,131 in net assets. (*Id.*)

#### **2.5 True Friends**

True Friends began as Friendship Foundation and provides financial support to the service organization, True Friends, both of which are based in Annandale, Minnesota. True Friends serves individuals with physical, developmental and learning disabilities by hosting health and education camps around Minnesota. True Friends states that it annually serves approximately 4,000 children and adults with disabilities. (Tab 24.) For fiscal year ending 2012, True Friends reported total contributions of \$7,572,135, total revenue of \$7,693,489, \$51,766 in investment income, \$12,174 from program services, and total expenses of \$147,005. (Tab 25.) True Friends also reported total assets of \$9,171,584, total liabilities of \$159,057, and a net worth of \$9,012,527. (*Id.*)

## **2.6 Vietnam Veterans of America, Inc.**

Vietnam Veterans of America, Inc. is headquartered in Silver Spring, Maryland. It is an Internal Revenue Code § 501(c)(19) organization. Vietnam Veterans of America states that its purpose is to act as an advocate for veterans of the War in Vietnam. (Tab 26.) For fiscal year ending 2012, Vietnam Veterans of America reported on its IRS Form 990 that it received contributions of \$2,272,706, program service revenue of \$329,931, and investment income of \$4,420,414. (*Id.*) Vietnam Veterans of America reported total expenses of \$7,625,102, for a net loss of \$480,758. (*Id.*) The organization also reported total assets of \$12,203,689 and total liabilities of \$5,579,960. (*Id.*)

### **SECTION THREE: THE BUSINESS PLAN**

Savers' business plan traces its lineage to Orlo and Ben Ellison, who started chains of thrift stores in the 1950s. The Ellisons reportedly coined the term "thrift store" to mean a store that sells used clothing, jewelry and household goods. (Tab 27, pg. 2.) Second and third-generation Ellisons have since created numerous thrift stores in various states, all modeled after the same business plan, many soliciting for different charities using different store names.

The business plan is relatively simple: the for-profit company contracts with multiple, separate tax-exempt organizations to solicit used clothing and household goods in the name of each charity. The solicitations are conducted by telemarketing calls, radio and television advertisements, direct mail marketing, websites, face-to-face interactions, brochures, posters, and at "community donation centers," designated areas of the company's stores where donations can be deposited.

Apogee, a for-profit company, offers to pick-up contributions from donors' homes through a trucking company and leave a tax deductible receipt for the donations. The trucks deliver the contributed goods to the company's thrift stores, where they are to be measured and

recorded. The donated goods are then processed by retail store employees, priced, and placed on the sales floor. With the exception of its payments to the charities, the company retains all the revenue from the sales.

### **3.1 Registration with the Attorney General's Office.**

Minnesota law defines a professional fundraiser as:

...any person who for financial compensation or profit performs for a charitable organization any service in connection with which contributions are, or will be, solicited in this state by the compensated person or by any compensated person the person employs, procures, or engages to solicit; or any person who for compensation or profit plans, manages, advises, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization. *See* Minn. Stat. § 309.50, subd. 6 (2014) (Tab 28).

Minnesota law requires all professional fundraisers to register with the Attorney General's Office. *See* Minn. Stat. § 309.531, subds. 1 and 2 (2014) (Tab 1). As part of registration, among other things, a professional fundraiser must file a copy of its contracts with charitable organizations and provide a copy of the organization's written consent for the solicitation. *See* Minn. Stat. § 309.531, subds. 2 and 3 (2014) (Tab 1).

Apogee is registered as a professional fundraiser with the Minnesota Attorney General's Office, but Savers has not registered. As further described below, it appears that both Apogee and Savers should be registered as professional fundraisers.

### **3.2 Savers' Contracts**

Although Savers has not registered as a professional fundraiser with the Attorney General's Office, it has what appears to be a solicitation relationship with the Disabled American Veterans Department of Minnesota, Inc. ("DAV") and Epilepsy Foundation.<sup>34</sup> (*See* Contract in

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<sup>34</sup> Minn. Stat. § 309.50, subd. 6 defines a "professional fundraiser" as, among other things, "...any person who for compensation or profit plans, manages, *advises*, *consults*, or prepares materials for, or with respect to, the solicitation in this state of contributions for a charitable (Footnote Continued on Next Page)

Tab 29 and solicitations in Tab 79.) Savers describes its solicitations as “donation campaigns.” (Tab 30.)

As of September 2014, Savers placed “donation drop spots” in Apple Valley and White Bear Lake, Minnesota. (Tab 31.) The drop spots are located in parking lots used by customers of local shopping malls that include stores such as a grocery store, Target and Best Buy. Each drop spot typically consists of two containers: 1) a large PODS storage container staffed by a Savers representative between 9 a.m. and 6 p.m., and 2) a small bin in which donors may deposit goods when a Savers representative is not present. (*Id.*)

The Savers donation drop spot in White Bear Lake solicits donations for Vietnam Veterans of America. The PODS container has a picture of a young girl hugging a man dressed in a military uniform. Near the picture, the banner states that the container is “Accepting donations on behalf of: Vietnam Veterans of America. In Service to America,” “Do a world of good...donate,” and “Your donations of clothing and household items support *our* community services.” (*Id.*, emphasis added.) On the bin, above Vietnam Veterans of America’s logo, it states that “Your donations [are] accepted on behalf of *our* Veterans” and “Do a world of good...donate. Clothing and household items to support *our* veterans.” (*Id.*, emphasis added.)

The drop spot in Apple Valley solicits donations for Lupus Foundation. (Tab 32.) The drop spot states that “Your donations of clothing and household items support *our* community services” and “Help *us* solve the cruel mystery of lupus.” (*Id.*, emphasis added.) The bin also states that “Clothing and household items to benefit several local non-profits.” (*Id.*) As noted

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(Footnote Continued from Previous Page)

organization.” (Emphasis added.) Attached as Tab 79 are solicitations produced by Savers asking Minnesotans to “donate at Savers” and stating that “[d]onations benefit: Epilepsy Foundation and DAV.” The solicitations also state that “[d]onating...does a world of good” and that “[Savers] pay[s] local nonprofits every time you donate.”

above, Savers has not registered with the Attorney General's Office as a professional fundraiser to solicit for Lupus Foundation or Vietnam Veterans of America.

On September 4, 2014, the Lupus Foundation requested from the Attorney General's Office information regarding Savers' professional fundraising contracts with charitable organizations. The Lupus Foundation then stated that its contract with Apogee expired in December and that it was thinking about contracting with Savers as a professional fundraiser. It appears that Savers has been soliciting donations on behalf of Lupus Foundation without the organization's written consent being filed with the Attorney General's Office as required by Minn. Stat. § 309.531, subd. 3. (Prohibiting a professional fundraiser from "...us[ing] the name of or solicit[ing] on behalf of any charitable organization unless such solicitor has written authorization from two officers of such organization, a copy of which shall be filed with the attorney general.")

### **3.3 Apogee's Contracts**

Under the company's contracts with each charity, Apogee solicits clothing and other household goods using the charities' names and provides payments to the charities that are calculated by a rate based on each 100 cubic feet of clothing collected the previous year.<sup>35</sup> (Tabs 33-38.)

In general, the prices paid by the company appear to be a fee to solicit contributions that are sold in the company's for-profit stores, using the charities' names to do so. Each contract pays various amounts to each charity despite using similar methods, comparable labor costs, and

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<sup>35</sup> For its year-end 2014 contracts, Apogee reports that payments are purportedly calculated by the number of pounds of contributions collected. Because Apogee's 2014 Solicitation Campaign Financial Reports are not yet due to the Attorney General's Office, the Office does not have data for this new measurement. As a result, this report focuses on the payments purportedly based on each 100 cubic feet of clothing collected, as was done every year prior to 2014.

receiving analogous donations in the name of each charity. Apogee does not explain the reason for the price differences, except to indicate that the rates are the result of negotiations with each charity.

### **3.4 Charitable Solicitation of Household Goods**

Under its contracts, Apogee is responsible to solicit donations of clothing and household goods for each charity. (Tabs 33-38.) Apogee’s telemarketing is conducted in its outbound call centers located in Columbus, Nebraska, and Little Canada, Minnesota. (Tab 39.) In 2009, Apogee stated that it made up to 600,000 telephone calls per month (which amounts up to 7,200,000 telephone calls per year) in Minnesota. (Tab 40.)

Apogee’s solicitations encourage donors to donate clothing. Mailings (such as donation bags) and websites maintained by Apogee (Tabs 41 and 42) use the banner of a charity and use statements such as: “We especially need clothing!” This is for good reason, as “apparel and domestics” constitute Savers’ largest component of sales, accounting for ■ percent of total net sales in 2012. (Tab 43.)

### **3.5 The On-Site Donation Program and Community Donation Centers**

As noted above, Savers established “community donation centers” at each of its retail stores. (See Tab 44 for an illustrative example.) The community donation centers show “Donation Drop-Off” drive-lanes and bins installed in each location. (See Tabs 45 and 64 for illustrative examples.)

Savers refers to donations left at Community Donation Centers as “On Site Donations” or “OSDs.” The contracts submitted by Apogee to the Attorney General’s Office do not

specifically denote OSDs, community donation centers, or the rates received by the charitable organizations for donations left at OSDs for a specific charity.<sup>36</sup> (Tabs 33-38.)

OSDs are very [REDACTED] for Savers. For some of its stores, Savers predicts that OSDs will generate [REDACTED] percent of their inventory. Savers reports that in some cases OSDs at retail stores are able to [REDACTED] the retail store's inventory. Savers predicts that by 2016, most of its retail stores will generate approximately [REDACTED] percent of their revenue from these donations. (Tab 46.) OSDs are cost effective, because without having to use its call centers and trucking company, it reduces overhead costs by [REDACTED] percent. (*Id.*) Savers also states that OSDs are [REDACTED] and provide a [REDACTED], all of which [REDACTED]. (*Id.*) While OSDs do not have high overhead costs, Savers does not appear to compensate the charities at a commensurately higher rate for this OSD program.

### **3.6 Household Goods Solicitation Program**

Apogee markets its business plan to tax-exempt charitable organizations as the "Household Goods Solicitation Program" ("Program"). (Tabs 33-38.) The Program is generally comprised of two contracts: a "Commercial Telephone Contract" and a "Mail Contract." Both contracts state that contributions will be measured and reported to each charity through "Operation Reports" (§7, Tab 33 and §11, Tabs 34-38), which itemize, among other things, the number of pick-ups from donors' homes made by the company and the number of 100 cubic foot units collected on behalf of the charity. Both contracts require Apogee to measure and report the

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<sup>36</sup> Apogee and Courage Kenny Foundation claim that although the contracts are silent with regard to compensation received from OSDs, compensation is based on the rates provided in the telephone contracts.

number of pickups made and the amount of household property collected the preceding month. (¶7, Tab 33 and ¶11, Tabs 34-38.)

Some of the contracts guarantee that Apogee will pay a minimum annual payment to a charitable organization and that a “true-up” payment will be made by the charitable organization should Apogee be unable to collect contributions to justify the minimum payment. In its response to the Attorney General’s Office’s Civil Investigative Demand, Apogee stated that no true-up payments were made to an organization,<sup>37</sup> which, if they should have been made and were not, may be required to be reported by the charitable organization to the IRS as income from Apogee.

### **3.7 Delivery of Household Goods and Clothing**

Apogee owns Apogee Trucking, LLC, which picks up contributions at donors’ homes through scheduled pick-ups arranged by the company through its call centers or websites. Apogee drivers are expected to complete between 90-150 stops during a work day, which begins when the drivers are provided with Route Sheets that include stop locations and any special instructions from the donor. (Tab 48.) Drivers are instructed to leave tax deduction receipts for all donations at donors’ homes. (*Id.*) After a route is complete, the truck driver calls a company dispatcher to report the contributions collected by the driver. The dispatcher will then direct the driver to deliver the contributions to the retail store that needs the items for its inventory. (Tab 49.) For example, a Valu Village manager calls the dispatcher to state that the store needs

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<sup>37</sup> Courage Kenny Foundation reported a donation on its 2010 Form 990 resulting from a true-up payment that it owed to Apogee, but that Apogee did not require to be paid. Lupus Foundation claims that it collected \$5,915 from Apogee in January 2013 to reconcile monies owed under its 2012 mail contract with Apogee. Apogee did not provide documentation to the Attorney General’s Office to substantiate additional true-up payments.

two carts of clothing and furniture. A truck driver who estimates that he has two carts of donated clothing and some furniture may then be directed to drop the donations off at the Valu Village.

At the store, the donated goods are placed into *Lien Machine* carts measuring 80.55 cubic feet in volume. (Response 6(b), Tab 50.) The company adds 8.45 cubic feet to its cart volume to accommodate “bulky” items that overstuff the top of the carts. (*Id.*) Items are separated by clothing and “brica,” a company term used for “everything that is not clothing,” such as jewelry, toys, china, vases, furniture, televisions, and other household goods. (Tab 49.) Books and large items, such as furniture, mattresses and rugs at times may be placed directly on the sales floor. (*Id.* and Tab 48.)

The signage used by the company at its onsite donation venues solicit donations in the form of “clothing & housewares,” and state that “[y]our donations of clothing and household items support our community services.” (Tab 31.) On behalf of the charities, the company distributes tax deduction receipts for both clothing and “brica.” (*See e.g.* Tabs 48 and 66.) Despite soliciting for “brica” donations and distributing tax deduction receipts for “brica,” the company acknowledges that it does not pay any money to the charity for “brica” contributions. (*See* Tab 52 for an illustrative example of unreported “brica” donations.) These receipts separately denominate “bags of clothing” from “miscellaneous” donations. (Tab 78.)

Once the carts are loaded, the store manager completes a Driver’s Truck Check Form to mark the cart as “1/4, 1/2, 3/4, and F[ull].” (Tab 53.) An example of a Driver’s Truck Check Form is attached as Tab 54. These measurements appear to contravene the provisions of the contracts between Apogee and the charitable organizations, which require contributions to be measured by the cubic foot instead of having a company employee estimate whether the cart is full or partially full. The data from the Driver’s Truck Check Form is recorded by a dispatcher

on a “Clear Sheet,” which is then recorded by the company to determine the amount of goods collected by each driver. (An illustrative example of a Clear Sheet is attached as Tab 55.)

After the contributed goods are measured, they are removed from the carts, sorted by quality, priced, scanned into the Savers’ software system, prepared for sale, and placed on the sales floor by Savers employees. Photographs of the sorting and tagging process are attached as Tab 56. The products are then displayed on the sales floor of the store. If the products cannot be sold, the products are shipped to bulk purchasers or to a Savers’ recycling center. (Tab 57.)

Casey Krawszynski worked as an Apogee truck driver for over nine years. (Tab 49.) He states that Apogee picked up as much “brica” as it did clothing. He states that furniture was not reported to the charities. Mr. Krawszynski states that donations were not separated by charity, because, from his perspective, the company’s purpose was to collect inventory for its retail stores instead of generating revenue for the charities. Pursuant to Minn. Stat. § 309.531, subd.(2)(c)(3), professional fundraisers are required to disclose the percentage of the total amount of funds solicited from each donor that is received by the charity. (Tab 1.) Mr. Krawszynski states that he was never told and did not know the percentage of the funds that would be retained by the charities. (Tab 49.)

### **3.8 The Commercial Telephone Contract**

The Commercial Telephone Contract is Apogee’s basic telemarketing contract. The terms of the Commercial Telephone Contracts are similar for each charity, except for the amount paid by Apogee to the charity. The 2013 year-end Commercial Telephone Contracts with True Friends and Lupus Foundation provide that Apogee will pay \$40 per 100 cubic feet of contributed household property. (¶6(b), Tab 33 and ¶4, Tab 34.) In contrast, Apogee pays the Courage Kenny Foundation a minimum of \$84,000 per year or \$40 per 100 cubic feet of contributed household property, whichever is greater. (¶4, Tab 35.) The Commercial Telephone

Contract with Vietnam Veterans of America is a national contract that provides a minimum payment of \$720,000 per year or a rate of \$56.51 per 100 cubic feet of contributed household property collected, whichever is greater. (¶4, Tab 36.)

### **3.9 The Direct Mail Contract**

The Direct Mail Contract is a program that requires the charitable organizations to underwrite a direct mail campaign to prospective donors. For the direct mail campaign, the company creates and coordinates the mailing of postcards and donation bags in the name of the charitable organization.<sup>38</sup> (Tabs 37 and 38.) Minn. Stat. § 309.556 requires that all solicitations being conducted by a professional fundraiser disclose the identity of the professional fundraiser and that the solicitation is being conducted by a “professional fundraiser.” (Tab 5.) The charities state that Apogee helps create the mailings, yet none of the mailings identify that a professional fundraiser is conducting the solicitation. (*See, e.g.*, Tab 58.) Donors interested in contributing to the charitable organization call the company phone number listed on the mailing to schedule a donation pick-up from their home.

Under the Direct Mail Contract, the charity pays an additional cost for underwriting the direct mail effort and receives a higher rate for contributions collected by the company, which substantially varies between charities. Apogee has two Direct Mail Contracts: one with Lupus Foundation and one with Vietnam Veterans of America. Lupus Foundation’s 2013 year-end Direct Mail Contract provides that Apogee will pay \$315 per 100 cubic feet, through a payment of \$24,238 paid every two weeks. (Tab 37, ¶4.) In contrast, Vietnam Veterans of America’s

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<sup>38</sup> Lupus Foundation states that under its direct mail contract with Apogee, Lupus Foundation manages and creates the contents of the mailings. However, in their responses to the Attorney General’s Office’s Civil Investigative Demand, both Apogee and Lupus Foundation state that Apogee creates the mailings subject to the charity’s approval. In any event, Apogee conducts the solicitations, and Minnesota law requires Apogee’s role to be disclosed in solicitation materials used during Apogee’s solicitation campaigns. *See* Minn. Stat. § 309.556 (2014).

2013 year-end Direct Mail Contract, a national contract, provides that Apogee will pay it \$430.22 per 100 cubic feet of soft goods collected, through a bi-monthly payment of \$249,000, subject to a true-up payment. (¶4, Tab 38.)

### **3.10 A Comparison of Contract Rates, Financial Reports and Collection Data**

The Minnesota Social and Charitable Organizations Act requires Apogee to provide to the Attorney General's Office a financial report for each solicitation campaign it conducts. *See* Minn. Stat. § 309.531, subd. 4 (2014) (Tab 1). As part of its financial report, Apogee must disclose the gross revenue and expenses incurred from each fundraising campaign. (*Id.*) Apogee's Solicitation Campaign Financial Reports should reconcile with the figures used in the collection data provided to the charities, which in turn should reconcile to the terms and rates outlined in the contracts with each charitable organization. Apogee's contracts state that the volume of goods collected determine the amount paid by Apogee to its client charities. As noted above, Apogee provides a monthly report to each charity, which states, among other things, the amount of goods supposedly collected on behalf of each charity.

Minn. Stat. § 309.531, subd 4, requires a professional fundraiser to file a financial report with the Attorney General's Office for each fundraising campaign. (Tab 1.) The financial reports provide prospective donors and regulators the opportunity to examine the financial status of a charitable organization. As discussed in the introduction of this report, the courts have ruled that a professional fundraiser's fees cannot be limited by law. These legal decisions put the burden on donors to be aware of the financial relationships between professional fundraisers and charitable organizations. To enable a donor to make an informed decision, professional fundraisers and charitable organizations are required to provide meaningful reports to regulators so that prospective donors can inspect the reports and make an informed choice about where to direct their donations.

The collection data provided by the Minnesota registered charities to the State do not reconcile with the Solicitation Campaign Financial Reports provided by Apogee to the State. (Tabs 47 and 59-62.) Chart 1 illustrates the differences between the payments Apogee identified in its fundraising campaign reports submitted to the Attorney General’s Office and the payments identified in reports to, and produced by, the charitable organizations as follows:

**CHART 1: PAYMENT DIFFERENCES BETWEEN APOGEE’S 2013 SOLICITATION CAMPAIGN FINANCIAL REPORTS TO THE ATTORNEY GENERAL’S OFFICE AND REPORTS TO THE CHARITY**

<b>Charity Contract</b>	<b>Payment to Charity per year-end 2013 Solicitation Campaign Financial Report</b>	<b>Payment owed to Charity per year-end 2013 reporting data including OSDs</b>	<b>Difference between payments</b>	<b>Tab</b>
True Friends <sup>39</sup>	\$56,996	\$57,547	\$551	47 & 61
Courage Kenny Foundation	\$128,970	\$128,970	\$0	47 & 62
Lupus Foundation <sup>40</sup>	\$694,297	\$765,868	(\$71,571)	47 & 60
Vietnam Vet. of America	\$1,701,601	\$1,343,803	\$357,798	47 & 59

In Chart 1 above, the “Payments Owed to Charity” column is calculated by multiplying the amount of “Cubic Feet Collected Per 2013 Reporting Data” column in Chart 2 by the contract rate. Chart 2 illustrates the difference between Apogee’s fundraising campaign report to the Attorney General’s Office and its report to the charitable organizations regarding the amount of cubic feet Apogee purportedly collected on behalf of each charity.

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<sup>39</sup> Due to Apogee’s True Friends solicitation campaign beginning in the middle of May, this number is an approximation.

<sup>40</sup> See Footnote 37.

**CHART 2: CUBIC FOOT DIFFERENCES BETWEEN APOGEE’S YEAR-END 2013 SOLICITATION CAMPAIGN FINANCIAL REPORTS TO THE ATTORNEY GENERAL’S OFFICE AND REPORTS TO THE CHARITY**

<b>Charity Contract</b>	<b>Cubic Feet Collected per year-end 2013 Solicitation Campaign Financial Report<sup>41</sup></b>	<b>Cubic Feet Collected per 2013 reporting data including OSDs<sup>42</sup></b>	<b>Difference between cubic feet collected</b>	<b>Tab</b>
True Friends	142,489 cu ft.	143,869 cu ft.	(1,380) cu ft.	47 & 61
Courage Kenny Foundation <sup>43</sup>	286,957 cu ft.	322,425 cu ft.	(35,468) cu ft.	47 & 62
Lupus Foundation	435,121 cu ft.	488,855 cu ft.	(53,734) cu ft.	47 & 60
Vietnam Vet. of America	569,867 cu ft.	640,333 cu ft.	(70,466) cu ft.	47 & 59

Apogee’s reports regarding payments and cubic feet collected appear to be inconsistent. Apogee appears to underreport to the State the amount of goods collected on behalf of the charities. Additionally, Apogee appears to commingle its reporting on its Solicitation Campaign Financial Reports for the Commercial Telephone and Direct Mail campaigns conducted on behalf of Vietnam Veterans of American and Lupus Foundation. (Tabs 59 and 60.) The Solicitation Campaign Financial Reports do not state the amount of funds Apogee receives from the solicitation campaigns. (Tabs 59-62.)

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<sup>41</sup> In its Solicitation Campaign Financial Report submitted to the State, Apogee identifies the number of carts it collected. The calculations in the second column of Chart 2 reflect a full cart measuring 89 cubic feet, as reported by Apogee in its response to the Attorney General’s Office’s Civil Investigative Demand.

<sup>42</sup> Apogee combines telephone contracts and mail contracts on the Campaign Financial Report submitted to the Attorney General’s Office. The telephone contracts and mail contracts have also been combined for purposes of this analysis.

<sup>43</sup> Although Apogee’s contract with Courage Kenny Foundation provides that it will be paid \$0.40 per cubic foot, it appears that Courage Kenny Foundation was actually paid \$0.45 per cubic foot, which is the result of dividing its 2013 reported payment from Apogee by the amount of cubic feet of donations reportedly collected.

Pursuant to its contracts, Apogee conducts full scale solicitations—telephone solicitations, mailings, trucking, and measuring donated goods—on behalf of four charities. In 2013, Apogee’s financial reports to the Attorney General’s Office state that Apogee collected over 35,839 carts—or 3,189,671 cubic feet<sup>44</sup>—of donated goods, yet Apogee reports to the Attorney General’s Office that it did not incur any expenses. (*Id.*)

The discrepancy between the reports by Apogee and the payments actually received by the charitable organizations suggests that neither Apogee nor the charities appear to make substantial effort to calculate the amount of donations collected on behalf of each charity. To compound these errors, as described further in Section Five of this Report, Apogee’s reports to the charities appear not to report the total amount of goods collected by Apogee on behalf of the charitable organizations.

Apogee’s contracts with Lupus Foundation, Vietnam Veterans of America, True Friends, and Courage Kenny Foundation allow the charities “...to audit any records kept by [Apogee] pertaining to the collection of goods donated...” (§11, Tabs 34-38.<sup>45</sup>) Neither the charities nor Apogee have identified that any charity has conducted an audit of Apogee’s records pertaining to the collection of donated goods.

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<sup>44</sup> This number was obtained by multiplying the carts reportedly collected by 89 cubic feet (Apogee’s reported measurement of its carts).

<sup>45</sup> Paragraph 7 of True Friends year-end 2013 contract requires these records to be “available” to the organization for inspection. (Tab 33.) True Friends subsequent contract allows the charity “...to audit any records kept by [Apogee] pertaining to the collection of goods.”

**SECTION FOUR: APOGEE’S 2009 ASSURANCE OF DISCONTINUANCE WITH THE MINNESOTA ATTORNEY GENERAL’S OFFICE.**

In 2009, Apogee entered into an Assurance of Discontinuance (“Assurance”) with the Attorney General’s Office. (Tab 40.) Under the Assurance, Apogee agreed to do the following during its solicitations on behalf of charitable organizations:

- Require its solicitations to disclose to potential contributors that a solicitation is being conducted by a professional fundraiser, as required by Minn. Stat. § 309.556, subd. 2. (See ¶ 36, Tab 40.)
- Advise potential contributors that any donation made could be tax-deductible, as required by Minn. Stat. § 309.556. (See ¶ 36, Tab 40.)
- Instruct its solicitors not to use the term “we” when describing the work of a charity and instead clarify to the potential contributor that the Apogee solicitor is working only on behalf of the charity. (See ¶¶ 18 and 36-37, Tab 40.)
- Appropriately monitor and supervise solicitations so that solicitors would not engage in deceptive practices. (See ¶ 38, Tab 40.)
- Adopt procedures to ensure that potential contributors who ask to be placed on a “Do Not Call” list would be so identified and that Apogee telemarketers would discontinue calls to such households. (See ¶ 40, Tab 40.)
- Limit its redials to households which did not answer a telephone solicitation to two calls per day or 10 calls per month for each charity it represents. (See ¶ 44, Tab 40.)
- Keep a log of all telephone calls made, and of all complaints received. (See ¶¶ 45 and 50, Tab 40.)
- Instruct and monitor its telemarketers on the laws regarding deceptive practices. (See ¶¶ 52-54, Tab 40.)

- File an annual report with the Attorney General’s Office for a period of three years identifying the steps taken to comply with the Assurance. (See ¶ 58, Tab 40.)
- Produce audio recordings of its telemarketers upon reasonable request by the Attorney General’s Office. (See ¶ 61, Tab 40.)

#### **4.1 Concerns Regarding Apogee’s Compliance with the Assurance**

Based on complaints received by the Attorney General’s Office, and upon a review of all the files, records and data maintained by the Office, it appears that Apogee may not be complying with the Assurance of Discontinuance in the following respects:

- Apogee fails to disclose to each potential contributor that a solicitation is being conducted by a professional fundraiser. (Tabs 41 and 58.)
- Apogee’s solicitors use the terms “we,” “us,” and “ours” when describing the work of a charity and do not clarify to potential donors that the solicitor is working for an outside company. (Tabs 41 and 58.)
- Since entering the Assurance, over 200 complaints were made by Minnesota residents against Apogee repeatedly calling donors despite requests from donors that Apogee stop calling. Apogee has apparently failed to adopt procedures that ensure that potential contributors who ask to be placed on a “Do Not Call” list are so identified and that Apogee telemarketers discontinue calls to such households. Many of the complainants report that they previously donated to the program, but wish to discontinue due to the solicitations.

These apparent violations suggest that Apogee is neither appropriately monitoring nor supervising its solicitation program.

**SECTION FIVE: COMPLIANCE WITH THE MINNESOTA CHARITABLE TRUSTS AND TRUSTEES ACT**

**5.1 Charitable Trust**

Under the Minnesota Charitable Trusts and Trustees Act, the company is the trustee of charitable assets, holding them for charitable purposes. *See* Minn. Stat. § 501B.35, subd. 4 (2014) (A Trustee is a “...legal entity who is vested with the control or responsibility of administering property held for charitable purposes.”). (Tab 6.) As a Trustee, the company is obliged to administer charitable assets in a manner consistent with the charitable purpose for which they are given. *See* Minn. Stat. § 501B.35, subd. 3 (2014). (*Id.*)

An illustration of the charitable trust doctrine is illustrated in *State ex rel. Atty. Gen. v. Vela*.<sup>46</sup> There, the State of Ohio filed a lawsuit against a non-profit foster home placement agency for breach of charitable trust. The Court determined that the non-profit was a charitable trust, because it intended to use its net earnings for charitable purposes and, as a Section 501(c)(3) organization exempt from federal income taxes, found that the organization “is prohibited from conferring any private benefit on any member, director, officer, shareholder, or other private individual.”<sup>47</sup> In making its determination, the Court held that “[i]n a case involving a purported charitable trust, the Court must use liberal and broad rules of construction...[t]he law of equity favors a charitable trust.”<sup>48</sup> The Court also found that evidence was sufficient to establish that the incorporator and directors were unjustly enriched by using agency funds for personal interests. *Id.* at 729-730. To prove unjust enrichment, Ohio determined that (1) a benefit was conferred by the non-profit upon the defendants, (2) the

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<sup>46</sup> *State ex rel. Atty. Gen. v. Vela*, 2013-Ohio-1049, 987 N.E.2d 722 (5th Dist.).

<sup>47</sup> *Id.* at 728.

<sup>48</sup> *Id.* at 729.

defendants were aware of the benefit, and (3) the defendants retained the benefit under circumstances where it was unjust to do so without payment.<sup>49</sup>

## **5.2 Commingling of Goods may be a Breach of Charitable Trust**

Minnesota law defines “commingled goods” as “goods that are physically united with other goods in such a manner that their identity is lost in a product or mass.” Minn. Stat. § 336.9-336 (2014). (Tab 65.) Commingling of charitable assets may constitute a breach of a charitable trust when the charity’s assets are diverted to compensate another organization that the charity has no legal obligation to pay.

The Attorney General’s Office conducted an analysis of Apogee’s 2013 trucking route slips, which provide real-time data of the donated goods Apogee collected on behalf of the charities. The analysis showed several instances of commingling, including (1) OSDs are not separated by charity, (2) donated goods collected on pick-up routes conducted on behalf of one charity being credited to another charity, and (3) donated goods being delivered to Savers-brand stores when the contracts required the donations to be delivered to Unique and Valu Village stores.

In a Savers drop spot located in Apple Valley, Minnesota, the donation bin prominently displays the banner of the Lupus Foundation. In smaller text on the side of the donation bin, however, states that “Clothing and household items to benefit *several non-profits*.” (Tab 32, emphasis added.) In other words, although this drop spot is marketed to attract donors of the Lupus Foundation, it nevertheless states that donated goods “benefit several non-profits.” This leads to one of two problems. On the one hand, if donors are entitled to donate to multiple charities using one bin, there is no way for Savers to identify the charity to which the donation

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<sup>49</sup> *Id.* at 731.

was made. On the other hand, if one bin is used by Savers to collect materials that only benefit Lupus Foundation, the language outside of the bin stating donated goods “benefit several non-profits” is inaccurate and misleading.

On August 16, 2013, an Attorney General’s Office analyst donated a lamp, a computer monitor, and a dress to the Unique retail store on Rice Street in St. Paul. (Tab 66.) The items were placed in the Donation Drop-Off bin in the front of the store. When the Analyst requested a receipt for the donations, the manager of the retail store provided a receipt from Courage Kenny Foundation. The Analyst accepted the receipt, examined it, and told the manager that she wanted to make the donation to Lupus Foundation. Allowing her to keep the Courage Kenny Foundation receipt, the manager provided an additional Lupus Foundation receipt. The Analyst asked how the donation would be attributed to the charities, and he replied, “It doesn’t matter. It all goes to the same place.”

Other examples of commingling of charitable goods include the following:

- Although the company’s website, *www.savers.com* (Tab 12), states that donations made at each Minnesota store only benefit one “nonprofit partner,” at some store locations, the company appears to solicit donations on behalf of more than one charity (Tab 64). There does not appear to be any way for a donor who drops materials in a bin to segregate materials by the identity of the organization to which he or she desires to donate.
- Under its contracts, Apogee is to deliver contributions to Unique and Valu Thrift stores in Minnesota. (Tabs 33-38.) Rather than doing so, it appears that on at least some occasions Apogee delivered contributions collected on behalf of the charitable organizations to Savers brand stores. (Tab 67.)
- An Apogee truck driver picked up furniture donated to Vietnam Veterans of America from six different households. The Truck Form, however, appears to report that the

donations were commingled with the driver's items he picked up on behalf of Lupus Foundation, which were delivered to the Unique retail store in Columbia Heights, Minnesota. (Tab 68.)

- On June 24, 2013, an Apogee truck driver was given a route to collect donations on behalf of True Friends. When his route was completed, however, it appears that the company attributed the donations to Vietnam Veterans of America. (Tab 69.)
- On October 14, 2013, an Apogee truck driver was on a route for Vietnam Veterans of America and picked up four and three-fourths carts of contributions. It appears the contributions were reported on the Driver's Truck Form as being attributed to Lupus Foundation. (Tab 70.)
- On October 18, 2013, an Apogee truck driver was on a route for Vietnam Veterans of America and picked up four carts of contributions. It appears the contributions were reported on the Driver's Truck Form as being attributed to Lupus Foundation. (Tab 71.)
- On November 12, 2013, an Apogee driver on a route for Lupus Foundation delivered six carts of donations to a Savers brand retail store. (Tab 55.) The Lupus Foundation's contracts with Apogee do not provide that donated clothing and household goods will be delivered to Savers' brand retail stores. (Tabs 34 and 37.) Savers provided no documentation showing that these donations were credited to the Lupus Foundation.
- On December 4, 2013, an Apogee driver on a route for True Friends was provided a route sheet that lists Savers retail stores. (Tab 72.) True Friends' contract with Apogee does not provide that donated clothing and household goods will be delivered to Savers' brand retail stores. (Tab 33.) Savers provided no documentation showing that these donations were credited to True Friends.

The signage in the OSD drive through lane at the Savers' Apple Valley store encourages Minnesotans to "[d]o good. Do your part DONATE." (Tab 64.) One sign leads donors to believe that onsite donations will benefit DAV. Another sign states that "[d]onations at this location also benefit: Epilepsy Foundation of Minnesota." (*Id.*) In November 2014, a donor was observed leaving a black bag of donated goods at the door of the drive through lane and driving away when no one answered the door. Based upon the solicitations on Savers' wall, this donor would have no way of knowing the charity to which Savers would credit the donation. (*Id.*)

A tenet of charitable solicitation law is that the intent of the donor be honored. As a result of these practices, donors appear to have intended to make charitable contributions to one organization, but Apogee has sent the proceeds to another organization with which the first organization does not share a common charitable purpose. Such commingling is inconsistent with Apogee's contracts with client charities and may constitute a breach of charitable trust.

### **5.3 Unjust Enrichment**

Unjust enrichment from a breach of charitable trust occurs when the charitable organization's assets are diverted to another party. Charitable organizations should be cognizant of transactions that, due to the complexity, unfamiliarity, or other circumstances, are difficult to oversee and may result in excess or inappropriate payments made to for-profit corporations.

A comparison of Apogee's 2013 Clear Sheets and Driver's Truck Check Forms (the forms that record contributions collected in real-time) with its 2013 collection data (accounting summaries provided to the charitable organizations) showed significant underreporting and underpayment to the charities by Apogee.<sup>50</sup> Underreporting and

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<sup>50</sup> The staff at the Attorney General's Office compared the Clear Sheets to the Driver's Truck Check Forms (hereinafter "collection data"). Using the collection data, the staff then recorded the number of carts collected per day on behalf of each charity. The staff compared the total (Footnote Continued on Next Page)

underpayment to the charities by Apogee occurs in at least two separate ways. First, Apogee did not always report to the charities the total amounts of contributions collected on behalf of each charity that were itemized on the Clear Sheets and Driver's Truck Check Forms. When collecting goods, the company measures contributions by labeling a cart's capacity as full, three-fourths full, half full, or one-fourth full. Hundreds of the company's records, however, report contributions filling "some" of the cart's capacity. There is no evidence that carts full of "some" goods were ever reported to the charity, even though they were recorded at the store.

This is significant, because in several instances, "some" was recorded as measuring approximately one-fourth of a cart or 75 pounds. (Tab 75.) This manner of underreporting occurred in at least 1,200 instances among the four charities.

The second way that Apogee underreported amounts collected is by not reporting fully and accurately the amount of materials disclosed in the trucking reports and clear sheets to the charities, leading to an underpayment.<sup>51</sup> In 2013, it appears the company did not report the collection of over 9,541 carts of contributions that appear on its trucking reports. Savers claims that many of these carts are "brica," which Savers defines as "everything that is not clothing, such as jewelry, toys, china, vases, furniture, televisions, and other household goods." Savers

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(Footnote Continued from Previous Page)

carts per the collection data reported to the charities less the OSDs. The staff was unable to reconcile the amount of carts Apogee reported to the charitable organizations (Tab 47) with the collection data. (Tab 73.) As a result, a significant amount of donated goods do not appear to have been credited by Apogee to the charitable organizations, resulting in insufficient payments by Apogee to the charities. Once the difference was obtained, the staff multiplied the total number of carts not reported to the charities by 89 cubic square feet (the cart measurement reported by Apogee) to obtain the number of total cubic square feet not reported to the charities. (Tab 74.) The staff multiplied the total cubic square feet not reported to the charities by the contract price, which resulted in the dollar amount owed by Apogee to each charity. (*Id.*)

<sup>51</sup> In addition to the lack of reconciliation between the Clear Sheets, the collection data, and the Solicitation Campaign Financial Reports, another illustrative example of the inaccurate reporting is attached as Tab 76, where the total carts on the Clear Sheets do not align with the report completed by a company Dispatcher.

states that it does not pay charities for “brica,” even though it solicits donations for “brica” and appears to sell those donations for profit in its stores. In any event, the non-crediting of brica donations coupled with other underpayments to the charities, results in over \$1,160,257 not being paid to the charities. Chart 3 illustrates this as follows:

**CHART 3: AMOUNTS OWED BY APOGEE TO CHARITIES IN 2013**

<b>Charity</b>	<b>Carts Not Reported by Apogee to the Charities</b>	<b>Cubic Feet as a result of carts not reported</b>	<b>Contract Price</b>	<b>Amount Owed to Charities</b>
True Friends (Commercial Telephone Contract)	1,063.50	94,652	\$40/100 cu ft.	\$37,861
Sister Kenny Foundation (Commercial Telephone Contract)	1,833	163,137	\$40/100 cu ft.	\$65,255
Lupus Foundation (Commercial Telephone Contract)	1,975.75	175,842	\$40/100 cu ft.	\$70,337
Lupus Foundation (Mail Contract)	719	63,991	\$315/100 cu ft.	\$201,572
Vietnam Veterans of America (Commercial Telephone Contract)	2,187	194,643	\$56.61/100 cu ft.	\$110,187
Vietnam Veterans of America (Mail Contract)	1,763	156,907	\$430.22/100 cu ft.	\$675,045
<b>TOTAL</b>				<b>\$1,160,257</b>

It appears that contributions not reported by Apogee to the charities are retained by Savers. (Tabs 33-38, 47, and 59-62.) The charitable organizations state that the Apogee’s reports to the charities, the contracts, and checks for payment are the only documents they receive from Apogee. Accurate accounting is essential for the proper administration of charitable trusts. This responsibility is incumbent not only on Apogee, but also upon the charitable organizations to which the donations are made. Contributions made to nonprofit

organizations that inure to the benefit of a private corporation have the potential to jeopardize the charitable organization's tax-exempt status.<sup>52</sup>

## **SECTION SIX: FAIR MARKET VALUE AND THE IRS DEDUCTION**

The IRS regulates all four of the charities named in this report as tax-exempt organizations. The Internal Revenue Code allows a taxpayer to deduct contributions of property made to a tax exempt charity. (Tab 77.) The IRS has promulgated special rules to determine the value of clothing and household items contributed by a taxpayer. For instance, a taxpayer cannot claim a deduction for clothing or household goods unless they are in good condition. Apogee's contracts with each charity, however, provide that Apogee will collect goods "regardless of the condition." (§6(b), Tab 33 and ¶ 4, Tabs 34-38.) Neither Apogee nor the charities report that any collected goods were discarded by Apogee and reported back the donor as not tax-deductible.

The IRS states that the sales price of a donated item is "the best indication of its fair market value." (Tab 77.) "Fair market value" is generally described as the price at which property will change hands between a willing buyer and a willing seller, neither having the need to immediately buy or sell the product, and both having reasonable knowledge of all the relevant facts. (*Id.*)

For used clothing, the IRS recommends that the amount of the deduction equal "the value of the price that buyers of used items actually pay in used clothing stores, such as consignment or thrift shops." (*Id.*) For household items, the IRS states that there is usually little or no market value. The IRS recommends that donors have documentation of their deduction, including:

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<sup>52</sup> See 26 U.S.C.A. § 501(c)(3) (2014).

(1) statements of value by the charity, (2) documentation from magazine or newspaper articles, or (3) photographs that describe the items. (*Id.*)

The information regarding the tax deductibility of donated items in Apogee's documents submitted to the State, the websites, its brochures, and the charities' deduction receipts state that the donor is responsible for determining the fair market value of donated goods. (Tabs 42 and 78.) Indeed, the solicitations put the burden on the taxpayer to estimate the fair market value of the donated goods. And do not clearly instruct taxpayers that federal tax law only allows the taxpayer to take a deduction for the price at which donated goods are likely to be sold.

In Apogee's Solicitation Campaign Financial Reports submitted to the State, Apogee states that the charity receives 100 percent of the contributions. (Tabs 59-62.) In fact, most of the fair market value of donated clothing appears to end up with Apogee's parent company, Savers, not the charity. For example, a dress sold at a Savers' retail store may sell for \$6.99 (Tab 80), a price comparable to dresses sold at other thrift stores. (Tab 81.) Presumably, \$6.99 is the amount deducted by a taxpayer. Apogee, however, pays a charity \$0.40 per cubic foot of clothing. The difference between the deducted value of the donated item (\$6.99) and the value received by the charity (less than \$0.40) appears to end up with Savers, a for-profit corporation. Apogee retains the difference between the fair market value and the value received by the charity; as a result, the difference is a professional fundraiser fee that should be reported to the Attorney General's Office by Apogee and the charitable organizations.

Furthermore, the company distributes the charities' donation receipts and donors take deductions on their tax returns for "brica," which is never the subject of a payment to a charity, according to Savers.

**SECTION SEVEN: COMPLIANCE WITH THE MINNESOTA SOCIAL AND CHARITABLE ORGANIZATION ACT**

**7.1 Registration of Professional Fundraisers**

As noted above, the Minnesota Social and Charitable Organizations Act (the “Act”) requires all professional fundraisers to register with the Attorney General’s Office prior to conducting a solicitation campaign. *See* Minn. Stat. § 309.531, subd. 1 (2014) (Tab 1). As noted in Section 3 of this report, Savers appears to have solicitation contracts with at least two organizations, Epilepsy Foundation and Disabled American Veterans, but it is not registered with the Attorney General’s Office. (Tab 29.)

The Act requires professional fundraisers to disclose the gross revenue received from each solicitation campaign and a reasonable estimate of the percentage of total amount of funds solicited from each donor that will be received by the charity. *See* Minn. Stat. § 309.531, subds. 2 (2014) (Tab 1). Apogee’s addenda to its Solicitation Campaign Financial Reports state that 100 percent of the funds collected were retained by the charity. (Tabs 59-62.) Apogee’s Solicitation Campaign Financial Reports do not make any attempt to disclose the funds retained by the professional fundraiser. (*Id.*) In fact, Apogee fails to even report all the donations collected on behalf of each charity. Indeed, all funds received from clothing items sold in the company’s retail stores (less the contract payments), and all the funds received from the sale of brica donations, are apparently retained by the company, which reportedly has gross revenue of over \$1 billion. (Tab 10.) Similarly, none of the charities appear to receive payments that can be reconciled with the reports provided by Apogee. This pattern of reporting makes it impossible for Apogee, the charitable organizations, the charitable regulators, the IRS, or donors to determine the percentage of funds that will be received by the charity.

The Act also requires a professional fundraiser to itemize all expenses incurred from each solicitation campaign conducted in Minnesota. *See* Minn. Stat. 309.531, subd. 4 (2014) (Tab 1). The Solicitation Campaign Financial Reports submitted by Apogee to the Attorney General's Office, however, state that no expenses were incurred by either the charity or Apogee. (Tabs 59-62.) To the contrary, Apogee operates large call centers in Little Canada, Minnesota, and Columbus, Nebraska (Tab 39), where employees are paid to solicit charitable donations using expensive equipment and materials, such software programs, hardware, and desktop applications, to contact donors. Apogee also operates Apogee Trucking, LLC (Tab 14) where employees are paid to pick up charitable donations using trucks that are insured and expensed by Apogee. (¶¶ 7 and 10, Tabs 33-38.) Further, in 2012, the cost of Savers' executive pay totaled \$██████████, which was ███ percent of the nearly \$██████████ of payroll benefits to its roughly ████████ employees. (Tab 82.)

## **7.2 Public Disclosure Requirements**

The Act requires charitable organizations and their fundraisers to disclose the tax deductibility of their contributions. *See* Minn. Stat. § 309.556, subd. 1 (2014) (Tab 5).

The Act also requires a professional fundraiser to disclose its identity and state that the solicitation is being conducted by a professional fundraiser. *See* Minn. Stat. §309.556, subd. 2 (2014) (Tab 5). The company's telemarketers identify themselves as representatives of Courage Kenny Foundation, Vietnam Veterans of America, or True Friends, respectively. (Tab 83.) During solicitation phone calls, Apogee did not previously disclose that a professional fundraiser

is making the solicitation. The scripts that Apogee requires to be utilized by its telemarketers state as follows:

*“Hello, my name is [NAME] and I’m calling on behalf of [CHARITY]. We will have a donation truck in your area on [DATE], collecting boxes and bags of clothing, books, dishes, and other household items. Would you have any items you would like to donate to help those [STATE CHARITABLE PURPOSE]?” (Id.)*

When the Attorney General’s Office notified Apogee in October 2013 that its scripts did not meet the requirements of Minnesota law, it changed its scripts to identify Apogee as the solicitor. Apogee does not appear to disclose this relationship in telemarketing calls made from Minnesota to donors in other parts of the country. (See, e.g. National Children’s Center call script in Tab 83.)

Pursuant to its 2009 Assurance of Discontinuance with the Attorney General’s Office, the call scripts used for solicitations on behalf of Lupus Foundation solicitations require disclosure that Apogee is a professional fundraiser making the call. (Tab 40.) Staff at the Attorney General’s Office, however, listened to the company’s recorded telephone calls made on behalf of Lupus Foundation and discovered a number of calls that fail to make the disclosure.

The Household Goods Program is advertised on the Internet at [www.savers.com](http://www.savers.com), [www.imunique.com](http://www.imunique.com), [www.lupuspick.org](http://www.lupuspick.org), [www.friendshipventurespickup.org](http://www.friendshipventurespickup.org), [www.vvapickup.org](http://www.vvapickup.org), and [www.couragepickup.org](http://www.couragepickup.org). (Tab 42.) None of these websites identify Savers or Apogee as the for-profit company managing the program. A donor is led to believe that the website belongs to the charity, not Savers. The numbers listed on the websites are handled by Savers’ call centers. A donor who desires to have contributions picked up enters his or her personal information onto the website, which is then programmed into Savers’ database. Each website “thanks” the donor for his or her “tax deductible support” of the charity. The websites do not identify that the solicitation is being conducted by a professional fundraiser. Moreover, the

websites for the charitable organizations do not identify that Apogee is conducting the solicitation.

Savers attaches brochures to the donation displays located in its retail stores. (Tab 79.) The brochures state “Donating does a world of good,” “We’re in the business of doing good,” and “We partner with local nonprofits and pay them for all the goods donated at our stores. The more you donate and shop at Savers and Unique, the more your community benefits!” The brochures do not identify that the solicitation is being conducted by a professional fundraiser.

Savers prominently displays large green posters on store windows and doors, proclaiming that “Good Things Come From a Donation” and “Do Good. Do Your Part. DONATE.” (See Tabs 44 and 45 for illustrative examples.) The posters prominently display logos of the charities, such as Vietnam Veterans of America. For instance, a large picture of a man in uniform hugging a young girl who is holding an American flag is displayed around its Community Donation Centers. (See Tab 44.) The posters do not identify that the solicitation is being conducted by a professional fundraiser.

The mailings prepared by Apogee for use in direct mailings identify the charitable organization and the charitable mission for which the solicitation is being conducted. Several mailings include pictures, organization logos, and expressions such as “we” and “us” in reference to the need for donations. The mailings do not identify Apogee or that the solicitation is being conducted by a professional fundraiser. (Tab 41.) The company also solicits donations via radio and television advertisements that proclaim “donating does a world of good.” These advertisements also do not disclose that the solicitations are being conducted by a professional fundraiser.

A final issue regarding solicitation is that the company states that it “...pays local nonprofits every time you donate.” (Tab 44.) It also states that “[c]lothing and *household items* [will] benefit several local non-profits.” (Tab 31.) But, as described above, the company states that it does not compensate charities for “brica” donations of non-clothing household items. If this is true, the company should not be soliciting “brica” charitable donations from the public.

### **7.3 False and Deceptive Practices**

The Act prohibits charitable organizations and their fundraisers from using

...any fraud, false pretense, false promise, misrepresentation, misleading statement, misleading name, mark or identification, or deceptive practice, method or device, with the intent that others should rely thereon in connection with any charitable solicitation, including any such actions or omissions designed to confuse or mislead a person to believe that...the funds being solicited are or will be used for purposes and programs within or for persons within the state of Minnesota when such is not the case; or to otherwise present purposes and uses of the funds which are not as provided within the purposes and uses filed upon registration of said organization. *See* Minn. Stat. § 309.55, subd. 5 (2014) (Tab 4).

On October 8, 2013, an Attorney General’s Office analyst made a contribution at a Donation Drop-Off bin located in the front of a Savers’ store. (Tab 84.) The store stated that it partners with Lupus Foundation, Vietnam Veterans of America, and Courage Kenny Foundation. She requested a receipt and was provided a receipt for Courage Center. The Analyst asked how she could have her contribution donated to Lupus Foundation as her intended charity. The store employee told her that she “really [wouldn’t] know that it goes exactly there but it goes to— every time you donate we pay the nonprofits. So we’re payin’ we’re basically splittin’ it into thirds.” (*Id.*) As described by Apogee’s contracts with the charities and its Solicitation Campaign Financial Reports filed with the Attorney General’s Office, the funds received from the contributions are not to be “split into thirds.”

In its solicitations and documents filed with the State, Apogee fails to accurately describe the allocation of contributions between Apogee, its for-profit affiliates, and the charities. Contrary to its reports submitted to the Attorney General's Office, 100 percent of the funds from the donated goods collected by Apogee do not appear to be retained by the charity. Also, as noted above, if the company does not compensate the charities for "brica" donations, as it has represented, its solicitation of the public for charitable "brica" donations appear to be deceptive.

In general, the IRS permits deductions for in-kind donations at the fair market value rate, which is determined by the sale price of the good between a willing seller and a willing buyer.<sup>53</sup> Apogee does not tell donors the price for which the donated goods are sold. Instead, Apogee puts the burden on the taxpayer to estimate the fair market value of the donated goods.

As described in Section 3 of this report, it appears that Savers is soliciting on behalf of charitable organizations without being registered with the Attorney General's Office as required by Minn. Stat. § 309.531, subd. 1. It also appears that at least one organization, Lupus Foundation, did not provide written consent to Savers to conduct solicitations on its behalf.

The solicitations utilized in conjunction with the Household Goods Program and the Community Donation Centers create the impression that Savers and Apogee are nonprofit charitable organizations rather than for-profit companies. Further, the public is unable to readily determine how the charitable assets will be used and the amounts actually retained by the charitable organizations. Finally, the company's apparent commingling of contributions and inaccurate accounting make it impossible to calculate a reasonable estimate of the percentage of the total amount of funds solicited from each donor that will be received by the charity, as required by the Act. *See* Minn. Stat § 309.531 (Tab 1).

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<sup>53</sup> *See* 26 C.F.R. § 170 (c)(2) (2014).

## **SECTION EIGHT: RECOMMENDATIONS**

As outlined in this Report, there are several regulatory concerns that stem from Apogee's and Savers' operations and reporting methods.

First, there does not appear to be a discernible method by which the public can tie the amounts negotiated in the fundraising contracts, the payments received by the organizations, and the actual amount received on behalf of the charitable organizations.

Second, as noted above, Apogee's solicitations seem to put the burden on the taxpayer to estimate the fair market value of the donated goods, and do not clearly tell the taxpayer that federal tax law only allows the taxpayer to take a deduction for the price at which donated goods are likely to be sold.<sup>54</sup>

Third, Apogee distributes the charities' donation receipts to donors for "brica" (televisions, electronic equipment, jewelry, housewares, furniture, lamps, china, books, etc.), which are retained solely for the profit of the company.

Fourth, Apogee does not provide accurate financial reports and registration statements to the Attorney General's Office. Minnesota law requires Apogee to disclose the gross revenue, estimated percentage of funds retained by each charitable organization, and expenses. *See* Minn. Stat. § 309.531, subs. 2 and 4 (2014) (Tab 1). Apogee bundles its financial reports for solicitation campaigns and does not report the expenses to conduct its solicitations at its retail stores or from its call centers. It also does not report the costs to operate Apogee Trucking. Further, the apparent commingling of donations and underreporting of contributions collected cause Apogee's financial reports to be inaccurate.

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<sup>54</sup> *See* Tabs 42, 78, and 79; *See also* 26 C.F.R. § 170 (c)(2) (2014).

Because Apogee fails to adhere to its legal obligations and the charitable organizations do not appear to sufficiently supervise the collection process, state and federal regulators, the charitable organizations, and donors cannot compare the efficiencies of the community donation centers and household goods program to similar programs offered by other in-kind donation programs, such as the Salvation Army, Goodwill Industries, or the Dorothy Day Center. Given that the Supreme Court nullified the ability of state regulators to regulate the amount of fees charged by professional fundraisers,<sup>55</sup> it is critical that there be full disclosure to donors of such costs.

Fifth, Apogee appears in some cases to commingle donations it collects on behalf of charitable organizations, making it impossible to allocate contributions of donated goods as intended by the donors.

Sixth, it is incumbent upon the charitable organizations to ensure that their donors know who is soliciting from them and are aware of how their contributions are utilized. In many instances, Apogee's telemarketers and solicitation materials fail to identify that the solicitations are being conducted by Apogee, a professional fundraiser, as required by Minn. Stat. § 309.556, subd. 2 (Tab 5).

Seventh, Apogee does not account for the total contributions collected on behalf of each charitable organization, leaving significant amounts not paid by Apogee to the charities over the lifetime of their contractual relationships.

Eighth, Apogee, a for-profit company, is holding the household goods in charitable trust. Apogee's inaccurate accounting and recordkeeping practices appear to cause the charitable assets

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<sup>55</sup> *Riley, supra.* at 792-794

to be improperly administered and improperly benefit Apogee's and its parent company, Savers', for-profit operation.

Finally, Apogee's parent company, Savers, appears to participate in and benefit from the solicitation campaigns conducted on behalf of the charitable organizations, but it has not registered as a professional fundraiser with the Attorney General's Office.

### **8.1 Compliance Recommendations**

The recommendations set forth below apply to all charitable organizations entering into contracts with Apogee. These recommendations are guidelines for the charitable organizations to use to attain compliance with federal and state laws regarding the household goods solicitation program and donations made at the community donation centers.

- 1. Monitor Operations of Professional Fundraiser.** The contracts between Apogee and each charitable organization allow the charity to audit Apogee's records. (¶7, Tab 33<sup>56</sup> and ¶11, Tabs 33-38.) It does not appear that any of the four charities have done so. The charitable organizations should periodically audit Apogee's operations as they relate to the solicitations conducted on behalf of each charitable organization. This includes, but is not limited to, requiring solicitation calls to be recorded and then reviewed by the charitable organization, reviewing the documents that show real-time collection of contributions, reviewing complaints about the solicitations and responses to those complaints, and taking other measures as are necessary to ensure accurate reporting.

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<sup>56</sup> See Footnote 45.

2. **Prevent Commingling of Contributions.** The charitable organizations should take measures to ensure that donations are not commingled by providing such a requirement in the contracts, require that donations made at community donation centers be segregated from contributions made to other charities, and periodically monitoring the collection, measurement, and administration of contributions at the retail stores.
3. **Require Savers, LLC to Register as a Professional Fundraiser.** It appears that Savers, Inc. substantially participates in and benefits from the solicitation campaigns conducted on behalf of the charitable organizations. Accordingly, Savers, LLC should be registered as a professional fundraiser in Minnesota. Savers should also be registered because it appears to be acting as a professional fundraiser for Epilepsy Foundation, Disabled American Veterans, Lupus Foundation, and Vietnam Veterans of America.
4. **Board Fiduciary Duties.** The boards of directors of each charity that contracts with Apogee should perform their own due diligence and take such further acts as are necessary to bring their organizations into compliance with applicable nonprofit laws and proper governance practices for charitable institutions.
5. **Provide Accurate Reports to Federal and State Government.** For each solicitation campaign conducted on behalf of a charitable organization, the charitable organization should require that accurate registration statements, solicitation campaign reports, and contracts be filed with the Minnesota Attorney General's Office.
  - a. The charitable organizations should require Apogee to accurately report the total fundraising expenses incurred from each solicitation campaign, including

the costs to operate Apogee Trucking, the Apogee call centers, and the Savers retail stores.

- b. For each solicitation campaign conducted on behalf of a charitable organization, the charitable organization should require that separate financial reports be filed with the Attorney General's Office.
- c. The charitable organizations should contractually require Apogee to set forth the methodology used to determine amounts of payments for donations made at community donation centers and require Apogee to provide an accounting and financial report for these contributions to the Attorney General's Office.

6. **Public Disclosure of Funds Received from Donations.** The charitable organizations should require Apogee to disclose the total amount of funds it receives from the sale of donated goods it collected on behalf of each charity. As done by the Courage Kenny Foundation, the charitable organizations should report the difference between the fair market value of the contributions and the amount received by the charitable organization as Apogee's professional fundraiser fee. In addition, all written and oral requests for contributions shall disclose the name and existence of the professional fundraiser in accordance with Minn. Stat. § 309.556, subd. 2 (2014) (Tab 5).

7. **No Charitable Deductions for "brica."** Savers states that it does not compensate the charities for "brica," a company term used for everything that is not clothing, such as jewelry, toys, china, vases, furniture, televisions, and other household goods. If so, Savers should not solicit "brica" donations, and it should also inform donors that they may not deduct "brica" donations on their tax returns.