

Dark Money in Nonprofits Gets Darker

11.30.18 | Linda J. Rosenthal, JD



In the third week of July 2018, the U.S. House of Representatives approved an appropriations bill that – if passed by the Senate – would effectively repeal the Johnson Amendment for political activity by churches. Many in the philanthropy community oppose this move as do many religious organizations. The fear is that it could open the door to an enormous amount of political “dark money” flowing in and through houses of worship without any accountability at all.

A week before, there was another move that may well open the door to political “dark money” into tax-exempt organizations other than 501(c)(3)s. The main concern is about the many 501(c)(4), “social welfare,” organizations that are permitted routinely engage in a good deal of advocacy and lobbying activities.

This other change was accomplished with the stroke of an administrative pen, changing a Treasury Regulation that has been around for almost 50 years. Specifically, beginning for taxable years on or after December 31, 2018, these non-501(c)(3), tax-exempt, organizations no longer have to disclose their donors on their Form 990s. Critics were taken by surprise and are howling over this development.

Regulation Change: More Dark Money?

This change was announced in a sunny, feel-good, [press release dated July 16, 2018](#): “Treasury Department and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations” with accompanying published “guidance” in the form of [Revenue Procedure 2018-38](#).

According to [this press release](#), “[t]he IRS’s new policy will relieve thousands of organizations of an unnecessary regulatory burden, while better protecting sensitive taxpayer information and ensuring appropriate transparency.”

The key elements of this change are:

- Tax-exempt organizations other than 501(c)(3)s are “no longer required to report the names and addresses of their contributors on the Schedule B of their Forms 990 or 990-

EZ.”

- These groups “must continue to collect and keep this information in their records and make it available to the IRS upon request, when needed for tax administration.”
- “Form 990 and Schedule B information that was previously open to public inspection and will continue to be reported and open to public inspection.”

Perhaps in an effort to persuade the public that this is no big deal, the Treasury mentions the relevant history. In a nutshell, “Congress required the IRS to collect 501(c)(3) information in the 1960s, but in 1971 the Nixon Administration extended the reporting requirement to other nonprofits.” That is, the requirement that 501(c)(3) disclose donors to the IRS was enacted by a *statute* passed by Congress, but the extension of this requirement to 501(c)(4) and other tax-exempt organizations was done by *regulation* only. A regulation can be set by the executive branch without Congressional action and can be changed in the same way. That’s what happened here.

The press release also explains the Treasury’s view of three benefits to this change.

“First, the IRS makes no systematic use of Schedule B with respect to these [non-501(c)(3)s] organizations in administering the tax code.” It may once have had a need for the information, but it’s no longer needed, and “if the information is needed for purposes of an examination, the IRS will be able to ask the organization for it directly.”

“Second, the new policy will better protect taxpayers by reducing the risk of inadvertent disclosure or misuse of confidential information – an especially important safeguard for organizations engaged in free speech and free association protected by the First Amendment.” “Unfortunately,” according to this Treasury Department statement, the IRS has “accidentally” spilled some confidential donor information before.

What’s added next is a highly partisan and discredited so-called “fact”: “In addition, conservative groups were disproportionately impacted by improper screening in the previous Administration...” in connection with the “political targeting scandal....” (In a separate post, we’ll address the now-discredited notion that there was any such anti-conservative political targeting activity.)

“Third, the new policy will save both private and government resources.”

Not Everyone’s On Board

The Nonprofit Quarterly has some thoughts on the matter. While this change affects more than 300,000 non-501(c)(3) organizations, “... it’s an open secret that the intent is to aid in concealing the donors to 501c4 social welfare groups often involved in significant political activity, sometimes referred to as “dark money” groups. In addition to further shrouding the identities of donors from the IRS, the rule change also makes it more difficult for states seeking to regulate political expenditures on elections held within their borders.

This move also creates problems for state regulators who already have a difficult time identifying “the sources and extent of dark money in state-level political campaigns.”

One governor – Steve Bullock (D-MT) – is so fired up about this, he announced in a tweet that he’s going to court over this policy change: “Hey there, quick update: I’m suing the IRS over dark money.” Gov. Bullock has “filed suit in a Montana federal district court seeking to prevent the relaxation of rules for certain types of nonprofits, including 501c4s, to disclose identifying information on their donors. This, of course, renders dark money even darker.”

Gov. Bullock’s lawsuit “...seeks to have the new rules nullified” alleging they “unlawfully interfere with Montana’s ability to gather the data it needs to manage its tax laws. The suit also claims the

Trump administration did not follow the Administrative Procedure Act, which requires agencies like the Treasury Department to provide opportunities for public comment before changing policies.” Professor Roger Colinvaux of Catholic University of America unleashes a multi-faceted attack on this recent change in *How the IRS’s Stance on Donor Disclosure Corrupts the Nonprofit World*. “The Internal Revenue Service,” he explains, “made clear last week just how broken federal oversight of nonprofits has become....The IRS has decided it does not need to know the funding sources of advocacy groups ... that have charitable arms but raise a big share of their money through related tax-exempt organizations classified under Section 501(c)(4)....”

He asserts that this change “was in response to intense congressional and outside pressure and so should come as no surprise. And on the surface, the tax agency’s action may seem like a benefit for nonprofits because it further promotes donor privacy.”

In a lengthy critique, Prof. Colinvaux explains why this “lack of disclosure will facilitate the further degradation of the nonprofit world to the benefit of foreign nationals, wealthy influence peddlers, and the outright corrupt.”

Conclusion

In addition to Montana Governor Bullock’s lawsuit challenging this policy change, Treasury is likely to face an onslaught of criticism and opposition in the months ahead.