

Donor Disclosure Regulations Finalized

06.09.20 | Linda J. Rosenthal, JD



For the past two and a half years, there's been a roller coaster of confusion and controversy about whether some or all nonprofits must disclose their donors' identities. Recently, the Treasury and IRS published a set of final regulations that ends this uncertainty.

Or does it? Experts predict that either litigation or legislation may turn this issue on its head once again.

Donor Disclosure: Dark-Money Problem

Last fall, when the government posted the proposed regulations on donor disclosure in the Federal Register, we took the opportunity to review what had been going on. In [*Disclosure of Donors: Latest Update*](#) (October 3, 2019), we wrote: "If you aren't clear about whether a tax-exempt organization must disclose its donors or not, the rest of us say: 'Welcome to the club.'" Historically, the rules had been clear-cut. Then – suddenly – they were not.

For the past 75 years or so, 501(c)(3) organizations have been required to disclose their donors to the IRS on the annual Form 990. "Several decades ago, the Department of the Treasury [extended the 501\(c\)\(3\) disclosure mandate](#) to groups with tax exemptions under different subsections of 501(c) – including 501(c)(4) social welfare groups, 501(c)(5) labor unions and 501(c)(6) chambers of commerce and trade and professional associations."

What's been at issue recently is not the donor-disclosure rule for 501(c)(3)s; that has remained in full force and effect. Most of the controversy now focuses on the rules that apply to the other categories just mentioned; most notably, 501(c)(4) social welfare organizations. The landmark [*Citizens United*](#) decision of the U.S. Supreme Court in 2010 has made it easier for this already "murky" and ill-defined tax-exemption classification to be further "mucked up by significant infusions of 'dark money.'"

The dark-money faucet was enhanced in 2018 when the current administration abruptly proposed to toss out the decades-long donor-disclosure rule for non-501(c)(3) organizations. Suddenly, social welfare groups – along with labor unions and trade groups – would no longer be required to include names and addresses of substantial donors on annual Form 990s.

Challenges to Dark-Money Donor Shield

Ordinarily – and by law – a major change is announced by proposed regulations formally published in the Federal Register and subject to a designated period for public comment, usually 30 to 60 days. But that didn't happen here. What the government issued in May 2018 was (new) Revenue Procedure (“Rev. Proc.” pronounced “rev prock”) 2018-38. A revenue procedure is two rungs below a formal, final regulation on the ladder of significance and enforceability. See *Understanding IRS Guidance – A Brief Primer*.

There were howls of protest by groups favoring transparency and “sunlight” as well as by some state governments that argued they need to have these disclosures to carry out their own state-level scrutiny of “dark money” flowing into nonprofits in their jurisdictions particularly in regard to state and local election contests.

The most significant – and successful – challenge was by Gov. Steve Bullock (D-MT); he filed a federal lawsuit – joined by New Jersey – challenging both the substance of this disclosure change as well as the procedure by which it happened. In July 2019, a federal district judge in Montana ruled in favor of these state challenges, noting – particularly – that Rev. Proc. 2018-38 (issued without any formal notice or comment period) was insufficient procedurally to meet the requirements of law and due process.

In response, the feds chose to reissue the same rule, albeit “... this time by regulation and dotting all the required ‘i’s’ and crossing all the required ‘t’s’ for public notice and input.” New proposed regulations were published in the Federal Register on September 10, 2019, with an extra-long public-comment period ending on December 9, 2019.

New Regulations on Donor Disclosure

On May 28, 2020, the Treasury published the final regulations on donor disclosure requirements “that [now] shield many nonprofits – except 501(c)(3) charities and 527 political organizations – from the requirement to disclose the names of significant donors on Schedule B (Schedule of Contributors) to their annual Form 990 returns.”

The approval of the final regulations titled *Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations* was expected even though Treasury had received significant and important written comments in opposition. Many of the stated concerns focused on the open secret that social welfare organizations were being used as dark-money funnels for improper spending on U.S. elections, including from foreign governments. Treasury brushed off these objections on the grounds that the IRS is not in the business of enforcing campaign finance laws and that wrongdoers were unlikely to report incriminating information on Schedule B forms in any event.

Conclusion

There are already moves by House Democrats and at least one senator to negate this regulation with new legislation.

Bear in mind, too, that the rule *requiring* donor-identity disclosure remains in full force and effect for 501(c)(3) organizations. The regulation change applies *only* to the 501(c)(4), 501(c)(5), and 501(c)(6) groups. And while the latter are now relieved of the duty to *disclose* names and addresses of key donors in real time *on each year's Form 990*, they still must collect, retain, and turn over that information if the IRS wants to review it somewhere down the line including during an audit.

We'll stay tuned and report on developments.

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