

Montana Federal Court Halts IRS Policy That Eliminated Reporting of Donor Information

August 1, 2019

Election and Political Law

The Internal Revenue Service (IRS) must adhere to public notice-and-comment procedures before it can relieve certain tax-exempt organizations of the burden of reporting the names and addresses of their donors to the IRS, a Montana federal court [ruled](#) this week. Last year's [Revenue Procedure 2018-38](#) provided that tax-exempt organizations, other than 501(c)(3) charities, were no longer required to report donor information to the IRS on the annual information return, Form 990. The U.S. District Court for the District of Montana held that the revenue procedure violated the Administrative Procedure Act (APA) because the IRS promulgated the new rule without adhering to the notice-and-comment procedures required for "legislative rules."

As we reported [last summer](#) the IRS policy change was a significant shift in donor disclosure rules for 501(c)(4) social welfare organizations, trade associations, and other tax-exempts. For over 50 years, the IRS had required that these tax-exempt organizations report the names and addresses of certain donors on Form 990, Schedule B, but the change in policy eliminated that requirement, even though the information was previously redacted by the IRS and tax-exempt organizations before making a Form 990 public. In [announcing](#) Revenue Procedure 2018-38, the IRS stated that the new policy did not prevent it from demanding donor information from tax-exempt organizations, which was still required to be collected and maintained by the organizations.

The federal court ruling invalidated Revenue Procedure 2018-38, effectively reinstating the requirement that tax-exempt organizations report their donors' names and addresses to the IRS on Form 990, Schedule B. After finding that the plaintiffs—Montana Governor Steve Bullock, the Montana Department of Revenue, and the state of New Jersey—had standing to challenge the policy change, the judge held that the policy was invalid. Current Treasury regulations require tax-exempt organizations to "file an annual information return" that includes "[t]he total of the contributions, gifts, grants, and similar amounts received . . . and the names and addresses of all persons who contributed, bequeathed, or devised \$5,000 or more . . ." 26 C.F.R. § 1.6033-2(a)(ii)(f). The court concluded that the IRS abolished the requirement to report donor names and addresses, which "effectively amended" the regulation, without adhering to notice-and-comment procedures.

The IRS had argued in the case that Revenue Procedure 2018-38 merely concerned a matter of agency practice or procedure and was therefore an "interpretive rule" that does not require

notice and comment. However, the court rejected this contention, on the basis that an interpretive rule must be “consistent with the regulation that it seeks to interpret.” Here, the court found, the new policy conflicted with the existing regulation, which affirmatively requires tax-exempts to report donor information. Accordingly, the court found that the new procedure was a “legislative rule” that would have the force of law, not an interpretive rule, and must therefore undergo the public notice-and-comment procedure.

The court made clear that the plaintiffs did not challenge “the substance of the IRS’s decision or whether substantial-contributor information must be disclosed,” but rather that the IRS failed to follow the required notice-and-comment procedure. Nothing in the court’s order would prevent the IRS from eliminating the requirement that tax-exempts report their donors. If the ruling stands, then, per the court’s order, the “IRS must follow the proper notice and comment procedures pursuant to the APA if it seeks to adopt a similar rule,” and may not, as the court put it, “attempt to evade the time-consuming procedures of the APA.”

We will monitor closely whether the IRS will attempt to repeal the donor reporting requirement for certain tax-exempts through a public notice-and-comment procedure, or whether the agency will appeal.

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