



Nonprofit Donor Information Disclosure

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UPDATE: On July 30, 2019, the United States District Court for the District of Montana [set-aside](#) as unlawful IRS Revenue Procedure 2018-38, which is the subject of this post. The Revenue Procedure would have eliminated the requirement that certain tax-exempt organizations disclose the names and addresses of their “[substantial](#)” donors in annual reports to the IRS. If the court decision stands and the law [remains unchanged](#), the IRS would need to go through the Administrative Procedure Act’s notice-and-comment rulemaking process in order to implement Revenue Procedure 2018-38’s donor disclosure policy changes.

The original post from April 14, 2018 is below.

In July 2018, the Internal Revenue Service (IRS) [announced](#) that certain organizations that are exempt from paying federal income tax (tax-exempt organizations or EOs) under the [Internal Revenue Code](#) (IRC), including social welfare organizations, labor unions, and trade associations, will no longer be required to disclose the names and addresses of their “[substantial](#)” donors in [Schedule B](#) of their annual [Form 990](#) returns to the IRS. Charitable tax-exempt organizations described in IRC Section 501(c)(3), which are statutorily required to disclose certain donor information, were not impacted by the July 2018 policy.

The IRS [noted](#) several reasons for making the change, including reducing administrative burdens and protecting sensitive, nonpublic personal information. In opposition, [some](#) have [argued](#) that the IRS’ policy change will reduce transparency over the funding sources of EOs’ political activities and make it more difficult for the IRS to enforce tax laws. At least one state has filed a [lawsuit](#) seeking to have the new policy set aside, alleging that the IRS implemented the policy in violation of the [Administrative Procedure Act](#) (APA).

This Sidebar will first provide background on the statute and regulations regarding EOs’ disclosure of contributor information. Next, the Sidebar will discuss the justifications of and reactions to the new policy, including the views of proponents and opponents of the new policy. The Sidebar will then discuss

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the litigation Montana has filed against the policy. Finally, the Sidebar will provide considerations for Congress.

Donor Information & Tax-Exempt Organizations

Organizations seeking to qualify for exemption from federal income tax under the IRC are subject to various standards and restrictions. For example, many EOs are required to file an annual return (Form 990) that includes information required by the IRC and implementing regulations and that is made publicly available after eliminating certain sensitive, nonpublic information.

Organizations seeking to qualify for tax exemption under [Section 501\(c\)\(3\)](#) of the IRC must operate exclusively for a charitable, religious, educational, or other [exempt purpose](#) and may not engage in [election campaign activities](#). In addition to income tax exemption, many 501(c)(3)s also are eligible to receive [tax-deductible donations](#), and these EOs are required by [statute](#) to disclose the names, addresses, and amounts of contributions received from “substantial” donors in their annual IRS returns.

In contrast, other organizations may qualify for tax-exemption under other sections of 501(c), such as social welfare organizations (501(c)(4)s), labor unions (501(c)(5)s), and trade associations (501(c)(6)s). These other 501(c)s generally are permitted to engage in [some campaign activities](#), but contributions to them generally are not tax deductible. By [regulation](#), these other 501(c)s have historically been required to disclose the same donor information in their Form 990s that 501(c)(3)s are required to report by statute.

The IRS Commissioner is [authorized](#) to [exempt](#) certain EOs from Form 990 reporting requirements when “he determines that such returns are not necessary for the efficient administration of the internal revenue laws.” Utilizing this authority, the IRS Commissioner, through [Revenue Procedure 2018-38](#), recently eliminated the requirement that EOs organized under Section 501(c)—other than 501(c)(3)—report the names and addresses of large donors. Revenue Procedure 2018-38 does not impact any other reporting requirements, meaning that EOs organized under Section 501(c) must continue to report other non-sensitive donor information, such as contribution amounts, in their annual Form 990s. Additionally, although these organizations no longer need to include donor names and addresses in their annual filings with the IRS, they must maintain this information in their records and provide it to the IRS upon request. In addition, Revenue Procedure 2018-38 [does not modify](#) donor reporting requirements applicable to 501(c)(3)s or super political action committees (PACs) and other political organizations that qualify for federal income tax exemption under IRC Section 527.

Legal Justifications for the Policy & Reactions

The IRS [provided](#) three reasons for the policy change in Revenue Procedure 2018-38. First, the IRS noted that it does not need the donor information to administer the tax code, in part [because](#) of [legislative changes](#) made in 2015. Second, according to the IRS, eliminating the disclosure requirement “reduc[es] the risk of inadvertent disclosure or misuse of confidential [donor] information.” Third, eliminating the disclosure requirement for certain EOs reduces the administrative burdens both of those EOs, by eliminating paperwork requirements, and the IRS, which historically had to expend resources scrubbing donor names and addresses from Form 990 information that is disclosed publicly.

Other [proponents](#) of Revenue Procedure 2018-38 argue that the IRS’ action strengthens values espoused by the First Amendment to the U.S. Constitution. According to this view, the change will allow individuals within an EO to speak with their purse without fear that sensitive donor information will become publicly available and potentially subject donors to political harassment from individuals who disagree with the mission or political views of the recipient EO.

Critics argue that the new policy could have deleterious effects on transparency, law enforcement, and campaign finance. Specifically, critics argue that the IRS' finite resources limit its ability to investigate and enforce tax laws, and eliminating donor information disclosure—data points that can raise red flags that justify further investigation—will only exacerbate those limitations. This in turn, some argue, could embolden bad actors to misuse funds by, for instance, illegally funneling contributions from foreign nationals or tax-deductible charitable donations to engage in political campaign activity in the United States.

Litigation

As previously mentioned, the State of Montana filed a lawsuit alleging that the process by which the IRS implemented Revenue Procedure 2018-38 violated the APA and therefore Revenue Procedure 2018-38 should be set aside. Specifically, Montana alleges that “Revenue Procedure 2018-38 is a substantive or legislative rule” that may only be implemented after the IRS provides public notice and the opportunity for public comment in accordance with the APA, which the IRS did not do. The state further argues that the IRS failed to support the policy change with “reasoned analysis” and, thus, the IRS' implementation of Revenue Procedure 2018-38 was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” in violation of the APA.

Montana alleges that “Revenue Procedure 2018-38 effects several distinct kinds of injury to Montana.” The state contends that Revenue Procedure 2018-38 “interfere[s] with Montana’s ability to gather data that the state needs in order to administer its tax laws.” (Notably, Montana has the most tax-exempt organizations per capita of any state). The state’s complaint notes that federal law allows the IRS to share the EO donor information the IRS collects with state officials, and that Montana relies on the information IRS shares with Montana to enforce its own tax and election laws. According to the complaint, “[t]he sources of an organization’s income—particularly the identities of its significant contributors”—are crucial for a state to determine whether an organization qualifies under state law for tax-exempt status and whether it continues to comply with tax, election, and other laws. Without this donor information, Montana argues that, among other things, it is more likely to grant tax exemptions erroneously, thus depriving the state of tax revenue. In light of the importance of this information to the administration of state laws, Montana contends that the enforcement of Revenue Procedure 2018-38 “will impose substantial pressure on the State of Montana to change its laws . . . to create a new procedure for the collection of significant contributor names and addresses.” Montana further contends that such a change in state law and procedure will require the expenditure of significant state resources. Montana also argues that other states will face the “same or greater burdens if significant contributors are no longer disclosed to the IRS.”

Considerations for Congress

Members of Congress have expressed opposing views of Revenue Procedure 2018-38, with some praising and others criticizing the policy. One Senator announced he will refuse to support the confirmation of nominees to the IRS unless they commit to reversing the policy. Whether or not policymakers agree with Revenue Procedure 2018-38, Congress can address the issue by, for instance, either passing legislation consistent with the IRS guidance or that mandates all 501(c)s—not just 501(c)(3)s—disclose the names and addresses of their substantial donors in their Form 990 annual returns. Congress also could pass legislation eliminating or curtailing the IRS Commissioner’s discretionary authority to exempt EOs from Form 990 reporting standards. Bills that would implement these divergent policies have been introduced in the 115th Congress. For example, H.R. 4916, the “Preventing IRS Abuse and Protecting Free Speech Act,” would, with few exceptions, bar the IRS from requiring 501(c)s to disclose personally identifiable donor information in their annual returns. On the other side of the spectrum, S. 3284, the “Spotlight Act,”

would repeal Revenue Procedure 2018-38, require 501(c)(4)s, (c)(5)s, and (c)(6)s to disclose substantial donor names and addresses in their annual Form 990s, and eliminate the IRS Commissioner's authority to provide exemptions from the disclosure requirements.