



# Federal Court Sets Aside Form 990 Schedule B Donor Disclosure Rule: How Will the IRS Respond?

08.06.2019 | By **Frederick T. Dombo III, Amber R. Maltbie, William A. Powers**

On July 30, 2019, a federal district judge set aside the Internal Revenue Service's Revenue Procedure 2018-38, a rule that had allowed 501(c)(4) social welfare organizations and other nonprofits to withhold donor information from annual returns filed on Schedule B of Form 990. Although Schedule B donor information is not disclosed to the public, state agencies may again have access to such information.

In the case of *Bullock v. IRS*, Montana and New Jersey challenged the IRS's authority to issue this rule, Revenue Procedure 2018-38, without following the Administrative Procedure Act's (APA's) notice and comment rulemaking requirements. The court ruled that the Revenue Procedure constituted a legislative, not an interpretive, rule and was therefore invalid because the IRS had not followed APA rulemaking procedures.

For context, and as we have noted in past client alerts and articles, the IRS's Revenue Procedure 2018-38 allowed nonprofits, other than 501(c)(3)s and 527 political organizations, to withhold their donors' identities from Schedule B when submitting their annual tax returns via Form 990. Although this Procedure affected a wide range of nonprofit entities, including 501(c)(6) trade associations, the lawsuit was aimed at politically active nonprofits that have sought to maintain donor confidentiality.

The court's ruling is notable for a number of reasons:

- It found that both Montana and New Jersey had standing to sue the IRS over its failure to collect this information, which had been a standard practice on Schedule B for the last 50 years. In reaching its conclusion, the court noted that the regulatory efforts required for New Jersey to gather this information no longer collected by the IRS was harm sufficient to give the state standing to sue.

- The court ruling sets aside Revenue Procedure 2018-38, which was effective for tax years ending December 31, 2018 or later. It is unclear at this time whether nonprofits that relied on the Procedure and withheld donor information from Form 990, in accordance with that Procedure in effect at the time, might need to amend their filings.
- Further, entities that took the automatic six-month extension to file their Form 990 will likely no longer be able to rely on the Procedure. However, there are several ways that this could play out before the November 15, 2019 deadline for extended 990s, so entities that have yet to file their returns may want to take a wait and see approach.

We think that either an appeal or rulemaking (or both) is likely, although it would be unlikely for the IRS to simply accept the ruling.

- Under one scenario, the IRS could appeal the district court's decision to the Court of Appeals for the 9th Circuit, requesting a stay of the lower court's decision. Nonprofits who are concerned about Schedule B and have not yet filed their Form 990 may wish to monitor the case to see whether Revenue Procedure 2018-38 is reinstated before their extended filing deadline by the 9th Circuit or even the Supreme Court.
- The IRS could also undertake a notice and comment rulemaking, possibly reissuing Revenue Procedure 2018-38 as an emergency or interim rule while it completes what could be a lengthy and burdensome rulemaking process.
- Although unlikely, the IRS could simply do nothing, in which case the donor disclosure rules for Schedule B would revert back to the 50-year status quo.

Each of these possibilities is worth considering for nonprofits, especially in light of the recent trend in states to require more donor disclosure by politically active nonprofits.

We continually monitor federal and state legal developments for new compliance requirements or changes to existing ones. We are available to assist clients with all of their compliance needs on the local, state, and federal level.