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Donald W. Kramer  
Editor and Publisher  
Lisa T. Chatburn  
Managing Editor

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*Nonprofit Issues*®  
P.O. Box 482  
Dresher, PA 19025-0482  
Phone (215) 542-7547  
1-888-NP-Issue  
Fax (215) 542-7548  
E-mail  
[info@nonprofitissues.com](mailto:info@nonprofitissues.com)  
[www.nonprofitissues.com](http://www.nonprofitissues.com)

## Federal Court Blocks IRS Effort To Suspend Requirement for Schedule B

*Says action cannot be taken without following  
rulemaking provisions of Administrative Procedure Act*

A federal District Court in Montana has put at least a temporary hold on the Internal Revenue Service's effort to suspend the requirement for tax-exempt organizations to file a list of their significant donors on Schedule B to the Form 990 tax information return. The Administration had eliminated the requirement for all exempt organizations except 501(c)(3) public charities by publishing a new Revenue Procedure in 2018. ([Rev. Proc. 2018-38](#). [See \*Nonprofit Issues\*®, Vol. XXVIII, No. 3](#))

The case is the latest development in what seems to have become a partisan battle over disclosure of contributors. The Ninth and Second Circuit Courts of Appeals have held that California and New York may require a complete copy of Schedule B for organizations seeking to register for charitable solicitation in their states. ([See \*Nonprofit Issues\*®, Vol. XXVIII, No. 4](#)) The lead plaintiff in the new case is Montana Governor and Democratic presidential candidate Steve Bullock, who was joined by the State of New Jersey. They each argued that the information was important to the states to assist in the administration of their state laws.

The Schedule generally requires reporting organizations to list contributors of \$5000 or more during the year. The Schedule is "confidential" in that the names and addresses of the donors do not have to be released to the public, but the number and amount of contributions must be shown upon request. States receiving the information require that it be kept confidential from the public but claim that they use it in administration of their own laws. Opponents of disclosure claim that it will "chill" willingness to contribute by people who want to retain their anonymity.

Before reaching the merits of the states' claims, the Montana Court had to determine whether the states had standing to bring the case. The IRS argued that they had no legally protected interest in receiving the donor information and had suffered no actual harm caused by the Rev. Proc. But the Court found that they had a "concrete, particularized" injury that was "fairly traceable" to the change in rules and "redressable by a favorable ruling."

Both states argued that they use the information collected by the IRS in administering their own state laws and that they had rights to obtain the information under information-sharing provisions of the Tax

Code. They also argued that it had, or would, cost them more to try to collect the information on their own. The Court ruled that the Rev. Proc. would significantly restrict the future flow of information on which the states rely.

The Court also rejected an IRS argument that the Tax Code gave the Commissioner “broad discretion” to relieve taxpayers from filing requirements “where he determines such information is not necessary for the efficient administration of the internal revenue laws.” It said that the courts have authority to determine whether the agency “followed whatever legal restrictions applied to [its] decision-making process.”

The Court noted that the IRS had established the Schedule B requirement by a formal Regulation promulgated in 1970 following a public notice and comment period. The Court said that the procedural requirements of the APA do not apply to “interpretive rules” that merely advise the public of an agency’s interpretation or construction of statutes and rules that it administers, but said they do apply to “legislative rules” that effect a change in existing law or policy. It held that the Rev. Proc. was in “clear conflict with existing law” and that the IRS could not escape the procedural demands of the APA.

The Court held unlawful and set aside Rev. Proc. 2018-38 and ordered the IRS to follow the procedures of the APA if it seeks to adopt a similar rule. ([\*Bullock v. Internal Revenue Service, D. MT, No. CV-18-103, 7/30/19.\*](#))

Update: The Treasury Department has started regulatory proceedings to adopt a regulation that exempts nonprofits other than 501(c)(3) public charities from filing the information on Schedule B with their Form 990 tax information returns. The Notice to modify section 6033 of the Tax Code was published in the Federal Register on September 10, 2019. Comments are due by December 9, 2019.

## YOU NEED TO KNOW

If the effect of this decision is not stayed on appeal, it may be hard to force the IRS to actually collect the Schedule B information from Form 990 filers other than public charities when the word has gone out that they don’t need to comply. The IRS will have little incentive to follow-up on a requirement that it thinks should not exist. But we will see what happens.