Colvin, Owens Outline on Form 990 Donor Disclosure

IRS Form 990 Donor Disclosure

Current Posture, Background, Options

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Current Posture

As reported two months ago in *Tax Notes Today* (November 13, 2001 [*The Exempt Organization Tax Review*, December 2001, p. 386]), the Internal Revenue Service has reversed its position regarding public disclosure of information on Form 990, Schedule B, Schedule of Contributors, causing alarm in the exempt organization community.

Schedule B requires most section 501(c) and some other exempt organizations to report name, address, amount, and other information regarding large donations received by the organization during the reporting period, including details about non-cash gifts. Schedule B is a new form introduced for tax years beginning in 2000, and it bears the prominent legend "***This form is generally not open to public inspection except for section 527 organizations.***"

Prior to introduction of Schedule B, Form 990 filers were required to compose a separate schedule of their own design identifying large donors in connection with reporting total contributions on Line 1d of Form 990, not subject to public disclosure. After a number of releases of donor information from such schedules, both specific and massive (via GuideStar), inadvertent though they may have been, it appeared that the new Schedule B would provide a means for the IRS to capture the non-public donor information, clearly separate it from the otherwise public Form 990 data, and withhold it from public inspection.

In November, we learned that legal disclosure officials at the IRS (in a memo we have requested but not yet received) advised the filing headquarters in Ogden, Utah, that Schedule B should be released despite the legend, redacting only name, address, and (we are told) other identifying information regarding donors. In fact, numerous Schedule B's have already been released and posted on GuideStar. A sample of those filings shows that while names and addresses are redacted, the aggregate amount of each donor's gifts, the type of gift (individual, payroll, or noncash), and other annotations on the form are made public in Part I. In Part II, more information is given on noncash gifts, including date, fair market value, and description of property, none of which is redacted except, in some instances, the name of the company in connection with a stock donation.

A similar problem exists for section 501(c)(3) public charities filing Form 990, Schedule A, in which the Part IV-A Support Schedule requires a listing of the aggregate gifts of large private donors for the previous four years, again, not subject to public disclosure. Following the same approach as with Schedule B, the Ogden IRS office is releasing information that appears on such support schedules, except for name and address. According to *Tax Notes*, the IRS is not planning to take any steps to notify the exempt organization community of its policy regarding partial disclosure of Schedule B and Schedule A, Part IV-A, donor information. Therefore, organizations and donors wishing to preserve the privacy and confidentiality of their giving relationship may be unaware that their reliance on the phrase "not open to public inspection" is misplaced.

Background

Internal Revenue Code section 6103 generally prohibits the Service from disclosing returns and return information, with limited exceptions that are not relevant here. This prohibition is particularly strong with respect to "taxpayer return information," i.e., return information provided by the taxpayer to the Service.

Section 6104(b) provides an exception to this rule by mandating that exempt organization return information "shall be made available to the public," but also states that: "Nothing in this subsection shall authorize the Secretary [of the Treasury] to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527) which is required to furnish such information."

Section 6033(b) requires section 501(c)(3) organizations to "furnish annually information . . . setting forth — . . . (5) the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors."

If the IRS were only collecting the names and addresses of large donors as authorized by section 6033(b), then the deletion of only name and address information would result in complete protection of private donor information. However, the donor information collected by the IRS from exempt organizations on Form 990 has grown over the years, and the public release of those details may cause some donors to be identified, publicized, harassed, and intimidated by those hostile to the filing organization. At the very least, the privacy of such donors may be invaded by other fundraisers, if not foes, of the causes they support.

The gravity of this situation is evident for a number of reasons:

- Donors rarely know or have the opportunity to influence what is said about their gifts on Schedule B or Schedule A, Part IV-A.
- The practices of accountants preparing Form 990 returns vary widely; much over-reporting of donor data occurs. Some report all aggregate donations over $5,000, rather than relying on the higher 2-percent threshold which would cause fewer donors to be listed. Others simply use a computer-generated donor list from the organization that contains extraneous and potentially revealing donor details.

- Even without disclosure of names and addresses, the publication of amounts given, specific dates, stock values, locations of real estate donated, etc., may allow curious minds who already have partial information to speculate about, narrow down, or actually identify the donors.

- We have already been contacted by individuals involved in "opposition research" who are using the Schedule B disclosures to piece together profiles of the major donors to charitable organizations whose ideologies or causes they wish to disrupt and disparage. This growing industry involves the use of expanding Internet databases, pretext telephone calls from investigative reporters, and information matching techniques that surpass the capacity of the IRS itself.

In essence, we suspect that the IRS has unwittingly permitted itself to become an accomplice to a massive invasion of taxpayer privacy through the release of exempt organization donor information.

That the IRS would allow this to occur is surprising in view of the much more protective polices that govern public release of private letter rulings (PLRs) and technical advice memoranda (TAMs). In those situations, the taxpayer is afforded the opportunity to request (and obtain) redaction of all identifying material before the ruling is made public. Amounts, dates, locations, prices, values, descriptions of property, and other specifics of subject matter are routinely and without question redacted before public release.

The Service's regulations under section 6110 provide the standards for such redactions. Reg. § 301.6110-3(a)(1) states that in order to protect the identity of persons named in such determinations, the Service must delete names, addresses and identifying numbers (e.g., social security numbers) from any publicly released determination. The regulation also provides that the Service must delete "[a]ny other information that would permit a person generally knowledgeable with respect to the appropriate community to identify any person." The "appropriate community" is defined as "that group of persons who would be able to associate a particular person with a category of transactions one of which is described in the written determination or background file document."

Elaborating on this section 6110 standard, the Internal Revenue Manual states that the "appropriate community" can be an industry community and/or a geographic community. IRM § 39.1.12.6. The IRM also provides that specific dates should be redacted if they would tend to identify the taxpayer involved. IRM § 39.1.12.5. The choice by the Service to redact the corporate names for contributed stock from publicly released copies of Schedule B, at least in some cases, indicates that the Service agrees that it is not only required to redact the actual names and addresses of contributors, but also any other information that would tend to lead a reader to be able to identify a contributor. It would therefore be logical to apply the section 6110 "a person generally knowledgeable with respect to the appropriate community" standard also in this context. In the case of an exempt organization, the appropriate community would generally be both the organization's "industry" community (e.g., health care organizations) and its geographic community. Given the ready availability of Form 990 information on the Internet, the appropriate community arguably also includes the larger national and international community of individuals and organizations who might have an interest in the organization, including donors, members and regulators.

Applying this standard demonstrates that the Service's current redactions are insufficient to prevent disclosure in many cases. For example,

- For a local charity in a small town, the disclosure that it has received a $100,000 donation from a single source could quickly lead a knowledgeable resident of that town to the conclusion that only the wealthy local resident who sits on the board of the charity could be the source of the contribution.

- For a charity that receives a donation of 10,000 shares of nonpublicly traded stock and then sells all of those shares, the disclosure of the number of shares combined with the required (by Form 990, Part I, Question 8) disclosure of detailed information regarding the sale of the shares would reveal the name of the corporation involved. As the Service has already recognized, revealing the name of the corporation for donated stock creates a significant risk that the donor of the stock could be readily identified.

- Our spot check of Schedule B information available on GuideStar revealed that a particular charity had received the contribution of 1,000 copies of a book, with the publisher *and* the purchaser identified by name. Assuming that the purchaser was the donor, the donor's identity was therefore revealed.

Recommendations

1 . Cease public release of Schedule Bs that contain the legend "not open to public disclosure," and release Schedule Bs only after a fully accurate legend appears on a revision of the form that notifies filers about what (if anything; see below) will be released and what will not, and the criteria for deciding what is released.

2. Modify Schedule B and/or the disclosure policy for Schedule B to prevent the release of identifying information in one of the following ways:

a. Limit the information reported on Schedule B to the names and addresses of contributors.

b. Leave Schedule B unchanged but make the entire Schedule B not subject to disclosure.

c. Modify the reporting of donor information beyond name and address on Schedule B so that it is collected in a way that avoids revealing details of specific donations, e.g., by using ranges and categories to request information from filing entities.

3. Expand Schedule B to include the public charity donor information now typically buried in an attachment to the Schedule A, Part IV-A, support schedule, and follow

one of the options listed above with respect to that information also.

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Investment Institute Seeks Clarification of Notice on Qualified Tuition Programs

Thomas T. Kim of the Investment Company Institute has suggested areas in need of clarification in Notice 2001-55, 2001-39 IRB 299, on the restriction on investment direction of qualified tuition programs under section 529(b)(5). (For Notice 2001-55, see The Exempt Organization Tax Review, November 2001, p. 258; Doc 2001-23435 (3 original pages); or 2001 TNT 175-10.)

December 21, 2001

BY FIRST CLASS MAIL

CC:ITA:RU (Notice 2001-55)
Room 5226
Internal Revenue Service
POB 7604, Ben Franklin Station
Washington, DC 20044

Re: Notice 2001-55 — Section 529
Qualified Tuition Programs

Ladies and Gentlemen:

The Investment Company Institute[1] commends the Service for issuing Notice 2001-55,[2] which provides guidance regarding the restriction on investment direction applicable to qualified tuition programs under section 529 of the Internal Revenue Code. The flexibility provided by the Notice will give program participants an opportunity to respond to changing market conditions, changes in account beneficiaries, and other circumstances under which individuals would reasonably seek to reallocate their investments. Coupled with the enhancements made to 529 programs by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Notice 2001-55 will help many Americans meet their higher education savings needs.

Specifically, Notice 2001-55 provides that a 529 program does not violate the restrictions of code section 529(b)(5) if it permits a change in the investment strategy selected for a 529 account once per calendar year and upon a change in the designated beneficiary of the account. This opportunity to change investment strategy is not available, however, unless the program is limited to broad-based investment strategies designed exclusively by the program.[3]

The regulatory regime that governs 529 programs is of particular interest to Institute members as they provide both the funding vehicles for many 529 programs and administrative services to such programs and their sponsoring states. Our specific comments below, which seek further clarification of the section 529 regulatory scheme, are designed to further advance the goal of enhancing savings opportunities for higher education.[4]

First, we urge the Service to clarify, through a safe harbor, that an investment company that meets the regulated investment company (RIC) qualification requirements under Subchapter M of the Internal Revenue Code — including the asset diversification requirement in code section 851(b)(3) — constitutes a "broad-based investment strategy." As the Service already has ruled that RICs may be the investment vehicles for 529 programs,[5] our request is essentially that final regulations reflect the Service's existing position.

Second, we urge the Service to clarify that the phrase "designed exclusively by the program" is to be interpreted by providing deference to states in their determination of investment strategies made available under their 529 programs. In this regard, consistent with previously issued letter rulings,[6] the Service should confirm that a preexisting investment vehicle determined by the state to be an appropriate investment strategy for its 529 program may be offered as such, so long as it meets otherwise applicable requirements.

Third, we urge the Service to clarify when, if at all, accounts must be aggregated in determining whether the once-per-calendar-year investment change limit has been reached. As a general matter, we believe that the Service should not require aggregation, which can lead to compliance difficulties for program administrators and inequitable or otherwise inappropriate treatment of beneficiaries and account owners.

I. "Broad-Based Investment Strategy"

The Notice requires that the investment strategies offered by a 529 program be "broad-based." We believe that the final regulations should include a safe harbor for investment vehicles offered by 529 programs that meet the definition of "broad-based investment strategies." Specifically, the safe harbor should provide that RICs, which must meet the asset diversification test of Subchapter M of the code, are "broad-based investment strategies."[7]

Code section 851(b)(3) requires RICs to meet specified diversification requirements that are designed to ensure that the performance of a RIC is not tied to the success of a few issuers. To meet the asset diversification test on each testing date: (1) at least 50 percent of the RIC's total assets must be invested in (a) cash, cash items, U.S. Government securities and shares of other RICs and (b) securities of issuers in which the RIC has an investment of no more than 5 percent of the RIC's assets and no more than 10 percent of the outstanding voting shares of the issuer; and (2) no more than 25 percent of the RIC's assets may be invested in the securities of any single issuer.

The purpose of the Subchapter M diversification test is "to assure that a regulated investment company is not closely tied to the success of a few issuers."[8] Although the term "broad-based" is *not* defined in the statute, the proposed regulations, or the Notice, the term presumably is intended