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Bullock, et al. v. IRS: Federal Court Strikes Down IRS Rule Change on Schedule B Donor Disclosure

On July 30, 2019, a **federal district court** in Montana invalidated **Revenue Procedure 2018-38**, which, last year, changed the long-standing general rule requiring exempt organizations to identify their larger donors to the IRS. The Rev. Proc. provided that organizations exempt from tax under IRC Sec. 501(a), other than those described in IRC Sec. 501(c)(3), were no longer required to provide the names and addresses of their contributors on Schedule B of Forms 990 or 990-EZ. (The Rev. Proc. did not affect the disclosure obligations of political organizations described in IRC Sec. 527.) In effect, the Rev. Proc. meant that IRC Sec. 501(c)(4) and IRC Sec. 501(c)(6) organizations (among others), which often make expenditures to influence candidate elections, would no longer have to identify their significant donors to the IRS. (Although Form 990 is generally a public document, the donor-identifying information on Schedule B is not public information. The IRS is prohibited from releasing it when responding to a public request for a copy of an organization's Form 990, and the organization is permitted to redact donor-identifying information from its own public-disclosure copies.)

The case was brought on behalf of the states of Montana (the named plaintiff, Steve Bullock, is the Governor) and New Jersey, both of which said they rely on Form 990 data, including Schedule B, to enforce their own tax and charitable solicitation laws. After finding that the states had standing to challenge the rule change, the court invalidated the Rev. Proc. because the IRS did not follow the notice and public comment requirements of the Administrative Procedure Act ("APA") before changing the long-standing disclosure rule.

It is not yet clear how the IRS will respond to the ruling. The IRS could appeal the decision, or, since the opinion found fault with IRS's procedures rather than with the merits of the Rev. Proc., the IRS might attempt to adopt the same rule after following the APA, including an opportunity for public comment.

One interesting twist for filing organizations is that the instructions accompanying the 2018 Schedule B follow the Rev. Proc., telling non-501(c)(3) filers that they do not have to provide donor-identifying information, so organizations that have already filed their 2018 returns may not have included the information. (In keeping with the Rev. Proc., however, the instructions make clear that these organizations do have to maintain this information in their files.) Other organizations affected by the Rev. Proc. and the ruling may not yet have filed their 2018 returns. The court did not address whether filers that have already submitted Form 990 without donor-identifying information on Schedule B, in accordance with the Rev. Proc. and the 2018 instructions, must amend their returns, or whether organizations that have not yet filed their 2018 returns but do so before the

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opportunity for appeal has passed must provide the information.

We will continue to follow this issue to see whether the IRS appeals the ruling, provides notice of a proposed rule change, or issues any guidance to filers.