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Enhanced disclosure of donor information in New York

By Michael J. Cooney

The New York Attorney General prevailed in the federal court of the Southern District of New York against Citizens United and its charitable arm, Citizens United Foundation, in requiring disclosure of donor information as a condition of soliciting financial support in the state. The decision follows a similar result in California, prompting charities and their donors to re-examine their expectations of privacy. Perhaps the most remarkable aspect of the decision is its potential broadening of the Attorney General's reporting regime for nonprofits generally.

The issue of donor confidentiality is not a new one by any means. At the federal level, public charities exempt under Section 501(c)(3) of the Internal Revenue Code of 1986 (the "Code") have long been required to file with the IRS an annual information return on Form 990, including its Schedule B donor disclosure. Churches and their integrated auxiliaries are an important exception to that filing requirement.

Congress, however, prohibited the IRS from making public the name or address of any contributor to that reporting charity—a protection not afforded to private foundations or political organizations. Further, public charities themselves are not required to disclose donor information, and so may withhold disclosure of their Schedule B to the public. Since 2006, this general deference to donor confidentiality recognized a specific statutory regime for reporting from the IRS to state officials, permitting donor disclosure to a state officer if the Service determines that such "return information may constitute evidence of noncompliance under the laws within the jurisdiction of the appropriate State officer." In other words, some evidence of probable cause is a pre-requisite to IRS disclosure.

Of course, states' attorneys general often have broad subpoena powers in the investigation of credible allegations of fraud or other illegality in the solicitation or use of charitable contributions. That well-established avenue of discovery seems little enhanced by access to donor information from IRS filings.

Yet the Ninth Circuit Court of Appeals in the case of *Center for Competitive Politics v. Harris* determined that the California Attorney General did not need a subpoena to access donor information, refusing to enjoin the state from requiring a complete copy of Form 990 Schedule B as

a condition of soliciting funds in the state. Despite objections from the plaintiff, the Circuit Court found that the California Attorney General provided sufficient justification for employing a state charitable solicitation disclosure requirement instead of issuing subpoenas. Importantly, the Ninth Circuit noted that while many documents filed in the California charities registry are open to public inspection, Form 990 Schedule B is confidential and accessible only to in-house staff and handled separately from non-confidential documents.

In the 1950s, New York (along with Massachusetts) created what has become a patchwork quilt of state registration and reporting imposed as a pre-requisite to charitable solicitation. Grounded on the premise that New Yorkers deserve to know their donations are protected against fraud and abuse, New York Executive Law Article 7-A requires the filing of Form 990 as part of the annual CHAR 500 submission. The instructions for the New York form reassure filers that the Form 990 Schedule B is exempt from disclosure to the public, as the complete filing package is otherwise made available by the Attorney General on-line at: https://www.charitiesnys.com/RegistrySearch/search_charities.jsp.

While charities were previously allowed to file redacted Schedules B with impunity, the New York Attorney General required complete disclosure beginning in 2012. The Citizens United entities challenged this requirement using First Amendment, Due Process and pre-emption claims. As in the earlier California case, all claims failed, resulting in dismissal of the Citizen United case.

As a result of these cases, nonprofits registering and reporting under state charitable solicitation laws should pay close attention to the information required and how it can be used. A state official may well have the power to compel a private charitable organization, absent any allegations of fraud or any other violation of the law, to disclose donor information. Donors for their part may change their behavior by giving anonymously, through intermediaries, or not at all.

The most lasting effect of the case may arise from the District Court's refusal to distinguish between Citizens United as a civic organization exempt under Code Section 501(c)(4) and its charitable affiliate under Code Section 501(c)(3). The opinion states that Citizens United Foundation "cannot advocate" as a Code Section 501(c)(3) entity, but charities do indeed advocate and have been a vital part of our public discourse since the days of abolition. Federal tax law is rather precise in its distinction between the two, for example in affording a donor an income tax charitable contribution deduction or subjecting compensation of both charities and civic organizations to the excess benefit rules.

Indeed, Citizens United submitted to the Attorney General its Schedule B every year since 1995. Perhaps as a result, the District Court found that the civic organization "falls smack dab within the attorney general's own definition of 'charitable organization'" and so is subject to the same registration and reporting regime as its charitable affiliate. Unclear from this holding is whether the great weight of New York law regulating charities is now also a burden on civic organizations.

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