



Client Alert



Court Reaffirms CA Attorney General's Demand for Donor List

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Donor information is expected to remain confidential.

With an apparent thumbs up from the U.S. Supreme Court, the Ninth Circuit Court of Appeals¹ once again upheld the position of the California Attorney General (AG) requiring that charities located or operating in California must provide a copy of their unredacted Form 990 Schedule B, including the names, addresses and contribution amounts for all donors listed.² While the court has preliminarily prevented the AG from making the information publicly available, the ruling is unwelcome news for charities concerned about protecting donors' identities. The collection of sensitive donor information from charities appears to be a growing trend by state Attorneys General.

Affected charities, including out-of-state charities soliciting or otherwise operating in California, should review their donor confidentiality policies and disclosures to ensure that their donors are aware of such requirements.

Regulation of Charities Located or Operating in California

Most California charities and certain out-of-state charities are required to register and file an annual report (Form RRF-1) with the AG's Registry of Charitable Trusts. Religious organizations, educational institutions, hospitals and health care service plans are exempt from this registration and reporting.

A copy of the charity's annual information return (Form 990 or Form 990-EZ) must be included with the annual report. The AG recently began treating annual reports submitted without Schedule B (or with a redacted Schedule B) as incomplete. Failure to file a complete report generally results in penalties, fees and the loss of California income tax exemption.

Several states, including New York, have a similar filing requirement. Both the California and New York AGs note that it is not their policy to disclose Schedule B to the public. In fact, in December of 2015, the California AG proposed amendments to state regulations to provide that donor information exempt from public inspection pursuant to the Internal Revenue Code will be maintained as confidential by the AG subject to certain limited exceptions.³

¹ *Americans for Prosperity Foundation v. Harris*, No. 15-55446 (9th Cir. Dec. 29, 2015).

² For our prior article on this subject matter, please visit <http://www.seyfarth.com/publications/CA060115-TEO>.

³ The AG has proposed to amend sections 310 and 999.1 of the California Code of Regulations Title 11, Division 1. The text of the proposed amendments and related materials may be found on the AG's website: <http://oag.ca.gov/charities/notice-prop-amend-regs>.

However, there is no guarantee that such disclosure policies (whether codified or not) will not change in the future and it is unclear if the donor information, once in the possession of a state attorney general, would be subject to a request for disclosure under that state's public records act.

Schedule B - Donor Disclosure

Schedule B to the Form 990 is used to disclose to the IRS the reporting organization's significant donors (generally those who contribute over \$5,000 in cash or property), including their names, addresses, and contribution amounts. Tax-exempt organizations are generally required to make available for public inspection and copying their three most recent annual returns, including copies of all schedules, attachments and supporting documents filed with these returns. Most such returns are posted and publicly available at no cost on third-party websites, such as Guidestar.org.

However, except for private foundations (Form 990-PF filers) and section 527 political organizations, public disclosure of the names and addresses of contributors set forth on Schedule B generally is not required, and the Schedules B of those organizations typically do not appear when posted online.

Center for Competitive Politics v. Harris

In an earlier case, Center for Competitive Politics, a Virginia nonprofit registered with the California AG, challenged the AG's unredacted Schedule B filing requirement. It argued that the disclosure violates its and its supporters' First Amendment rights to freedom of association and that certain nondisclosure rules under federal law preempt the state requirement.

The U.S. Court of Appeals for the Ninth Circuit rejected the Center's arguments, concluding that the disclosure requirement bears a substantial relation to a sufficiently important government interest and is facially constitutional, and the U.S. Supreme Court denied the Center's petition for the case to be reviewed.⁴

However, the Ninth Circuit left open the possibility that a future litigant could show a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment or reprisals that would warrant relief on an "as-applied" challenge.

Americans for Prosperity Foundation v. Harris

Two nonprofits, Americans for Prosperity Foundation and Thomas More Law Center, brought such a challenge, resulting in preliminary injunctions issued by the Federal District Court prohibiting the AG from demanding the plaintiffs' unredacted Schedules B.

The plaintiffs argued that confidential disclosure to the AG itself chills protected conduct or would lead to persecution and harassment of their donors by the state or the public. Second, they argued that, notwithstanding the AG's voluntary policy against disclosing Schedule B forms to the public, the AG may change its policy or be compelled to release the forms under state law, and that the resulting public disclosure would lead to harassment of their donors by the public, chilling protected conduct.

However, the Ninth Circuit vacated the injunctions and rejected the plaintiffs' arguments.⁵ The Court noted that neither plaintiff had shown anything more than broad allegations or subjective fears that *confidential* disclosure to the AG would chill participation or result in harassment of its donors by the state or the public. Neither plaintiff was able to show to the Court's satisfaction that the disclosure had actually chilled protected conduct or would be likely to do so, or that there was a reasonable probability of harassment at the hands of the state or the public due to such disclosure.

The Court did, however, issue a new injunction preventing the AG from publicly disclosing the Schedule B information, consistent with the AG's stated position and the proposed regulations.

⁴ *Center for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. May 1, 2015), cert. denied (November 9, 2015).

⁵ *Americans for Prosperity Foundation v. Harris*, No. 15-55446 (9th Cir. Dec. 29, 2015).

This decision, upholding the AG's confidential disclosure requirements, coupled with the AG's recent proposal to amend state regulations to generally prohibit the AG's disclosure of Schedule B information, appears to close the book on any new confidentiality exceptions to California's filing requirement. It would seem unlikely for the U.S. Supreme Court to agree to review the *Americans for Prosperity Foundation* case after having declined a review of the *Center for Competitive Politics* case.

Conclusion

These court decisions exemplify what we expect to be a growing trend by state Attorneys General to demand sensitive donor information from charities operating or soliciting in those states. Charities should continue to heed the Schedule B instructions and not include Schedule B in filings with states that do not specifically require it, as those states may inadvertently disclose the charity's donor information to the public.⁶

In addition, out-of-state charities that are (1) "doing business" in California for charitable purposes or (2) "holding property" in California, and are not currently registered with the AG's Registry of Charitable Trusts, may wish to consider contacting local counsel for advice regarding their California operations to avoid or minimize potential penalties.⁷

If you have any questions or would like further information, please contact [Ofer Lion](mailto:olion@seyfarth.com) at olion@seyfarth.com, [Douglas Mancino](mailto:dmancino@seyfarth.com) at dmancino@seyfarth.com, [Christian Canas](mailto:ccanas@seyfarth.com) at ccanas@seyfarth.com, or your Seyfarth attorney.

www.seyfarth.com/Tax-Exempt-Organizations

⁶ Schedule B, Page 5 (General Instructions: Public Inspection), available at <http://www.irs.gov/pub/irs-pdf/f990ezb.pdf>.

⁷ For a detailed discussion of California requirements that extend to out-of-state charities, see Mancino, "California Regulation of Out-of-State Charities," 17 *Taxation of Exempts* 6 (May/June 2006).

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