



Client Alert



Court Affirms CA Attorney General's Demand for Donor List

By Ofer Lion, Douglas M. Mancino, Christian Canas

Unwelcome news for charities concerned with donor confidentiality

A recent court ruling¹ upheld the position of the California Attorney General (AG) requiring that charities located or operating in California provide a copy of their unredacted Form 990 Schedule B, including the names, addresses and contribution amounts for all donors listed. While the AG has indicated that the information will not be made 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 return (Form 990) 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 their policy is not to disclose Schedule B to the public. However, there is no guarantee that their disclosure policies will not change in the future and it is unclear if the donor information, once in the possession of a state's AG, 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

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

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.

The 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 Ninth Circuit affirmed an earlier decision to deny the Center's motion for a preliminary injunction, rejecting the Center's arguments and concluding that the disclosure requirement bears a substantial relation to a sufficiently important government interest and is facially constitutional.²

However, the Court left open the possibility that the Center 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. Such a challenge, *Americans for Prosperity Foundation v. Harris*,³ is pending in the Ninth Circuit. So, the Court may soon carve such an exception out of California's filing requirement, or not.

Out-of-State Charities with a California Presence Subject to Disclosure

Out-of-state corporations that are (1) "doing business" in California for charitable purposes or (2) "holding property" in California for such purposes are subject to the AG's registration and filing requirements, as well as a whole host of other regulations generally applicable to California charities.⁴

"Doing business" is not a defined term, but generally requires that a corporation conduct some systematic or ongoing activity in California. The AG has issued limited examples of activities that, if conducted in the state, would constitute doing business in California, including: (1) soliciting donations by mail, by advertisements in publications, or by any other means from outside of California, (2) holding board or membership meetings, (3) maintaining an office, (4) having officers or employees who perform work, and/or (5) conducting charitable programs. Grantmaking in California, by itself, generally is not considered doing business in California.

The second basis for subjecting an out-of-state charity to the reporting and registration requirements is "holding property" in California for charitable purposes. Unfortunately, the AG's office has not issued guidance on the distinction between holding property for charitable purposes and holding property for investment or other non-charitable purposes other than a brief statement on its website that maintaining "financial accounts or investments at an office of a financial institution located in California" does not constitute doing business in California.

Out-of-state charities that may meet the above requirements 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.

² On May 15, 2015, the Center filed with the U.S. Supreme Court (Justice Kennedy) an application for an injunction to block the disclosure pending the filing and disposition of a petition for a writ of certiorari. In a setback to the Center, the application was denied without prejudice to renewal in light of any further developments.

³ *Americans for Prosperity Foundation v. Harris*, No. 2: 14-cv-09448-R-FFM (C.D. Cal. Feb. 23, 2015).

⁴ 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).

Conclusion

The recent *Center for Competitive Politics* decision exemplifies 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 require it, as those states may inadvertently disclose the charity's donor information to the public.⁵

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

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

www.seyfarth.com

Attorney Advertising. This Client Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Client Alert | June 1, 2015

©2015 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.