

Donors to Controversial Causes Must Take Care to Avoid Identity Disclosure

By Louis E. Michelson
and Boyd D. Hudson

Nonprofit organizations with controversial causes should learn how to report donor information on the annual Form 990s and avoid inadvertent disclosure. A recent change in Internal Revenue Service policy makes this education mandatory. Some commentators have gone as far as stating that the IRS has become an unwitting accomplice to a widespread invasion of privacy through the release of tax-exempt organization donor information.

When one makes a contribution of money or property to a tax-exempt organization, one usually does it with the objective to assist a worthwhile organization or cause. The charity normally reciprocates by recognition of the donor in year-end "honor rolls" or other forms of publicity. Most donors are pleased with the publicity. The names etched in the opera center walls or prominently displayed in theater playbill listings testify to their generosity.



Some commentators have stated that the IRS has become an unwitting accomplice to an invasion of privacy through the release of donor information.

The story, however, is different with tax-exempt organizations with controversial causes. There are thousands of tax-exempt organizations with hot-button causes, ranging from abortion rights to right to life and from school vouchers to gay rights. Some donors to these organizations prefer a lower profile — or even anonymity. These donors, their charities and their advisers may be very distressed when their cover is blown and they are listed as a supporter.

How can this happen, one might ask? Opposition research or "oppo-research" is the answer. These folk want to gather as much information as possible about major donors to charitable organizations that they wish to disrupt and disparage. When the opposition research "exposes" the major donors, in addition to the loss of their privacy, they may be harassed, intimidated and threatened or even experience physical harm. This problem has become more acute as the IRS and Congress have mandated increased public disclosure by tax-exempt organizations.

The first change was the increased disclosure requirements for public charities enacted in the Taxpayer Bill of Rights II (enacted July 30, 1996) and the same disclosure requirements for private foundations enacted in the Tax and Trade Relief Extension Act of 1998 (enacted Oct 21, 1998).

A balance between disclosure to the public of information on public charities and the right to privacy, which is the concern of individual donors, is codified in the Internal Revenue Code. Internal Revenue Code Section 6103 generally provides that returns

and return information shall be confidential. The IRS is prohibited from disclosing return information provided by the taxpayer to the IRS. However, in the case of tax-exempt organizations, the law recognizes that some disclosure is essential.

One exception to the general rule of confidentiality requires certain return information of an exempt organization to be made available to the public or to those who make a request. Internal Revenue Code Section 6104(b). Nonetheless, the IRS is not authorized to disclose the name or address of any contributor to any charity that is required to furnish the information to the IRS. Internal Revenue Code Section 6104(d)(3)(A). (In contrast, the IRS is authorized to release the name or address of any contributor to a private foundation or a Section 527 political organization.)

In 1999, the Treasury issued regulations under Section 6104 requiring tax-exempt public charities to furnish copies of their exemption application and the three most recent tax returns available to those that request them. These same rules became applicable March 13, 2000, to private foundations. T.D. 8818, 1999-1 C.B. 945 (1999), and T.D. 8861, 2000-1 C.B.441 (2000).

One way to satisfy this disclosure requirement is by posting the documents to the Internet. Some organizations, such as Guidestar.org, independently have accumulated this information and posted it to their Web site. In California, the California attorney general's Registry of Charitable Trusts publishes Form 990s for charities registered with it on its Web site, caag.state.ca.us/charities/.

Some tax-exempt organizations have taken advantage of the new disclosure environment to promote their activities on the Form 990. However, not all visitors and interested parties come to the party bearing gifts. Oppo-researchers have used this newly available information to tarnish certain charities or their donors.

The disclosure problem first arose in November 2001 when the IRS reversed its policy regarding public disclosure of information of Form 990, Schedule B (Schedule of Contributors). Schedule B was introduced for tax years beginning in 2000. Organizations, such as Section 501(c)(3) charitable organizations, that are obligated to file this form now are required to report the name, address, amount and other information regarding large donations received by the organization during the reporting period. For certain 501(c)(3) organizations that meet the one-third public support test of the regulations, the threshold for reporting a large donor is the greater of \$5,000 or 2 percent of total contributions, gifts and grants for the year.

At the top of Schedule B for 2000, a printed legend reads in large, italicized type, *"This form is generally not open to public inspection except for section 527 organizations."*

Despite the printed assurance, completed Schedule Bs began to appear on Guidestar's Web site, accompanying the Forms 990 that were filed by various charities. In most cases, the names and addresses of donors were not reflected on the Schedule B because of redaction by IRS personnel. However, other potentially identifying information was left in.

Tax Notes, a weekly publication for tax practitioners, highlighted this issue and the

potential damage to donors and tax-exempts. "IRS Releasing Redacted EO Donor Lists; Statement on Form is Wrong," Tax Notes, Nov. 19, 2001.

When the Tax Notes story appeared, an IRS representative explained that the IRS initially believed that the donor schedule was not disclosable. The IRS later changed its position in response to advice from the IRS disclosure litigation office. The released information began to appear on Guidestar.org in November 2001.

Some practitioners expressed concern that donors' identities could be deduced from remaining unredacted information. Without clear direction from the IRS, exempt organizations would continue completing Schedule B under the mistaken belief that the form would not be made public.

The IRS did modify the Schedule B for 2001: It no longer has the misleading legend. The instructions to the form now indicate that donor information other than names and addresses generally will be made public.

The same disclosure problem exists for those public charities that file the public support schedule (Form 990, Schedule A). Part IV-A of the support schedule requires a listing of the aggregate gifts of major donors for the previous four years.

The 2000 version of this form required that the major donor list be attached but contained the proviso that the list was not open to public inspection. However, similar to Schedule B, the IRS began releasing information that appeared on the support schedules, redacting only the names and addresses. The 2001 version of this form now instructs organizations not to file the list with the Form 990.

One more noteworthy change occurred in Form 990 disclosure. Previously, the instructions for Schedule B instructed filers to "[d]escribe the noncash contribution fully." The new 2001 form drops the word "fully" and states, "Describe the noncash contribution." Because of the uproar over the disclosure issue, the omission of the word "fully" is significant.

How might oppo-researchers use this information? It is very easy to piece together information from grantee lists of various private foundations and match them to a particular recipient charity being investigated. By matching the dollar amounts on the Schedule B to the grants on the Form 990PF's of the donors, an oppo-research consultant might determine where most of the contributions of the target charity come from.

To protect the privacy of major donors, tax-exempt organizations should consider the following:

- Because only name and address will be redacted by the IRS, do not include information on Schedule B that might lead to identifying a donor. Avoid providing amounts, values, dates and other information if such data will assist identifying a donor.

- If applicable, avoid reporting donors on Schedule B if their total gifts are between \$5,000 and the 2 percent threshold.

- Consider whether the IRS will treat the Form 990 as an incomplete return because of omission of donor-related information.

- Avoid disclosing more than minimal information about noncash contributions.

Louis E. Michelson is a tax and business lawyer who practices law in Sherman Oaks. **Boyd D. Hudson** practices tax law at Adams, Hawekotte & Hudson in Pasadena.