Comments of the Public Policy Legal Institute

On "Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations," REG-102508-16, 84 FED. REG. 47447 (Sept. 10, 2019)
December 6, 2019

Executive Summary and Recommendations:

The Public Policy Legal Institute strongly supports the proposed update to the regulations under Internal Revenue Code § 6033. The proposed update to the information reporting regulations is a welcome clarification and consolidation of the current regulations. Schedule B to Form 990 has been a troublesome form since it was implemented in 2000, and widespread evidence demonstrates that Schedule B can be misused and abused in a manner which violates congressional intent and Service practice and ignores important First Amendment safeguards in the Code. The danger to constitutionally- and statutorily-protected interests far outweighs any benefit from the current design of Schedule B, and the proposed update helps to remedy that imbalance and the Service's own mistakes.

The Service requested comments on "concerns regarding the efficient administration of the Code without the annual reporting of the names and addresses of substantial contributors for tax-exempt organizations other than section 501(c)(3) and section 527 organizations." 84 FED. REG. 47447, 47452 (Sept. 10, 2019)(daily ed.). This comment, in response to the Service's request, makes five specific recommendations in three areas:

1) **Protect Donors Against Indirect Disclosure:** Although welcome, the Explanation of the proposed update does not go far enough to protect donor privacy, especially in other Sections of the Code, such as Code §§ 6104 and 6110. Current Service practice and Code requirements protect not only against direct disclosure of donor names and addresses, but against indirect disclosure as well. The Service's Explanation should stress that nothing in the proposed update is intended to supersede or weaken existing protections against direct or indirect disclosure of donor information in other sections of the Code.

2) **Protect Donors Against the Misuse of Compelled Disclosures:** The Explanation of the proposed update should also stress that the ONLY intended purpose of Schedule B is the administration of tax laws, not campaign finance proposals, consumer protection, or any other non-tax-related laws. There is a widespread, and erroneous, impression that disclosures of taxpayers' compelled tax-related speech are somehow intended or expected to be used in a variety of other contexts. The Service itself has contributed to this unwarranted expansion of the use of compelled speech in, for example, a 2001 Service staff memorandum which, unilaterally and without basis, claimed that all compelled disclosures are to be released unless donor identification is specifically protected. This memorandum reversed the interpretation of the controlling Supreme Court decision about applicable donor disclosure and conflicts with the statutory language governing disclosures and their use by third parties. A 2002 letter from then-Exempt Organizations Division Director Steve Miller attempted to mitigate this interpretation, and was incorporated into the Internal Revenue Manual, but only for internal Service actions. This staff memo and any other similar regulatory guidance should be withdrawn and corrected, and the Service should make that clarification in the Explanation of this proposed update.

Donor disclosure protection should be the Service's default position, as it is in the statute and Constitution, not a Service-monitored and –controlled privilege. The Service's exchange of that information with other agencies, Federal and state, should not weaken or abrogate that donor disclosure protection. In addition to the proposed update, the Service should change the Internal Revenue Manual and other sub-regulatory guidance to resolve conflicts and contradictions which could lead to weakening donor privacy protections.

In addition, the Service should clarify for other agencies, including states and private organizations, that its rules against the misuse of information it gathers from taxpayers will be respected and enforced, even against those agencies which receive information from the Service. In particular, Service-compelled information may not be used for such non-tax-related activities as campaign-finance law enforcement or consumer protection. The Explanation of the proposed update should include a clear statement that, absent court order or similar due process-satisfying mechanisms, the use of compelled disclosure information is limited to tax administration-related purposes.

3) **Balance the Burdens and Risks of Schedule B Against the Lack of Need for the Compelled Disclosures:** Schedule B was well-intended, but has proven to be a waste of government and private resources, a threat to constitutionally- and statutorily-protected rights, and an invitation to misuse IRS information. Schedule B was always intended only to be a mechanism to strengthen donor protection, by, among other things, standardizing the presentation of required information in a manner that would prevent Service officials from inadvertently disclosing donor information reporting. Unfortunately, Schedule B has become a mechanism which is misused by state governments and others for purposes far afield from the efficient administration of federal tax laws. The Service itself admits that the information on this Schedule is not needed for tax administration, and can be easily obtained from original sources if needed. The Service should consider whether the statutory requirement to obtain names of substantial donors is adequately fulfilled by other Schedules in the Form 990, and the paperwork waste, constitutional risks and managerial burdens of having this particular Schedule far outweigh the utility of having a Schedule B at all.

The Commenter:

The Public Policy Legal Institute is a Washington state charitable corporation, recognized as exempt under Code § 501(c)(3). www.publicpolicylegal.com. PPLI's chief charitable purpose is educating the public about the constitutional and statutory rights of free speech and association. PPLI has filed "friend of the court" briefs in the Supreme Court of the United States and comments with the Service on tax administration proposals such as congressional intent in the development of Form 1024-A. The principal author of these comments for PPLI is Barnaby Zall, President and Chairman of PPLI.

Background:

Since 1976, congressional policy has been that taxpayer information is to be kept confidential except in "limited situations." The Supreme Court ratified that interpretation in 1987 against a request to release even redacted information. In 2000, facing repeated instances of

Service personnel releasing this confidential information, the Service adopted Schedule B, as an attempt to clearly identify for its own employees the information that could not be released.

But Schedule B failed, in large part because Service employees reversed the congressional and Supreme Court interpretation in a 2001 staff memorandum. In 2002, the Service decided just to ignore its own mistake and require people to request the information twice. That non-compliant policy has continued since, with the requests for non-compliant, non-tax administration-based use of Schedule B increasing. Those increasing requests have caused untold, but very real damage to tax-exempt organizations and individuals, with unrebutted court records of harassment and donor loss of privacy caused directly by the requests of state governments and Service leaks.

This has been the confused and confusing situation for almost twenty years, until this proposed update. In this proposed update, the Service would cut the Gordian knot by simply not requiring the name and address to be filed. The stated rationale is that the information is not needed, but the real answer is that the proposed update finally returns the Service position to what it was after *Scientology* and its progeny explained the correct interpretation of the legislative language and intent.

Other commenters on the update proposed in this NPRM have amply demonstrated the constitutional nature of the requirement to protect donor confidentiality and the unrebutted failure of various state government recipients of Schedules B. *See, e.g.*, Comments to this NPRM from the Institute for Free Speech and Americans for Prosperity Foundation. Cases such as *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016), *rev'd sub nom. Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018), *petition for cert. filed*, No. 19-251 (filed Aug. 26, 2019), No. 19-251, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-251.html, detail extensive disclosures and other violations of donor protections by state governments. Neither this constitutional and statutory analysis nor the recitations of unrebutted factual records of abuse have been challenged or answered in the comments to this NPRM.

Nor have any comments to this NPRM challenged the unrebutted statements of state governments that they don't need Schedule B filings. Fourteen state governments recently told the Supreme Court that neither they nor any other state government needed Schedule B to be filed with their tax authorities to effectively enforce their tax or other legal priorities. https://www.supremecourt.gov/DocketPDF/19/19-251/116963/20190925121200818_19-251%20Arizona%20Amicus%20Brief--PDFA.pdf, *see*, pp. 5-8. The state governments also noted that the required filing of Schedules B with state governments creates a threat that the filings and the information they contain will be illegally released, and that the threat affects citizens nationwide. *Id*., at 8-10.

Thus, no comments provided in response to this NPRM have indicated that the Secretary's discretion in promulgating this update is either arbitrary or capricious. The available record, therefore, is that the update is justified in both legal and factual terms. PPLI urges the expeditious adoption of the proposed update.

Law Regarding Donor Disclosure Protection:

The General Requirement to Protect Confidential Taxpayer Information from "Direct or Indirect" Disclosure:

Code § 6103 generally prohibits the Service from disclosing returns and return information, including "taxpayer return information" provided by the taxpayer to the Service. This is a "general rule" complicated by an exception for certain information that "cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer":

> Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103, lays down a general rule that "returns" and "return information" as defined therein shall be confidential. "Return information" is elaborately defined in § 6103(b)(2); immediately after that definition appears the following proviso, known as the Haskell Amendment: "[B]ut such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

Church of Scientology of California v. I.R.S., 484 U.S. 9, 10 (1987) ("*Scientology*").

By negative inference, under the statute and the "Haskell Amendment," information that can be "associated with or otherwise identify, **directly or indirectly**, a particular taxpayer" is fully protected from disclosure. *Scientology*, 484 U.S. at 14-15 (emphasis added).

Code § 6103(b)(2)(A) includes in "return information … the nature, source, or amount of his income, … receipts." Code § 6103(b)(8) defines a disclosure as "...the making known to any person in any manner whatever a return or return information." Both Code §§ 6103 and 6104 contain detailed restrictions and requirements for any disclosure to state governments of information about individuals' contributions. *See, e.g.*, Code §§ 6103(d)(1) (disclosure only to state tax agencies "for the purpose of and only to the extent necessary in, the administration of [tax] laws"), 6104(c)(3) (disclosure of information about non-501(c)(3) charitable organizations "for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or assets of such [charitable] organizations.").

Disclosure Requirements to be Interpreted Narrowly:

Prior to the Supreme Court's decision in *Scientology*, the Courts of Appeal had been split on whether simply redacting taxpayers' names and addresses was sufficient to protect the taxpayers' confidential information. In *Scientology*, the petitioner Church contended that the Haskell Amendment included: "all material in the files of the Internal Revenue Service (IRS) which can be redacted to delete those parts which would identify a particular taxpayer", so that it could obtain information about former church members held in Service files so long as identifying information was redacted. 484 U.S. at 11. The Service responded that "the mere redaction of identifying data will not, by virtue of the Haskell Amendment, take the material out of the definition of 'return information.'" *Id*.

The Court of Appeals in *Scientology* held that simple redaction was not sufficient to protect the taxpayer information: "Congress contemplated not merely the deletion of an identifying name or symbol on a document that contains return information, but agency reformulation of the return information into a statistical study or some other composite

product....” 792 F.2d 153, 160 (1986) (quotation remarks removed). Thus, the court held, “[M]ere deletion of the taxpayer’s name or other identifying data is not enough, since that would render the reformulation requirement entirely duplicative of the nonidentification requirement.” *Scientology*, 792 F.2d at 163. Two other Circuits agreed with the D.C. Circuit. *King v. IRS*, 688 F.2d 488, 493 (7th Cir. 1982); *Currie v. IRS*, 704 F.2d 523, 531-32 (11th Cir. 1983)(Haskell Amendment does not obligate the Service, in a suit under the Freedom of Information Act, to delete identifying material from documents and release what would otherwise be return information). But the Ninth Circuit had held that the Haskell Amendment removes from the category of protected return information any documents that do not identify a particular taxpayer once names, addresses, and similar details are deleted. *Long v. IRS*, 596 F.2d 362, 367-69 (9th Cir. 1979), *cert. den.* 446 U.S. 917 (1980).

The Supreme Court sided with the Service’s position, finding that neither the statutory language nor its legislative history indicated that the mere redaction of identifying information rendered the remaining material disclosable. *Scientology*, 484 U.S. at 14-15.

> One of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than respondent. *See* S. Rep. No. 94-938, p. 318 (1976), U.S. Code Cong. & Admin. News 1976, pp. 2897, 3747 (“[R]eturns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103”). Petitioner’s suggestion that the Haskell Amendment was intended to modify the restrictions of § 6103 by making all nonidentifying return information eligible for disclosure would mean that the Amendment was designed to undercut the legislation’s primary purpose of limiting access to tax filings.

Scientology, 484 U.S. at 16.

The Supreme Court rejected an assertion that “the segregation requirement of the FOIA, § 552(b), directs respondent to remove the identifiers from such documents as these and that, once the materials are purged of such identifiers, they must be disclosed because they no longer constitute return information described in § 6103(b)(2).” 484 U.S. at 14. The Court pointed out that the purpose of the restriction was to tighten restrictions on disclosure, not make them available under other statutes. “If the mere removal of identifying details from return information sufficed to put the information “in a form” envisioned by the Haskell Amendment [FOIA disclosure], the remainder of the categories included in § 6103(b)(2) would often be irrelevant. … Congress did not intend the statute to allow the disclosure of otherwise confidential return information merely by the redaction of identifying details.” 484 U.S. at 15, 16. A later D.C. Circuit decision clarified that “legal analyses” applicable to other taxpayers may be disclosed in a partially-redacted document but not “taxpayer-specific information.” *Tax Analysts v. I.R.S.*, 117 F.3d 607, 614-615 (D.C. Cir. 1997).

Thus, under *Scientology*, the privacy protections under Code § 6103 must be read expansively and disclosure requirements read narrowly. Redaction of specific identifying information alone is not sufficient to protect those interests.

The Requirement to Disclose Contributors on Form 990 Annual Information Returns:

Code § 6033(a) requires Code § 501(c) organizations to file annual information returns, generally known as Form 990, containing such information as the Secretary of the Treasury requires. This section applies generally to filing information with the Service, but, through the operation of other sections that require disclosure of information filed with the Service, also affects public disclosure requirements, and by extension, requirements applicable to information-sharing agreements with state governments. Otherwise, the Service could, by agreeing with state governments to ignore statutory and regulatory requirements, evade the privacy interests protected by Code § 6033 and other Code sections.

Code § 6033(b)(5) says that returns of Code § 501(c)(3) organizations[1] shall include "the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors." Treas. Reg. § 1.6033-2(a)(2)(ii) describes the information required to be filed in Part VIII of Form 990, including separate listings for gross revenue excluding contributions, and membership dues and assessments not otherwise included in gross revenues.

Treas. Reg. § 1.6033-2(a)(2)(ii)(*f*) requires a listing of "The total of the contributions, gifts, grants and similar amounts received by it during the taxable year, and the names and addresses of all persons who contributed, bequeathed or devised $5,000 or more (in money or other property) during the taxable year." Treas. Reg. § 1.6033-2(a)(2)(iii)(b) says that an "exempt organization other than a private foundation is required to report only the names and addresses of contributors of whom it has actual knowledge", giving as an example the need to report only an employer's name if an employee gave more than $5,000. Treas. Reg. § 1.6033-2(a)(2)(iii)(c) says that a person's gifts of more than $1,000 (or in excess of 2% of revenue) in a year must be aggregated. Since 2000, this contributor information has been reported on Schedule B to the Form 990.

The Exception to Confidentiality for Certain Tax-Exempt Organization Returns:

Like the Haskell Amendment to Code § 6103(b)(2), Code § 6104(b) provides that exempt organization return information "shall be made available to the public," but also states that: "Nothing in this subsection shall authorize the Secretary [of the Treasury] to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527) which is required to furnish such information." Similarly, Code § 6104(d)(1) provides for public inspection of Form 990s, but Code § 6104(d)(3)(A) says: "Nondisclosure of contributors, etc. In the case of an organization which is not [a private foundation or 527], paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization."

In other words, Code § 6033, as interpreted by the IRS, requires an exempt organization to file contributors' names and addresses with the IRS, but Code § 6104(d)(3)(A) says that most

[1] Code § 6033 has no direct statutory reference to Code § 501(c)(5), (c)(6) or most other tax-exempt organizations as it does for Code § 501(c)(3) and (c)(4) organizations. Since 1976, however, the Service has applied the information reporting requirements broadly, relying on the general authority under Code § 6033(a)(1) that requires the filing of "such other information for the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe." Code § 6033(a)(1). Code § 6033(f) requires Code § 501(c)(4) organizations to provide information about violations of the prohibition on excess benefit transactions in Code § 4958, but is silent on the other requirements applicable to Code § 501(c)(3) organizations under Code § 6033(b).

organizations need not disclose that information to the public. In fact, Code § 6104(b) says that the Secretary is not authorized to disclose that information.

There is no definition of what is protected from "disclosure of the name or address of any contributor." The Service carried the statutory language forward in the Regulations by declaring that the term "annual information return" required to be disclosed by organizations other than private foundations "does not include the name and address of any contributor to the organization." Treas. Reg. 301.6104(d)-1(b)(4)(ii).

In 2000, Interpreting § 6104, the Service Reversed *Scientology*'s Narrow Presumption of Disclosure and Contradicted Its Own § 6110 Regulations:

Ordinarily, similar phrases in a statute should be interpreted consistently, which would mean Code § 6104(d) should be interpreted similarly to the Haskell Amendment to Code § 6103, which, in turn, would make the *Scientology* narrowing interpretation applicable to this additional disclosure analysis. *Dolan v. U.S. Postal Service,* 546 U.S. 481, 486-87 (2006). Yet, in explaining the Code § 6104 regulations, the Service reversed the presumption of non-disclosure previously recognized by the Supreme Court in *Scientology*: "Section 6104(d) requires public disclosure of all the information contained on an exemption application and an annual information return filed with the IRS, unless the information is specifically excepted from disclosure." 65 FED.REG. 2030, 2032 (Jan. 13, 2000) (daily ed.).

Compare this regulatory interpretation of "disclosure of all the information … unless the information is specifically excepted from disclosure," *id.,* with *Scientology*'s quotation of the legislative history of the statute: "One of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than respondent. *See* S. Rep. No. 94-938, p. 318 (1976), U.S. Code Cong. & Admin. News 1976, pp. 2897, 3747 ('[R]eturns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103')." *Scientology*, 484 U.S. at 16.

The 2000 Federal Register statement was even more unusual because it is not consistent with the Service's own definition of what information identifies confidential taxpayer information, at least as applied to its own handling of taxpayer information submitted or obtained under Code § 6110. Treas. Reg § 301.6110-3 requires, in very broad terms, deletion of material that can be used to identify taxpayers:

> **§ 301.6110-3**
> **Deletion of certain information in written determinations open to public inspection.**
> (a) Information subject to deletion. There shall be deleted from the text of any written determination open to public inspection or subject to inspection upon written request and background file document subject to inspection upon written request pursuant to section 6110 the following types of information:
>
> (1) Identifying details. (i) The names, addresses, and identifying numbers (including telephone, license, social security, employer identification, credit card, and selective service numbers) of any person … and
>
> (ii) **Any other information that would permit a person generally knowledgeable with respect to the appropriate community to identify any**

> **person**. **The determination of whether information would permit identification of a particular person will be made in view of information available to the public at the time the written determination or background file document is made open or subject to inspection and in view of information that will subsequently become available, provided the Internal Revenue Service is made aware of such information and the potential that such information may identify any person**. The "appropriate community" is that group of persons who would be able to associate a particular person with a category of transactions one of which is described in the written determination or background file document. The appropriate community may vary according to the nature of the transaction which is the subject of the written determination. For example, if a steel company proposes to enter a transaction involving the purchase and installation of blast furnaces, the "appropriate community" may include all steel producers and blast furnace manufacturers, but if the installation process is a unique process of which everyone in national industry is aware, the "appropriate community" might also include the national industrial community. On the other hand, if the steel company proposes to enter a transaction involving the purchase of land on which to construct a building to house the blast furnaces, the "appropriate community" may also include those residing or doing business within the geographical locale of the land to be purchased.
>
> …
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> (5) Information within the ambit of personal privacy. Information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, **despite the fact that identifying details are deleted pursuant to paragraph (a)(1) of this section**. Personal privacy information encompasses embarrassing or sensitive information that a reasonable person would not reveal to the public under ordinary circumstances. Matters of personal privacy include, but are not limited to, details not yet public of a pending divorce, medical treatment for physical or mental disease or injury, adoption of a child, the amount of a gift, and **political preferences**. A clearly unwarranted invasion of personal privacy exists if from analysis of information submitted in support of the request for a written determination it is determined that the public interest purpose for requiring disclosure is outweighed by the potential harm attributable to such invasion of personal privacy.

Treas. Reg. § 301.6110-3 (emphases added).

Thus, for example, under Code § 6110, the IRS must delete from publicly-available material "the amount of a gift," or information that would permit identification of a person's "political preferences." Treas. Reg. § 301.6110-3(a)(5). The test is whether "it is determined that the public interest purpose for requiring disclosure is outweighed by the potential harm attributable to such invasion of personal privacy." *Id.* This is consistent with decades of Supreme Court precedent finding that government information should not be disclosed if the result might be harassment. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)("[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action.").

The D.C. Circuit cited this Code § 6110 as indicating a lower standard than the standard for Code § 6103. *Tax Analysts v. I.R.S.*, 117 F.3d at 612 ("§ 6103 is a statute specifically exempting certain matters from disclosure to the general public and leaving the IRS with no discretion to reveal those matters publicly."). Where Code § 6110 would allow revealing legal analysis after redaction, apparently Code § 6103 would not.

In other words, if, under Code § 6110, the IRS itself must use strict redaction criteria focusing on more than just the specific names and addresses of contributors, why should state governments be allowed to exploit lower privacy protection standards to obtain donor disclosures? There is no indication that Congress intended less protection for this compelled speech than for the federal government's own information, and the Supreme Court has made clear in the tax-exempt organization context that compelled speech is subject to substantial First Amendment limits on government action. *AID v. Alliance for Open Society Int'l*, 570 U.S. 205, 133 S.Ct. 2321, 2327 (2013).

***The Changing Application of These Rules to Contributor Information on Form 990 and Schedule B*:**

The Service has struggled to reconcile its privacy and disclosure obligations under these seemingly conflicting sections. The recent history of the interpretation of Code § 6104, in particular, contains evidence of internal IRS concern and incomplete revisions, and this conflict resonates directly in the consideration of this proposed update.

Prior to the introduction of Schedule B in 2000, Form 990 filers were required to compose a separate schedule identifying large donors in connection with reporting total contributions on Line 1d of Form 990, not subject to public disclosure. The General Instructions for the 1998 Form 990, for example, included Section L, which included the statements:

Note: Not open for public inspection. See the Caution below. …

Caution: If the organization files a copy of Form 990, or Form 990-EZ, and attachments with any state, do not include, in the attachments for the state, the schedule of contributors discussed above unless the schedule is specifically required by the state with which the organization is filing the return. States that do not require the information might nevertheless make it available for public inspection along with the rest of the return.

http://www.pgdc.com/pdf/forms/irs/1998/i990-ez.pdf.

In 2000, after a number of releases of contributor information, including through Guidestar, the Service determined that at least some of the disclosures were caused by Service employees in Ogden failing to recognize that these schedules of donors' information were protected material. The Service decided to help its employees protect the donors' information by creating a standard format, now called Schedule B to the Form 990 Annual Information Return. To help its employees, the original version of Schedule B in 2000 included in prominent large-font italicized text at the top of the first page the legend:

"**Note:** *This form is generally not open to public inspection except for section 527 organizations."*

Schedule B failed as a donor protection mechanism, in part because of a self-inflicted wound by Service reviewers. In 2001, in a memorandum, Service officials reversed the Service's position on disclosure of Schedule B. *Exempt Organization Tax Review*, December 2001, P. 386. Experienced practitioners complained:

> In November, we learned that legal disclosure officials at the IRS (in a memo we have requested but not yet received) advised the filing headquarters in Ogden, Utah, that Schedule B should be released despite the legend, redacting only name, address, and (we are told) other identifying information regarding donors. In fact, numerous Schedule B's have already been released and posted on GuideStar. A sample of those filings shows that while names and addresses are redacted, the aggregate amount of each donor's gifts, the type of gift (individual, payroll, or noncash), and other annotations on the form are made public in Part I.

Greg Colvin & Marcus Owens, "IRS Form 990 Donor Disclosure: Current Posture, Background, Options," 35 *EOTR* No. 3, March 2002, 408.

Colvin and Owens noted several examples of problems with the release of information other than name and address, including identification of donors through amounts of contributions and by correlating stock transactions and other information with amounts reported on a Schedule B. *Id*., at 409.

> Even without disclosure of names and addresses, the publication of amounts given, specific dates, stock values, locations of real estate donated, etc., may allow curious minds who already have partial information to speculate about, narrow down, or actually identify the donors.
>
> We have already been contacted by individuals involved in "opposition research" who are using the Schedule B disclosures to piece together profiles of the major donors to charitable organizations whose ideologies or causes they wish to disrupt and disparage. This growing industry involves the use of expanding Internet databases, pretext telephone calls from investigative reporters, and information matching techniques that surpass the capacity of the IRS itself.
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> In essence, we suspect that the IRS has unwittingly permitted itself to become an accomplice to a massive invasion of taxpayer privacy through the release of exempt organization donor information.

Id.

A 2002 IRS/TEGE Continuing Professional Education (internal training guide) article reflected the Service's ambiguity about Schedule B:

> In general, Forms 990 and 990-EZ, including Schedule A and certain information on Schedule B, must be available for public inspection. This does not include nondisclosable contributor information. These disclosure requirements were discussed in detail in Topic O of the FY 2000 CPE text.[2] **Schedule B is moving toward a situation where all of the nondisclosable contribution information required by Form 990 can be filed on Schedule B and easily removed before the return is made public**. This is still a work in process.

[2] Note that Topic O of the 2000 CPE did not discuss in detail the nondisclosable contributor information, other than to repeat the statutory text.

Cheryl Chasin, Debra Kawecki, and David Jones, "Topic G. The 990," at 232, http://www.irs.gov/pub/irs-tege/eotopicg02.pdf (emphasis added).

Nevertheless, the only significant change in the Schedule B since the 2002 CPE was published is the removal of the nondisclosure statement from the front page and moving the instructions to the end of the form. Apparently, the Schedule B is "still a work in progress", especially given the varying treatment of the schedule and its disclosure.

Any reliance on informal agency policy which is asserted as creating permanent governmental interests (as asserted in some litigation over Schedule B) is inherently weak. Agency discretion generally provides no authority "to alter [legal] requirements and to establish with the force of law that otherwise-prohibited conduct will not violate" a statute. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014). "An agency confronting resource constraints may change its own conduct, but it cannot change the law." *Id*., 134 S. Ct. at 446. In other words, statutory donor protection provisions, such as those described above, cannot be substantively changed simply by Service employee memoranda. None of the substantive donor protection provisions of the Code were changed by the creation and interpretation of Schedule B.

Unfortunately, the Service's implementation of Schedule still reflects the confusion sown in 2001. The current version of Schedule includes these somewhat contradictory instructions, with the first section reflecting the new Service position, but the second paragraph clearly derived from the old pre-Schedule B instructions:

> " … the names and addresses of contributors are not required to be made available for public inspection. All other information, including the amount of contributions, the description of noncash contributions, and any other information, is required to be made available for public inspection unless it clearly identifies the contributor."
>
> "If an organization files a copy of Form 990 or 990-EZ, and attachments, with any state, it should not include its Schedule B (Form 990, 990-EZ, or 990-PF) in the attachments for the state, unless a schedule of contributors is specifically required by the state. States that do not require the information might inadvertently make the schedule available for public inspection along with the rest of the Form 990 or 990-EZ."

Note that the term "clearly" in the first paragraph of the Instructions is inconsistent with the applicable regulations. Treas. Reg. § 301.6104(b)-1(b)(2) ("reasonably"). "Clearly" is a much broader standard than the narrow definition than in the Haskell Amendment and the Supreme Court's *Scientology* decision. "Petitioner's suggestion that the Haskell Amendment was intended to modify the restrictions of § 6103 by making all nonidentifying return information eligible for disclosure would mean that the Amendment was designed to undercut the legislation's primary purpose of limiting access to tax filings." *Scientology*, 484 U.S. at 16.

The Instructions' first paragraph is a change in the law, probably following the erroneous 2001 staff memorandum, while the second reflects the constitutional and statutory concerns that sparked the use of Schedule B in the first place and the findings of various courts, including the Supreme Court in *Scientology*. Neither is consistent with congressional intent, as found by the Supreme Court.

IRS Official Steve Miller's 2002 Interpretive Letter Does Not Clarify the Conflict:

The confused and confusing Service approach to this question was continued in an October 28, 2002 letter[3] from Steven T. Miller, then Director, Exempt Organizations. The October 2002 TEGE letter responds to concerns about the availability of contributor information on publicly-disclosed Schedules B by saying:

> We are taking several actions to address the issue of contributor privacy for IRC section 501(c) organizations. First, we will not include Schedule B on the CD sets or any other form of media that are made available to the public. Second, we will inform requesters that we will make redacted versions of Schedule B available upon request. Finally, when an individual makes a request for Schedule B, we will review the schedule on a case-by-case basis to determine whether the information can reasonably be expected to identify any contributor.

http://www.pgdc.com/pgdc/irs-protect-privacy-contributors-exempt-organizations.

The current Internal Revenue Manual includes a section incorporating the protections promised in the October 2002 TEGE letter:

> **11.3.9.13** (12-28-2007)
> **Information Subject to Deletion**
> …
>
> (2) Contributor names and addresses and some contribution amounts must be edited from certain returns before the returns are open to public inspection.
> (3) In general, the names and addresses of contributors to an organization other than a private foundation shall not be available for public inspection.
> …
>
> (4) The amounts of contributions and bequests to an organization shall be available for public inspection unless the disclosure can reasonably be expected to identify any contributor.
>
> ***Note:*** To reduce the risk of inadvertently identifying contributors, Exempt Organizations (EO) of TEGE has established the policy to not include Form 990 Schedule B, which lists contributors and the amounts of contributions, with copies of 990s for mass distribution, such as DVD sets or other public media, and will not include the schedules in individual requests for copies of Form 990s. Requestors are advised that a redacted Schedule B may be requested, and, if requested, the schedules are to be redacted in accordance with guidance provided in this section. This is the policy used by Ogden when copying Forms 990 for public use.

I.R.M. 11.3.9.13 (12/28/2007).

[3] Reprinted at Planned Giving Design Center, "IRS to Protect Privacy of Contributors to Exempt Organizations," Nov. 12, 2002, http://www.pgdc.com/pgdc/irs-protect-privacy-contributors-exempt-organizations.

Thus, the current Service procedure is to not provide disclosure copies of Schedule B at all. They do "advise" requestors that a redacted Schedule B is available. The redactions include name, address and any information that "can reasonably be expected to identify any contributor."

Again, note the Service position wavering between "reasonably be expected" (regulations and I.R.M.) and "clearly be expected" (Instructions) to identify a contributor, both of which are more lax in providing donor protection than the *Scientology* standard. "[M]ere deletion of the taxpayer's name or other identifying data is not enough, since that would render the reformulation requirement entirely duplicative of the nonidentification requirement." *Scientology*, 792 F.2d at 163.

> One of the major purposes in revising § 6103 was to tighten the restrictions on the use of return information by entities other than respondent. *See* S. Rep. No. 94-938, p. 318 (1976), U.S. Code Cong. & Admin. News 1976, pp. 2897, 3747 ("[R]eturns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103"). Petitioner's suggestion that the Haskell Amendment was intended to modify the restrictions of § 6103 by making all nonidentifying return information eligible for disclosure would mean that the Amendment was designed to undercut the legislation's primary purpose of limiting access to tax filings.

Scientology, 484 U.S. at 16.

Both the statutory language and the legislative history indicate that disclosure of identifying information would be only in "limited situations." Redaction alone was not enough to protect donors. Instead of the Service fixing its own mistaken interpretation of the disclosure standard to meet the legislative intent and judicial interpretations, it simply punted the question by saying it wouldn't release the information unless an inquiry was made, and then it would redact some of the information. As noted above, this compromise is a reversal of the Supreme Court's redaction instruction under Code § 6103 (as well as the general rule that similar phrases be interpreted alike), but it still provides a baseline for redacting information that, in context, "can reasonably be expected to identify any contributor."

Under the Conflicting Directions in the I.R.M., Redactions Should Include Disclosures That Can Be "Reasonably" Expected to Identify A Contributor. So What's "Reasonable"?

As to the amount of redaction required, there is little dispute over the non-disclosure of name and address. "(3) In general, the names and addresses of contributors to an organization other than a private foundation shall not be available for public inspection." I.R.M. 11.3.9.13.3. Indeed, Code § 6104(b) does not even "authorize" the IRS to release names and addresses.

In contrast, the I.R.M. twice states a general rule that at least "some" contribution amounts will be disclosed unless they are identifying. "(2) Contributor names and addresses **and some contribution amounts must** be edited from certain returns before the returns are open to public inspection." I.R.M. 11.3.9.13.2 (emphasis added). "(4) The amounts of contributions and bequests to an organization shall be available for public inspection unless the disclosure can reasonably be expected to identify any contributor." I.R.M. 11.3.9.13.4.

Unfortunately, neither Code § 6104(d) nor its implementing regulations (or the I.R.M.) state a basis for determining what the IRS will consider "reasonably" identifying information. In fact, the phrase does not appear in any other federal statute or regulation, even without the reference to a "contributor." The IRS has not published any guidance interpreting the phrase, and there are no cases interpreting the phrase. Even the October 2002 TEGE letter supplies only a "process" approach to privacy protection, and not a definition of what is protected.

Apparently, "Reasonable" Includes Information OTHER THAN Name and Address:

There is a general scheme in the Code § 6110 regulations for determining whether "other" information will permit identification of a contributor:

> The determination of whether information would permit identification of a particular person will be made in view of information available to the public at the time the written determination or background file document is made open or subject to inspection and in view of information that will subsequently become available, provided the Internal Revenue Service is made aware of such information and the potential that such information may identify any person. The "appropriate community" is that group of persons who would be able to associate a particular person with a category of transactions one of which is described in the written determination or background file document. The appropriate community may vary according to the nature of the transaction which is the subject of the written determination.

Citing this scheme, Colvin and Owens wrote in 2000:

> In those [Code § 6110] situations, the taxpayer is afforded the opportunity to request (and obtain) redaction of all identifying material before the ruling is made public. Amounts, dates, locations, prices, values, descriptions of property, and other specifics of subject matter are routinely and without question redacted before public release.
> …
> For a local charity in a small town, the disclosure that it has received a $100,000 donation from a single source could quickly lead a knowledgeable resident of that town to the conclusion that only the wealthy local resident who sits on the board of the charity could be the source of the contribution.
>
> For a charity that receives a donation of 10,000 shares of nonpublicly traded stock and then sells all of those shares, the disclosure of the number of shares combined with the required (by Form 990, Part I, Question 8) disclosure of detailed information regarding the sale of the shares would reveal the name of the corporation involved. As the Service has already recognized, revealing the name of the corporation for donated stock creates a significant risk that the donor of the stock could be readily identified.
>
> Our spot check of Schedule B information available on GuideStar revealed that a particular charity had received the contribution of 1,000 copies of a book, with the publisher and the purchaser identified by name. Assuming that the purchaser was the donor, the donor's identity was therefore revealed.

Colvin & Owens, *supra*, at 409.

Thus, it would likely be completely compliant to redact from an organization's Schedule B the names and addresses of all contributors, plus the contribution amounts which can indirectly

permit identification. This redaction, however, leaves open the question of "negative inference"-type identification.

The Code Seems to Require Protection for "Negative-Inference"-type Information, in an Era of Data Deep Dives:

Even where the contribution amount itself is not immediately identifying, would the amount, in conjunction with other information provided in the 990 or elsewhere make the amount identifying? That is the question answered affirmatively in the Code §§ 6103 and 6110 cases and Service analyses. Absent some indication of congressional intention sufficient to displace both the general privacy rules and the general similarity in interpretation canon, there is no reason to think that disclosure beyond the Service should be any more revealing than the Service's internal procedures.

The D.C. Circuit in *Tax Analysts*, *supra,* has noted that *Scientology* requires the use of at least one form of "negative-type" inference for Code § 6110 purposes: "If these portions of the FSAs are within the catchall 'other data,' the Supreme Court's *Scientology* opinion makes it irrelevant whether the legal analyses and conclusions themselves identify any individual taxpayers." *Tax Analysts*, 117 F.3d at 612, *citing Scientology*, 484 U.S. at 18.

In the absence of definition of the parameters of the Code § 6104(d) exception to the "general rule" of privacy protections in Code § 6103, *Scientology,* 484 U.S. at 10, the policy of the more strict privacy protections should apply: "Congress did not intend the statute to allow the disclosure of otherwise confidential return information merely by the redaction of identifying details." *Scientology,* 484 U.S. at 16; *Tax Analysts v. I.R.S.*, 117 F.3d at 614-615 ("legal analyses" applicable to other taxpayers may be disclosed in a partially-redacted document but not "taxpayer-specific information.").

As Colvin and Owens indicate, amounts that are not otherwise clearly identifying, can become so in conjunction with other information. "[M]ere deletion of the taxpayer's name or other identifying data is not enough." *Scientology*, 484 U.S. at 95 Today, this concern is far broader and more relevant than when the Supreme Court considered *Scientology* in 1987; the use of "big data" to identify individuals on the basis of incomplete, and seemingly unrelated, data is widespread. *See, e.g.*, Justin Rohrlich, "The Tax Man Browseth: The Use of Social Media to Catch Tax Cheats," *Quartz*, Dec. 26, 2018, https://qz.com/1507962/the-irs-wants-to-use-facebook-and-instagram-to-catch-tax-evaders/.

This concern has long been reflected (though, of course, in more primitive forms) in tax administration. For example, the Code § 6110 regulations offer an example of a steel company, which is identified solely by virtue of using a "unique process." Treas. Reg. § 301.6110-3. This single measure, untied to the amount being invested, is sufficient to identify the company for confidentiality protection purposes.

Similarly, a credit counseling agency private letter ruling, PLR 201314058 (April 5, 2013), redacts substantial information about the Code § 501(c)(3) organization, including the names and addresses of contributors and the amounts of all contributions. Nevertheless, the information available in the PLR permits a simple Google search to narrow the identification of

the organization to one of less than five possible organizations.[4] This would be the type of "narrowing down" research Colvin and Owens warned about in 2000. Colvin & Owens, *supra*, at 409. It is logical to assume, therefore, that it is as important to identify circumstances in which a contributor can be identified not just by the information on the Schedule B, but by other information, in conjunction with the Schedule B information.

There is clearly a reason to protect this information: the Colvin/Owens article identifies likely problems if amount or other information is released. For an organization which has members whose names and addresses do not appear on the Schedule B as filed, the implication, especially under *Scientology*, is that the membership information is protected by Code § 6103 against disclosure through selective redaction under Code § 6104. The question then is whether the Service can simply give that information to state governments or other requestors without regard to the historical, statutory and regulatory background protecting that information.

Conclusion:

The proposed update is not a complete answer to the problems the Service itself has caused by not respecting congressional intent and Supreme Court guidance. But it is far better than allowing the confusion and injury to continue. The update should be promulgated.

In addition, however, the Public Policy Legal Institute believes that the Explanation for the proposed update can be improved and the Service could do more to remedy its self-inflicted wounds. Five specific recommendations follow:

Recommendations:

The Service requested comments on "concerns regarding the efficient administration of the Code without the annual reporting of the names and addresses of substantial contributors for tax-exempt organizations other than section 501(c)(3) and section 527 organizations." 84 FED. REG. 47447, 47452 (Sept. 10, 2019)(daily ed.). This comment, in response to the Service's request, makes five specific recommendations:

1) ***Add Language to Explanation to Protect Donors Against Indirect Disclosure:***

Donor disclosure protection should be the Service's default position, as it is in the statute and Constitution, not a Service-monitored and –controlled privilege. The Service's exchange of that information with other agencies, Federal and state, should not weaken or abrogate that donor disclosure protection.

The Explanation of the proposed update only deals with the "efficient administration of the internal revenue laws," without referencing in appropriate amounts the equally-important privacy interests protected by, *inter alia*, Code §§ 6104 and 6110. This is inconsistent with prior Service consideration of, and regulatory balancing of, disclosure issues, and would be particularly important in light of changing technology which abruptly magnifies the likely

[4] The religious base of the organization, quote from the mission of the organization, the date of incorporation, the relatively small number of credit counseling organizations remaining operational following the enactment of Code § 501(q), and other information provide a working list of only three religiously-based credit counseling agencies in a recent Google search, which can be checked against the list of organizations whose exemptions were revoked in that time period.

damage from any failure to provide the previously-required protection. More to the point, as the last twenty years have shown, there is increasing hydraulic pressure to misuse Schedule B, which should be resisted, in part by clarifying some gaps in the Explanation.

In short, the proposal simply to not require the filing of names and addresses is not the level of protection the Service has traditionally applied to donor disclosure issues. In today's world, and as shown below, even in prior years, those blanks in the data sets can be easily and quickly filled. The Service has recognized as much, even years ago, in regulations which permitted redaction from disclosure of information which could "indirectly" identify donors. The Colvin and Owens analysis long before the advent of modern data techniques demonstrates the ease with which informational gaps could be filled in 2002; today more of those gaps can be filled, with more accuracy and speed. Just the availability of Google searches can uncover the identities of donors even in the absence of names and addresses.

As shown above, current Service practice and Code requirements protect not only against direct disclosure of donor names and addresses, but against indirect disclosure as well. The proposed update could be wrongly interpreted as a change in the Service's traditional donor protections, especially in light of the Service's changing and conflicting history and explanation of Schedule B. The Service's Explanation should stress that nothing in the proposed update is intended to supersede or weaken existing protections against direct or indirect disclosure of donor information in other sections of the Code, and should explain that disclosure of information which, directly or indirectly, might identify donors is not the default position.

2) ***Add Language to Explanation to Clarify that the Proposed Update Does Not Permit Use of Service-Compelled Information to be Used for Non-Tax Administration Purposes:***

There is a widespread, and erroneous, impression that disclosures of taxpayers' compelled tax-related speech are somehow intended BY THE SERVICE to be used in a variety of other contexts; the Service itself has contributed to this unwarranted expansion of the use of compelled speech in, for example, the 2001 Service staff memorandum described above. The 2002 letter from then-Exempt Organizations Division Director Steve Miller attempted to mitigate this interpretation, but, since it was only added to the I.R.M. applies just to internal Service actions. The Explanation of the proposed update should also stress that the ONLY intended purpose of Schedule B is the administration of tax laws, not campaign finance proposals, consumer protection, or any other non-tax-related laws.

3) & 4) ***Clarify and Remove Conflicts over Donor Disclosures Both in the Explanation and in Subregulatory Guidance:***

In addition to the proposed update, the Service should change the Internal Revenue Manual and other sub-regulatory guidance to resolve conflicts and contradictions which could lead to weakening donor privacy protections. Specifically, the 2001 staff memo and any other similar regulatory guidance ignoring or reversing legislative intent and the Supreme Court's guidance in *Scientology* should be withdrawn and corrected, and the Service also should make that clarification in the Explanation of this proposed update.

5) ***Remind Recipients of Service-Compelled Disclosures of the Applicable Rules Against Misuse of Tax-Related Information:***

The Service should clarify for other agencies, including states and private organizations, that its rules against the misuse of information it gathers from taxpayers will be respected and enforced, even against those agencies which receive information from the Service. For example, Service-compelled information may not be used for such non-tax-related activities as campaign-finance law enforcement, except pursuant to court order. The Explanation of the proposed update should include a recitation of those laws and the consequences of misuse of Service-provided information.