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IRS Ruling Hopefully Will Intensity Efforts To Expand Disclosure by Independent Groups

JEFF BRINDLE • September 24, 2018, 2:04 pm

What appears to be a blow to disclosure may spur efforts to enhance it.

On July 16, 2018, the U.S. Department of the Treasury ended the long-standing requirement that most 501(c) non-profits disclose their major donors to the Internal Revenue Service (IRS).

The surprise announcement naturally sent shock waves through those of us concerned with the growing influence of independent groups over federal, state and even local elections.

The Department of Treasury defended its action by noting that most 501(c) organizations are not mandated by law to disclose their donors and the information is not necessary for enforcement purposes. Plus, the move will reduce compliance costs.

“Americans shouldn’t be required to send the IRS information that it doesn’t need to effectively enforce our tax laws, and the IRS simply does not need tax returns with donor names and addresses to do its job in this area,” Treasury Secretary Steven Munchin said in a statement.

Further, the Department maintains that the new policy will better protect against the misuse of confidential information, including the use of social media to threaten donors.

The change reverses a policy that has been in effect for almost 60 years.

Critics say it is ill-timed since it makes it easier to get around a federal ban on foreign campaign contributions at a time when the U.S. Justice Department is conducting a major investigation of such influence and has already announced multiple indictments.

“This will make so-called dark money a bit darker,” Lloyd Hitoshi Mayer, a professor at Notre Dame Law School, told the New York Times in a July 18, 2018 story on the policy change.

Montana Governor Steve Bullock, a strong advocate of campaign finance disclosure rules and a possible 2020 Democratic presidential candidate, has filed a lawsuit to try to stop the change.

“Not only do we have a long history of fighting against dark money and corporate money in our elections, but it also could substantially impact our state treasuries- what Montana and other states collect,” he told the New York Times on July 24, 2018.

Those favoring the change, however, can point out that the new IRS policy comes on the heels of allegations that IRS officials may have intentionally hampered several hundred groups from forming 501(c)(4) social welfare organizations in recent years.

A Justice Department investigation in October 2015 declined to recommend criminal charges against IRS workers and instead blamed “mismanagement, poor judgement and institutional inertia” for the lengthy delays in approving the non-profit status of the affected groups.

Even so, a federal judge in April 2018 approved a \$3.5 million IRS settlement of a lawsuit filed by hundreds of Tea Party and other conservative groups. The lawsuit led to the release of a list of 426 groups that received special IRS scrutiny. It included 282 conservative groups, about two-thirds of the total, and 67 liberal groups, or 16 percent.

Non-profit groups were first allowed to become involved in politics in 1959 during the Eisenhower administration, when the IRS promulgated a regulation that permitted non-profit civic leagues to participate in politics if it was not their major purpose.

Prior to 1959, these groups could function only for social welfare purposes. This had been the case since 1913 when Congress passed legislation exempting organizations from paying federal taxes if they acted for the common welfare of the community.

Before the recent rule change, all 501(c) groups were required to disclose to IRS officials the names and addresses of all donors who gave more than \$5,000 annually. Donor information except for amounts was redacted on publicly-available reports released by the IRS.

Non-profits subject to the new policy no longer are required to file full information about donors to the IRS. They do still have to anonymously list the amounts received from each donor. Complete donor records also must be kept by the groups in case of audits or enforcement actions by the IRS.

501(c)(3) charitable organizations and 527 political organizations must continue to disclose their donors to the IRS in reports that are made available to the public.

The announcement that 501(c)(4) social welfare organizations, 501(c)(5) labor organizations, and 501(c)(6) trade associations would no longer be required to disclose their donors to the IRS has alarmed those in the field of campaign finance since many independent groups use one of these three types of non-profits to participate in elections.

At first blush, this somewhat unexpected policy change appears to increase the risk that illegal contributions will find their way to these secretive non-profits, thus constituting a serious threat to transparency in government.

Regulators took comfort from the fact that, under the old policy, IRS officials at least got a chance to review major donors to these non-profits. That scrutiny alone presumably chased off checks from foreign agents, mobsters and other unsuitable donors.

Instead of causing despair, the IRS change should become a rallying cry. Hopefully it will create a tipping point that moves donor disclosure squarely where it should be- under campaign finance law, not tax law.

While organizations set up to monitor campaign financing were more comfortable with the previous IRS policy, the complex non-profit reports available on the hard-to-use IRS website have always made it difficult for Joe Public to try to track the financial activity of 501(c) organizations involved in political campaigns.

The Department of the Treasury action may serve the public interest if it generates momentum in Congress and throughout the States to enact legislation that would require these organizations to register and disclose their politically-based financial activity to the public.

Let's face it, the now-exempt policy of requiring 501(c) groups to disclose their donors did little to enhance transparency of their political operations among the general public.

If this policy change and subsequent media attention reinvigorates efforts to require detailed disclosure at least by 501(c) groups involved in elections, it may end up a blessing in disguise.

The political engagement by 501(c) organizations and 527 Super PACs is and should be protected by the First Amendment. However, like political parties and candidates, these organizations should be required to fully disclose their election-related financial activity to the public.

This campaign finance activity should be disclosed to the Federal Election Commission (FEC) and state agencies like ELEC, not the IRS, which keeps the information virtually hidden from the public.

For eight years, the New Jersey Election Law Enforcement Commission has been urging the Legislature to enact legislation that more disclosure by independent groups, strengthen political parties, and greatly streamline pay-to-play laws. Both parties have introduced bills to accomplish these changes.

The proposals include:

Independent Groups

Registration and full disclosure of contributions and expenditures;

Political Parties

Exclude parties from Pay-to-Play;

Tax credit for small contributions to parties and candidates;

Increase contribution limits;

Allow parties to participate in gubernatorial campaigns;

Allow county parties to give to each other;

Pay-to-Play

One state law;

All contracts over \$17,500 disclosed;

End Fair and Open loophole;

Increase contractor donation to \$1,000;

Include PACs under the law; and,

Contractor donations to independent groups disclosed.

Taken together, these reforms would strengthen political parties while offsetting the growing influence of outside, independent groups over elections in New Jersey.

In light of the federal policy change, now would seem the perfect time to enact ELEC's legislative recommendations.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission.

The opinions presented here are his own and not necessarily those of the Commission.