



December 16, 2015

Via Federal eRulemaking Portal

The Hon. John A. Koskinen
Commissioner of Internal Revenue
CC:PA:LPD:PR (REG-138344-13)
Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

RE: Comments on IRS NPRM, REG-138344-13

Dear Commissioner Koskinen:

The Center for Competitive Politics (“CCP”) submits these comments in response to the above-referenced Notice of Proposed Rulemaking (the “NPRM”). For the following reasons, CCP urges the Internal Revenue Service (the “Service”) to abandon its proposal for certain tax-exempt organizations to collect and report to the Service their donors’ personal details, including Social Security numbers, in lieu of the “contemporaneous written acknowledgement” requirement:

- The NPRM’s alternative for documenting tax-deductible donations is more burdensome and intrusive than the current requirement for contemporaneous written acknowledgements, and there is no reason why any donor or exempt organization would elect this option;
- The NPRM’s requirement for exempt organizations to obtain and report donors’ Social Security numbers is unnecessary;
- It is questionable whether the Service will be able to properly safeguard donors’ Social Security numbers on these information returns.

INTEREST OF THE CENTER FOR COMPETITIVE POLITICS

Founded in 2005 by former Federal Election Commission Chairman Bradley Smith, the Center for Competitive Politics (“CCP”) is a 501(c)(3) organization that seeks to educate the public about the effects of money in politics, and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First

Amendment rights of speech, assembly, and petition through scholarly research and state and federal litigation.

As a 501(c)(3) organization, CCP's own fundraising and donor documentation requirements would be directly affected by the NPRM. However, CCP also is concerned that the intrusive collection of donor information the NPRM proposes would poison the general environment for non-profit fundraising – an activity which the Supreme Court repeatedly has held is protected by the First Amendment.¹

DISCUSSION

- A) *There is No Reason Why Any Donor or Exempt Organization Would Choose the NPRM's Alternative to the Contemporaneous Written Acknowledgement Requirement.*

In order for a donor to claim a tax deduction for making an eligible contribution of \$250 or more, the donor must obtain a contemporaneous written acknowledgment from the donee organization containing the following:

- (i) The amount of cash and a description (but not value) of any property other than cash contributed.
- (ii) Whether the donee organization provided any goods or services in consideration, in whole or in part, for any property described in clause (i).
- (iii) A description and good faith estimate of the value of any goods or services referred to in clause (ii) or, if such goods or services consist solely of intangible religious benefits, a statement to that effect.²

As an alternative to the contemporaneous written acknowledgement requirement, the NPRM proposes that donors may claim a deduction if the donee organization files an "information return" containing the following elements, and a copy of which must be provided to donors:

- (A) The name and address of the donee;
- (B) The name and address of the donor;
- (C) *The taxpayer identification number of the donor;*

¹ See, e.g., *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781 (1988).

² 26 U.S.C. § 170(f)(8)(B).

(D) The amount of cash and a description (but not necessarily the value) of any property other than cash contributed by the donor to the donee;

(E) Whether any goods and services were provided by the donee organization in consideration, in whole or in part, for the contribution by the donor; and

(F) A description and good faith estimate of the value of any goods and services provided by the donee organization or a statement that such goods and services consist solely of intangible religious benefits.³

It is obvious from the face of the NPRM that filing the optional information return is more burdensome and intrusive for exempt organizations than providing the contemporaneous written acknowledgment. Not only does the information return have to include all of the elements of the contemporaneous written acknowledgment, but it also must include donors' taxpayer identification (in most instances, Social Security) numbers. And it is not as if the NPRM's proposed alternative would reduce the flow of paperwork either; the alternative would simply replace the contemporaneous written acknowledgment that donee organizations have to send to donors with the copy of the information return.

In practice, nearly all charitable organizations would continue to send donation acknowledgement letters and emails to donors, even if such acknowledgments would no longer be required under the proposed rule. As noted in the "Best Practices: Gift Acknowledgement" guide published by the Association of Donor Relations Professionals, "Timely and meaningful acknowledgments [of donations] are essential to donor satisfaction and retention. They demonstrate that a donor's generosity is appreciated and that his or her gift will advance the mission of your organization. Good acknowledgments affirm to the donor that s/he has made a worthwhile investment. They set the stage for ongoing strategic communication about a donor's gift that will deepen his/her connection with your organization."⁴

Given: (1) the additional burden of collecting donors' sensitive Social Security numbers and the expense and significant risks involved in safeguarding such information from theft, hacking, and misuse; and (2) the likelihood that charitable organizations would continue to send written acknowledgments to donors anyway if the proposed rule were adopted, the Service has failed to explain why any exempt organization would choose to also file the information return.

³ Internal Rev. Svc., Notice of Proposed Rulemaking: Substantiation Requirement for Certain Contributions, 80 Fed. Reg. 55802, 55805 (Sep. 17, 2015) (*hereinafter*, "NPRM") (emphasis added).

⁴ "Best Practices: Gift Acknowledgement," Association of Donor Relations Professionals, *available at* <http://www.adrp.net/assets/adrp%20best%20practices%20-%20gift%20acknowledgment.pdf>

B) *The Requirement to Obtain and Report Donors' Social Security Numbers is Unnecessary.*

As discussed above, the information return proposed by the NPRM contains substantially the same information as a contemporary written acknowledgement, but for the additional requirement of collecting and reporting donees' taxpayer identification numbers. The only explanation the NPRM offers for this additional requirement – which is the central point of contention for comments that have responded to the NPRM thus far⁵ – is that “[t]he donors' taxpayer identification number is necessary in order to properly associate the donation information with the correct donor.”

This terse justification for such an intrusive data collection and reporting requirement is quite dubious. If donors' names and addresses are insufficient “to properly associate the donation information with the correct donor” without also requiring their taxpayer identification numbers, then how has the Service apparently managed over the past 20 years⁶ to associate donors with donee organizations using the contemporary written acknowledgements, which lack such information?

Without a more persuasive rationale, the requirement to collect and report donors' Social Security numbers on the information return appears to be wholly unnecessary.

C) *The Requirement to Obtain and Report Donors' Social Security Numbers Puts Donors at Risk.*

As the NPRM itself concedes: “The Treasury Department and the IRS are concerned about the potential risk for identity theft involved with donee reporting given that donees will be collecting donors' taxpayer identification numbers and maintaining those numbers for some period of time.”⁷

That alone should be sufficient reason for the Service not to adopt the proposal. However, there is an equal, if not greater, concern that the Service itself may not be a reliable repository of such sensitive information.

The NPRM implicitly acknowledges this concern when it explains that:

⁵ See, e.g., Michael Cohn, “Charities Concerned about IRS Proposal to Provide Social Security Numbers of Donors,” ACCOUNTING TODAY (Dec. 8, 2015), available at <http://www.accountingtoday.com/news/tax-practice/charities-concerned-irs-proposal-provide-social-security-numbers-donors-76634-1.html>.

⁶ As the NPRM notes, the requirement to substantiate charitable contributions of \$250 or more went into effect on January 1, 1994. NPRM, 80 Fed. Reg. at 55803.

⁷ *Id.* at 55804.

In order to better protect donor privacy, the Treasury Department and the IRS have concluded that the Form 990 series should not be used for donee reporting. Instead, before finalization of these proposed regulations, the IRS intends to develop a specific-use information return for donee reporting.⁸

Presumably, this is related to the Service's recent and disturbing release of confidential donor information contained on the Form 990s of groups such as the National Organization for Marriage (for which the Service recently paid a \$50,000 settlement⁹) and Republican Governors Association.¹⁰ These lapses apparently were not an anomaly; a report last year by the Treasury Inspector General for Tax Administration revealed that the Service "inadvertently disclosed sensitive taxpayer information" in 21 percent of Freedom of Information Act/Privacy Act requests and in 1.9 percent of other requests for taxpayer information.¹¹

While the Service inevitably must collect individuals' taxpayer identification numbers as part of the Form 1040 personal tax return, it is imperative that the Service not collect such information to a greater extent than is absolutely necessary. As discussed above, the requirement to collect donors' Social Security numbers and report them on donee organizations' information returns does not appear to be necessary to substantiate charitable deductions, and for the reasons discussed in this section, the Service does not appear to be capable of adequately safeguarding such information.

CONCLUSION

Even if exempt organizations do not elect the option of collecting and reporting donors' Social Security numbers in lieu of the contemporaneous written acknowledgement requirement, the NPRM's proposed alternative will have a chilling effect on charitable donations. Many donors who are not knowledgeable about the nuances of the substantiation requirements will inevitably believe that exercising their First Amendment right of association by donating to an organization requires providing their Social Security numbers.

⁸ *Id.* at 55803.

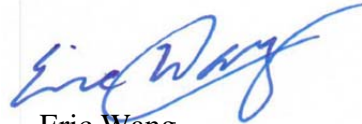
⁹ *See, e.g.*, Mackenzie Weinger, "IRS pays \$50K in confidentiality suit," POLITICO, Jun. 24, 2014, *available at* <http://www.politico.com/story/2014/06/irs-nom-lawsuit-108266>.

¹⁰ *See, e.g.*, Paul Abowd, "IRS 'outs' handful of donors to Republican group," CENTER FOR PUBLIC INTEGRITY, Apr. 4, 2013, *at* <http://www.publicintegrity.org/2013/04/04/12426/irs-outs-handful-donors-republican-group>.

¹¹ U.S. Dept. of the Treas., Treasury Inspector General for Tax Administration, FY 2014 Statutory Review of Compliance With the Freedom of Information Act, *available at* <https://www.treasury.gov/tigta/auditreports/2014reports/201430064fr.html#disclosure>.

For this reason, and all of the reasons discussed above, CCP urges the Service to abandon this rulemaking.

Respectfully submitted,



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¹² Eric Wang is also Special Counsel in the Election Law practice group at the Washington, DC law firm of Wiley Rein, LLP. Any opinions expressed herein are those of the Center for Competitive Politics and Mr. Wang, and not necessarily those of his firm or its clients.