



INSTITUTE FOR FREE SPEECH

December 7, 2017

The Honorable Mitch McConnell
Majority Leader
United States Senate
317 Russell Senate Office Building
Washington, DC 20510

The Honorable Paul Ryan
Speaker
United States House of Representatives
1233 Longworth House Office Building
Washington, DC 20515

Dear Majority Leader McConnell and Speaker Ryan,

The Institute for Free Speech¹ writes in support of repeal of the Internal Revenue Service's (IRS) Form 990, Schedule B requirement. Eliminating this mandate is a sensible and much-needed policy that would end the statutory requirement that the IRS collect sensitive information on nonprofit tax returns, detailing the names and addresses of significant donors to every charity in the country. Repealing this requirement would also prohibit the agency from collecting similar data from all nonprofit groups, save for narrowly-tailored exceptions.

In the 114th Congress, the House of Representatives passed legislation sponsored by Representative Peter Roskam (R-IL), H.R. 5053, the "Preventing IRS Abuse and Protecting Free Speech Act," that would have permanently repealed this requirement. Senator Tim Scott (R-SC) sponsored identical legislation under S. 3057 in the Senate. The Institute for Free Speech strongly supported those efforts² and urges Congress to again consider repeal of this invasive, speech-chilling, and unnecessary measure.

More specifically, repealing the Form 990, Schedule B would eliminate an outdated and ineffective portion of the tax code that serves no legitimate function as a regulatory tool for the agency, puts the privacy of American citizens at risk, and heightens the odds of politically motivated abuse by government officials.

Based on IRS data, we estimate providing this donor information on tax returns costs charities and other nonprofit groups **\$63 million per year**³ – money that could be better spent on program activities by charities and nonprofits.

¹ The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. The Institute is the nation's largest organization dedicated solely to protecting First Amendment political rights.

² See David Keating, "Letter in Support of H.R. 5053 ("Preventing IRS Abuse and Protecting Free Speech Act")," Institute for Free Speech. Retrieved on December 7, 2017. Available at: http://www.ifs.org/wp-content/uploads/2016/06/2016-06-13_Keating-Support-Letter_US_HR-5053_Elimination-Of-Form-990-Schedule-B.pdf (June 13, 2016) and David Keating, "Comments to Representative Peter Roskam Rebutting Unfounded Arguments about H.R. 5053 ("Preventing IRS Abuse and Protecting Free Speech Act")," Institute for Free Speech. Retrieved on December 7, 2017. Available at: http://www.ifs.org/wp-content/uploads/2016/04/2016-04-28_Keating-Comments_House_HR-5053_Anti-First-Amendment-Groups.pdf (April 28, 2016). Please note that both letters were authored by the Center for Competitive Politics, which is now the Institute for Free Speech.

³ Calculations available from the Institute for Free Speech upon request.

I. The IRS has failed to safeguard the private data of donors to nonprofits.

The government has long acknowledged that information about the names and addresses of donors to charitable organizations is sensitive information that should remain private. Accordingly, the IRS is statutorily required to respect the privacy of this information and prevent its public disclosure. Unfortunately, the IRS has proven it is incapable of maintaining donor privacy.

The IRS itself has indicated a desire to end such data collection on Form 990, Schedule B. A former IRS Commissioner and Director of Exempt Organizations explained that the IRS has considered dropping the Schedule B donor reporting requirement for some nonprofits because the agency has not found it useful for its oversight of tax-exempt groups and must expend significant resources to protect the confidentiality of nonprofit donors as required by law.⁴

There have also been repeated, often unintentional, leaks of this data by IRS employees.⁵ The agency has also expressed concern about the cost and practicality of protecting the privacy of this data in response to bulk Freedom of Information Act requests.

In short, the IRS has proven that it has not been able to guard the privacy of contributors to nonprofit organizations. It is worth noting that the Justice Department recently agreed to pay a multimillion-dollar settlement for the IRS's failures to administer the application for tax exemption in an unbiased manner.⁶ Among the actions the IRS took in inappropriately scrutinizing certain groups were inappropriate requests for affected organizations' private donor information. Given these concerns, ending the collection of this data is a reasonable and prudent step Congress should take to reduce the risk of future abuse for Americans who donate to nonprofit organizations and those organizations themselves.

II. The IRS does not require donor information to enforce the tax laws.

Simply put, the elimination of the Form 990, Schedule B would in no way hinder the ability of the IRS to enforce the laws and regulations applicable to donors and nonprofit groups. Regarding donors, in order to claim a tax deduction for a charitable contribution, the donor must have a receipt from the charity indicating the date of the donation, the name of the charity, and the

⁴ See Jillian P. Diamant and Tomer J. Inbar, "Possible end to required disclosure of contributors," *Lexology*. Retrieved on December 7, 2017. Available at: <https://www.lexology.com/library/detail.aspx?g=a43ecb44-f470-4333-b57d-5429f6e08a33/> (December 3, 2015) and Editorial Board, "The IRS's Donor Lists," *The Wall Street Journal*. Retrieved on December 7, 2017. Available at: <https://www.wsj.com/articles/the-irss-donor-lists-1463346736> (May 15, 2016).

⁵ See, for example, Jonathan H. Adler, "IRS agrees to pay non-profit group \$50,000 for unauthorized release of tax return," *The Washington Post*. Retrieved on December 7, 2017. Available at: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/24/irs-agrees-to-pay-non-profit-group-50000-for-unauthorized-release-of-tax-return/?utm_term=.1f0be7d2fb78 (June 24, 2014) and Eliana Johnson, "The Missing Koch Report," *National Review Online*. Retrieved on December 7, 2017. Available at: <http://www.nationalreview.com/article/356260/missing-koch-report-eliana-johnson> (August 20, 2013).

⁶ Emily Cochrane, "Justice Department Settles With Tea Party Groups After I.R.S. Scrutiny," *The New York Times*. Retrieved on December 7, 2017. Available at: <https://www.nytimes.com/2017/10/26/us/politics/irs-tea-party-lawsuit-settlement.html> (October 26, 2017).

amount of the payment.⁷ Simply put, there is no evidence the IRS uses – or plans to use – the information it compiles from charities to enforce compliance with the income tax.

Two primary arguments have been articulated to the contrary by those who believe the IRS needs this private information to monitor nonprofits, and neither holds merit.

First, it has been suggested that without the Schedule B, charitable organizations would be able to act for private gain and not their established public purpose. However, a provision allowing the IRS to continue collecting identifying information for officers, directors, and highly-compensated employees would negate this concern. Mass collection of major donor information is neither a necessary nor sufficient tool to combat this type of fraud. Additionally, the IRS has an array of other information it gathers on organizational tax returns that is useful in detecting bad actors attempting to use charities for private gain.

The insufficiency of the Schedule B as a law enforcement tool was highlighted in a recent court battle in California. In that case, *Americans for Prosperity Foundation (AFPF) v. Harris*, the investigative auditor for the Attorney General testified that in the 540 investigations of nonprofit activity conducted by the state of California, just five relied on the IRS Form 990, Schedule B. Further, in those five cases, the investigator could not recall if an unredacted Schedule B was part of the initial investigation. And, as the District Court’s decision in *AFPF v. Harris* notes, “even in instances where a Schedule B was relied on, the relevant information it contained could have been obtained from other sources.”⁸ IRS investigators have even greater tools and resources than the state of California. Form 990, Schedule B is, at best, redundant to any IRS investigation of fraud by a nonprofit group.

Second, some have argued that the Form 990, Schedule B is a necessary tool to prevent foreign contributions from influencing U.S. elections. As the Institute outlined in an earlier letter,⁹ such concerns are unfounded. Several protections in the law already exist to prevent foreign influence – most importantly the Bank Secrecy Act, which mandates the reporting of “any suspicious transaction relevant to a possible violation of law.” The Form 990, Schedule B, furthermore, does not aid in the detection of foreign influence, as foreign individuals are legally allowed to contribute to American nonprofits as long as the donations are segregated from general funds that may be used to engage in political speech. The Form 990, Schedule B, therefore, is not currently being used (nor could it be used) to monitor illegitimate foreign donations. Claims that elimination of the Schedule B would increase foreign influence in elections are little more than scaremongering.

⁷ “Substantiating Charitable Contributions,” Internal Revenue Service. Retrieved on December 7, 2017. Available at: <https://www.irs.gov/charities-non-profits/substantiating-charitable-contributions> (August 27, 2017).

⁸ *Americans for Prosperity Found. v. Harris*, 14-9448, 2016 U.S. Dist. LEXIS 53679 at *7 (C.D. Ca. Apr. 21, 2016) (citing (Bauman Test. 3/4/16, p. 31:8-32:10)).

⁹ See David Keating, “Comments to Representative Peter Roskam Rebutting Unfounded Arguments about H.R. 5053 (“Preventing IRS Abuse and Protecting Free Speech Act”),” Institute for Free Speech. Retrieved on December 7, 2017. Available at: http://www.ifs.org/wp-content/uploads/2016/04/2016-04-28_Keating-Comments_House_HR-5053_Anti-First-Amendment-Groups.pdf (April 28, 2016).

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For the above reasons, the Institute for Free Speech strongly supports Congressional action to eliminate the IRS Form 990, Schedule B. This requirement serves no benefit to the IRS or American citizens. When the IRS has received information from the Schedule B, the agency has shown an inability to keep donor information private, and, in so doing, has violated the speech and association rights of Americans and the nonprofits to which they contribute. As the IRS itself has acknowledged, the benefits of this Form do not outweigh the costs. To help prevent future IRS abuse, Congress should quickly act to eliminate this unnecessary provision.

Sincerely,



David Keating
President

CC: Members of the U.S. Senate Finance Committee
Members of the U.S. Senate Homeland Security and Governmental Affairs Committee
Members of the U.S. House Ways and Means Committee
Members of the U.S. House Oversight and Government Reform Committee