



**Before the
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Washington, D.C. 20224**

In the Matter of)
)
Substantiation Requirement for) RIN 1545-BL94
Certain Contributions) REG-138344-13
)

COMMENTS OF THE COMPETITIVE ENTERPRISE INSTITUTE

December 16, 2015

On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit these comments in response to the Internal Revenue Service's notice of proposed rulemaking concerning the time and manner for charitable organizations to file information returns on their contributions.¹ CEI is a nonprofit public interest organization dedicated to the principles of limited constitutional government and free enterprise.²

The Internal Revenue Code (IRC) generally permits a taxpayer to deduct from her income a charitable contribution of \$250 or more only if “the taxpayer substantiates the contribution by a contemporaneous written acknowledgment of the contribution by the donee organization.”³ For such an acknowledgment to effectively substantiate the contribution, it must contain certain details about the taxpayer's donation.⁴ But the IRC provides an exception to this general rule: a taxpayer need not obtain a contemporaneous written acknowledgment if the “donee organization files a return” in accordance with IRS rules that includes the same information that is otherwise required of a written acknowledgment.⁵

To date, however, the IRS has not issued any rules governing how a “donee organization” may report a taxpayer's contribution in lieu of furnishing the taxpayer a contemporaneous written acknowledgment of her donation.⁶ Indeed, the IRS has “specifically declined” to issue such regulations, asserting that the “present ... system works effectively, with minimal burden on donors and donees.”⁷ In other words, although Congress provided an alternative statutory means for taxpayers to substantiate charitable contributions in lieu of the contemporaneous written acknowledgment, IRS regulations have precluded taxpayers or donee organizations from availing themselves of this option.

Now, the IRS proposes regulations that would allow a donee organization to elect to report certain contributions, provided that the organization reports not only the amount of the contribution, but also the donor's name, address, and taxpayer

1. Substantiation Requirement for Certain Contributions, *Notice of Proposed Rulemaking*, 80 Fed. Reg. 55,802 (Sept. 17, 2015) [hereinafter NPRM], available at <http://www.regulations.gov/contentStreamer?documentId=IRS-2015-0049-0001&disposition=attachment&contentType=pdf>.

2. *About CEI*, COMPETITIVE ENTER. INST., <https://goo.gl/NS6bNe> (last visited Dec. 14, 2015).

3. 26 U.S.C. § 170(f)(8)(A).

4. *Id.* § 170(f)(8)(B).

5. *Id.* § 170(f)(8)(D).

6. NPRM, *supra* note 1, at 55,803.

7. *Id.*

identification number.⁸ The organization would also be required to retain this sensitive information in accordance with IRS recordkeeping requirements.⁹ The IRS contends that it needs these details so that it can “store, maintain, and readily retrieve the return information for a specific taxpayer if and when substantiation is required in the course of an examination.”¹⁰

We support steps to effectuate Congress’s desire to give taxpayers and charitable organizations multiple ways to substantiate donations of \$250 or more. However, the proposed rule raises significant privacy concerns for any taxpayer whose charitable donation is reported by the donee organization. These concerns appear to trump any administrative efficiencies the IRS might realize as a result of the reporting system it now proposes.

Each taxpayer who files a federal income tax return must furnish the IRS a taxpayer identification number.¹¹ This number is generally identical to one of the following: a social security number (SSN); an individual taxpayer identification number (ITIN); or an employer identification number (EIN).¹² Only a business may obtain an EIN, although some small businesses may file using the proprietor’s SSN.¹³ For an individual with a SSN—i.e., virtually all U.S. citizens and some noncitizens authorized to work in the United States—that person’s SSN is also their taxpayer identification number.¹⁴ Finally, certain resident and nonresident aliens can obtain an ITIN from the IRS, although no person who has an SSN—or is legally eligible to obtain one—may be issued an ITIN.¹⁵

Under the IRS proposal, donee organizations could opt in to reporting charitable donations of \$250 or more, provided that the organization obtain from each donor his or her taxpayer identification number and report it to the IRS.¹⁶ Because most charitable organizations receive a substantial portion of their contributions from

8. *Id.* at 55,804.

9. *Id.*

10. *Id.*

11. 26 C.F.R. §§ 301.6109-1(b).

12. *See generally id.* §§ 301.6109-1(a)(1).

13. *Id.* §§ 301.6109-1(a)(1)(ii)(C)–(D).

14. *Id.* § 301.6109-1(a)(1)(ii)(A); *see also* INTERNAL REVENUE SERV., TOPIC 857 – INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER, <https://www.irs.gov/taxtopics/tc857.html> (last visited Dec. 16, 2015).

15. 26 C.F.R. § 301.6109-1(a)(1)(ii)(B).

16. NPRM, *supra* note 1, at 55,804.

individuals who are U.S. citizens, any organization that elects to avail itself of this new reporting option will almost certainly need to collect SSNs from its donors—and retain this data for years.¹⁷

The downside of this approach is obvious, especially given the recent epidemic of identity theft, which afflicted nearly 18 million Americans in 2014.¹⁸ For a criminal who wishes to obtain credit under another person's identity, or otherwise impersonate another individual for some nefarious reason, acquiring that person's SSN is often essential.¹⁹ Whereas many details about a person—such as her full name, date of birth, home address, employer, telephone number, her maiden name, and so forth—can often be found with relative ease on the Internet, uncovering a person's SSN is rarely a trivial task.²⁰

In addition to government agencies, lenders and employers often ask for an individual's SSN for a variety of legitimate reasons.²¹ Similarly, certain businesses that regularly enter into long-term service agreements with their customers, such as insurers, wireless carriers, and television providers, often request a prospective customer's SSN so as to better assess the customer's risk profile.²² However, outside of these contexts, individuals are rarely asked to divulge their SSN in the course of everyday transactions—and when a business asks for a customer's SSN, the customer may decline to provide it.²³

17. *See id.*

18. *Compare* ERIKA HARRELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VICTIMS OF IDENTITY THEFT, 2014 1 (2015), *available at* <http://www.bjs.gov/content/pub/pdf/vit14.pdf> (17.6 million U.S. victims of identity theft in 2014), *with* LYNN LANGTON & MICHAEL PLANTY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VICTIMS OF IDENTITY THEFT, 2008 1 (2010), *available at* <http://www.bjs.gov/content/pub/pdf/vit08.pdf> (11.7 million victims in 2008).

19. Jordan Robertson, *Here's Why Your Social Security Number Is Holy Grail for Hackers*, BLOOMBERGBUSINESS (Feb. 5, 2015, 5:32 PM), <http://www.bloomberg.com/news/articles/2015-02-05/here-s-why-your-social-security-number-is-holy-grail-for-hackers>.

20. *Cf.* Adam Dachis, *How Thieves Steal Your Identity (and How You Can Protect Yourself)*, LIFEHACKER (Apr. 10, 2012), <http://lifehacker.com/5900782/how-thieves-steal-your-identity-and-how-you-can-protect-yourself>.

21. *See, e.g.*, Barbara Kiviat, *Guarding Your Social Security Number*, TIME (Dec. 4, 2007), <http://content.time.com/time/business/article/0,8599,1690827,00.html>.

22. *See* Terry Sheridan, *What To Do When Someone Asks For Your Social Security Number*, BUSINESS INSIDER (Jul. 12, 2013, 12:54 PM), <http://www.businessinsider.com/protect-your-social-security-number-2013-7>.

23. *Cf.* Adam Levin, *5 Places Where You Should Never Give Your Social Security Number*, HUFFINGTON POST (Mar. 28, 2013, 8:01 AM), http://www.huffingtonpost.com/adam-levin/identity-theft_b_2967679.html.

By expanding the number of entities that have a legitimate reason to obtain and store SSNs, the proposed rule would compound the many risks that individuals already face from identity thieves and other criminals. Unlike large corporations such as banks and insurers that routinely handle sensitive information, many non-profit charitable organizations are fairly unsophisticated when it comes to data security.²⁴ Even the IRS admits it is worried 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.”²⁵ And the IRS regularly advises taxpayers not to give out their SSNs unless doing so is “absolutely necessary.”²⁶

Some privacy risks are inescapable if the IRS is to function properly; for instance, it is hard to imagine how the IRS could administer the federal income tax system without requiring Americans to divulge their sources of income.²⁷ But when the IRS can craft regulations *without* endangering sensitive personal information, it should do so—as it can in this proceeding. Specifically, the IRS could simply require donee organizations that opt in to the donor reporting regime to report each donor’s full name and address—but not their taxpayer identification number. The IRS claims that it needs each donor’s “taxpayer identification number is necessary in order to properly associate the donation information with the correct donor,”²⁸ but this seems more like an administrative convenience than a genuine necessity. Although excluding taxpayer identification numbers from donee organizations’ reports might add some complexity to the process of matching a particular taxpayer’s claimed charitable gift deduction to the reporting of that gift by the donee organization, it is difficult to see why an IRS examination could not reliably link a taxpayer’s name and address with those same data points on a charitable organization’s return.

As the IRS observes in the notice of proposed rulemaking, under current law, charitable organizations send contemporaneous written substantiations only to

24. See Nat’l Council of Nonprofits, *Gift Substantiation Proposed Regulations of the Treasury Department and Internal Revenue Service 3* (2015), available at <https://www.councilofnonprofits.org/sites/default/files/documents/IRS%20Gift%20Substantiation%20proposal%20-%20Analysis%20by%20National%20Council%20of%20Nonprofits.pdf>.

25. NPRM, *supra* note 1, at 55,804.

26. See Nat’l Council of Nonprofits, *supra* note 24, at 2.

27. See generally Boris I. Bittker, *Federal Income Tax Returns – Confidentiality vs. Public Disclosure*, 20 WASHBURN L.J. 479 (1981).

28. NPRM, *supra* note 1, at 55,804.

donors—not to the IRS.²⁹ The taxpayer may then claim a deduction for an amount commensurate to the gift described in the written acknowledgment, which the IRS will later review only if “substantiation is required in the course of an examination.”³⁰ Although existing regulations require charitable organizations to disclose certain major donations to the IRS, an organization must report only those donors who give \$5,000 or more in a year—and even then, the IRS mandates the disclosure of such donors’ names and addresses, but not their taxpayer identification numbers.³¹

Moreover, although the proposed rule is voluntary, the IRS could conceivably alter its rules to *require* charitable organizations to collect their donors’ identities—including their SSNs—and report them to the IRS. This outcome would compound the aforementioned privacy risks and the burdens on smaller charitable organizations.

Indeed, some nonprofits have expressed concerns that the proposed rule might not remain “voluntary” for long, particularly given recent revelations about the IRS targeting certain charitable organizations for reasons often described as politically motivated.³² If the proposed reporting procedures were mandatory, the donation reports filed by controversial organizations would invariably become a prized target for advocates and unscrupulous journalists. For instance, in 2012, an IRS agent leaked the National Organization for Marriage’s confidential donor list to its chief opponent, the Human Rights Campaign, as a subsequent investigation by the House Ways and Means Committee concluded.³³ This is not the only instance in which a charitable organization’s donor list—i.e., Schedule B of IRS Form 990—has found its way into the media. According to a recent court filing, the Americans for Prosperity Foundation stated that California’s Register of Charitable Trusts had allowed the public to access more than 1,400 unredacted versions of nonprofits’ donor disclosures to the IRS through the register’s searchable online database.³⁴ If these disclosures had contained individual SSNs, many donors to charitable organizations would now be vulnerable to all sorts of mischief and criminal wrongdoing.

29. *Id.*

30. *Id.*

31. See 26 C.F.R. § 1.6033-2(a)(2)(ii)(f).

32. See, e.g., Editorial, *The IRS Targets Political Donors*, WALL ST. J., Dec. 16, 2015, available at <http://www.wsj.com/articles/the-irs-targets-political-donors-1450225321>.

33. Eliana Johnson, *Investigation IDs IRS Leaker*, NAT’L REV. (Oct. 30, 2015), <http://www.nationalreview.com/article/362667/investigation-ids-irs-leaker-eliana-johnson>.

34. Response of Plaintiff-Appellee to Defendant-Appellant’s Motion to Stay Trial Proceedings Pending Appeal at 17, *Ams. for Prosperity Found. v. Harris*, No. 15-55446 (9th Cir. Nov. 5, 2015), available at <http://freebeacon.com/wp-content/uploads/2015/11/afpf-motion.pdf>.

For the foregoing reasons, we urge the IRS to amend its proposed rule so as not to require donee organizations to collect or report donor taxpayer identification numbers under any circumstances.

Respectfully Submitted,

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