Free Speech
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December 16, 2015
via the Federal eRulemaking Portal at
http://www.regulations.gov
(IRS REG–138344–13)

Mr. John Dalrymple
Deputy Commissioner for Services and Enforcement
CC:PA:LPD:PR (REG–138344–13), Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments of the Free Speech Coalition, Inc.,
Free Speech Defense and Education Fund, Inc.,
and Other Tax-Exempt Organizations
in Response to Department of the Treasury (IRS)
Notice of Proposed Rulemaking relating to
"Substantiation Requirement for Certain Contributions"

Dear Mr. Dalrymple:

These comments are submitted on behalf of The Free Speech Coalition, Inc. ("FSC") and Free Speech Defense and Education Fund, Inc. ("FSDEF"), and the following tax-exempt organizations:

Campaign for Liberty Foundation
Campaign for Liberty, Inc.
Citizens United
Citizens United Foundation
Clare Boothe Luce Policy Institute
Conservative Legal Defense and Education Fund
DownsizeDC.org
Downsize D.C. Foundation
English First
Gun Owners of America, Inc.

Gun Owners Foundation
The Heller Foundation
National Center on Sexual Exploitation
Policy Analysis Center
Public Advocate of the United States
The Senior Citizens League
U.S. Border Control Foundation
U.S. Justice Foundation
Western Center for Journalism
Young America's Foundation

We appreciate the opportunity to comment on the proposed regulations set forth in the Notice of Proposed Rulemaking relating to "Substantiation Requirement for Certain Contributions" (hereinafter referred to as the "NPRM"). 80 *Fed. Reg.* 55802 (Sept. 17, 2015).

IDENTITY AND INTEREST OF COMMENTERS

FSC is an association of conservative, libertarian, liberal, and non-ideological issue-activists concerned with the preservation of the rights of nonprofit advocacy organizations and substantially, but not exclusively, focused on questions related to the First Amendment. This diverse group, formed 22 years ago and exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"), has had occasion to present its views to the Internal Revenue Service ("IRS") in the past on a variety of regulatory issues, ranging from proposed regulations defining lobbying and burdensome disclaimer requirements to proposed regulations redefining permissible IRC section 501(c)(4) activity. In general, FSC has been pleased that some of its past suggestions — often jointed in by many other commenters — have been heeded by the IRS. Hopefully, that will occur again in this case, where the proposed regulations appear to be unnecessary for the proper administration of the federal tax code and, in the view of FSC, are ill-advised.

Although, as an IRC section 501(c)(4) organization, FSC does not receive tax-deductible charitable contributions, FSC and its member organizations have an interest in opposing officious, expensive, and unnecessary regulatory expansion. For more than two decades, FSC members have banded together to defend the interests of Americans who want to participate fully in the formation of public policy in this country without undue governmental interference and restriction, and they do so again in opposition to the IRS proposed regulations being considered in this NPRM. FSDEF, which joins FSC in submitting these comments, is an educational public charity, exempt from federal income tax under IRC section 501(c)(3), which works in defense of a robust, deregulated marketplace of ideas. FSDEF, which does receive tax-deductible charitable contributions, would be directly impacted by the proposed regulations, and opposes the proposed regulations under consideration in this NPRM.

Likewise, the other nonprofit organizations joining these comments are exempt from federal income tax under IRC section 501(c)(3) or 501(c)(4).

OVERVIEW

The proposed regulations threaten to intrude into a system that the government concedes is working fine as is. The NPRM offers no convincing justification for such proposed regulations. Moreover, implementation of such regulatory changes obviously would be burdensome to the government, impose new burdens on nonprofits, and would threaten the privacy of confidential donor information and risk of identity theft. Although the NPRM attempts to downplay such burden and risk, it offers no supporting assessment of the regulatory impact, and its primary disclaimer regarding any significant regulatory impact upon the public is that the records/reporting system proposed by the regulatory change would be optional. Such an evasive rationale is vapid in both form and substance. Although it may be difficult to assess with precision the damage that would be wrought by such unnecessary regulation, these commenters are certain that real harm resulting to Americans would be the result of such unnecessary, intrusive, confusing, and poorly designed regulations.

COMMENTS

1. **The proposed regulations are unnecessary**. Currently, IRC section 170(f)(8) requires a taxpayer claiming a charitable contribution deduction of $250 or more to have substantiation for the contribution in the form of a contemporaneous written acknowledgment received from the donee charity, which must include certain designated information and be provided in a timely manner — *i.e.*, "contemporaneously." That acknowledgment letter — referred to in the NPRM as the"contemporaneous written acknowledgment," or "CWA" — is required to be sent by the charity and retained by the donor to substantiate such a gift under section 170(f)(8).

According to the NPRM itself, "[t]he present CWA system works effectively, with minimal burden on donors and donees, and the Treasury Department and the IRS have received few requests…to implement a donee reporting system." 80 *Fed. Reg*. at 55803. **Nothing in the NPRM would contradict that statement regarding how well the current system works, and the NPRM is devoid of any serious rationale that the system needs to be changed or further developed.** Thus, the proposed regulations are being offered without any real justification for their adoption.

Even though the statute allows for an optional system allowing a deduction if the charity files a return including the information required to be disclosed on the CWA, the NPRM admits that **the IRS decided ("specifically declined") to issue regulations** implementing the donee reporting provisions of IRC section 170(f)(8)(D). 80 *Fed. Reg*. at 55803. **No sufficient reason has been indicated in the NPRM for doing so now.**

The statute contains an exception to the general rule disallowing contributions that are not substantiated by a CWA, whereby a donor's deduction would not be disallowed (even if there is no CWA) if the charity files a return (on a form and in a manner to be set forth in Treasury Regulations) that includes the information otherwise required to be disclosed on the CWA. No regulations implementing that statutory exception have ever been proposed or adopted. As a supposed reason for the proposed regulations, the NPRM offers the following:

> In recent years, **some taxpayers** under examination for their claimed charitable contribution deductions **have argued that a failure to comply with the CWA** requirements of section 170(f)(8)(A) **may be cured** if the donee organization files an **amended Form 990**, "Return of Organization Exempt From Income Tax," that includes the information described in section 170(f)(8)(B) for the contribution at issue. These taxpayers argue that an amended Form 990 constitutes permissible donee reporting within the meaning of section 170(f)(8)(D), even if the amended Form 990 is submitted to the IRS many years after the purported charitable contribution was made. The IRS has consistently maintained that the section 170(f)(8)(D) exception is not available unless and until the Treasury Department and the IRS issue final regulations prescribing the method by which donee reporting may be accomplished. Moreover, the Treasury Department and the IRS have concluded that the Form 990 is unsuitable for donee reporting. [80 *Fed. Reg.* at 55803 (emphasis added).]

This "justification" for the proposed regulations is inadequate. First, the statement is offered in follow-up to a statement that the current system (*i.e.*, without the proposed regulations) is working well. Second, the NPRM offers no statistics or figures of any kind indicating that the "taxpayers' argument" relied upon as the reason for the proposed change is anything more than anecdotal, and no information is given at all about what effect, if any, such an argument had in the cases in which it was made. Third, the proposed regulations merely offer an optional system, so such a donee reporting option — as a practical matter — may be illusory, at least from the point of view of the taxpayer claiming the charitable deduction without certain substantiation required. One obvious question here is why a charity would ever elect to develop and maintain a cumbersome reporting system such as that envisioned in the proposed regulations, when the charity could easily mail a CWA letter to the donor using systems it already has in place. Surely, if the only reason for proposing such a confusing and problematic alternate reporting system is to strengthen the government's argument in a tax case or two, such a justification should be found wanting, and the proposed regulations withdrawn.

2. **The proposed regulations would unnecessarily jeopardize the confidentiality of donor information**. Under the current tax system, donor information is reported by public charities, if at all, only on Schedule B Form 990 filed with the IRS. Such information includes the name, address, and amount donated of certain large donors, but does not include the Social Security numbers of those donors. Furthermore, such donor information is reported only to the IRS, and is "tax return information" under IRC section 6103. Thus, Schedule B

information is redacted from the charity's "public Form 990," which must be provided (by the public charity) to requesters under IRC section 6104. Nor may the IRS itself disclose such donor information to those who request to inspect the charity's Form 990. The confidentiality of such tax return information is strongly protected under IRC section 6103.

According to the NPRM, "… the Treasury Department and the IRS have concluded that the Form 990 is unsuitable for donee reporting." 80 *Fed. Reg*. at 55803. Irrespective of the merits of the IRS position, the system suggested in the NPRM would not "fix the problem." This is because, first, there is no problem, as already discussed above. The system is working fine. Nevertheless, the proposed regulations would institute a new system whereby donor information — including the donors' Social Security numbers — would be the subject of a new return maintained by each public charity to which each donor contributes. In addition to the substantial record-development and storage burdens such a system would impose upon public charities, such a system obviously would require public charities to obtain, transmit, and store the Social Security numbers of prospective donors.

At each step of the process — obtaining donors' Social Security numbers, developing a records system designed to record and maintain such numbers, transmittal of the new donation returns to donors, and maintenance of the public charity's records system — the risk of disclosing donors' private information, including their Social Security numbers, would be severe. The NPRM itself acknowledges such a risk in the following statement:

> 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. The Treasury Department and the IRS request comments on whether additional guidance is necessary regarding the procedures a donee should use in soliciting and maintaining a donor's taxpayer identification number and address to mitigate the risk. [80 *Fed. Reg*. at 55803 (emphasis added).]

While acknowledging such concerns, the NPRM offers nothing in the way of a solution, merely pointing out that the proposed system would be optional. But that point — which does not address the privacy/security concerns at issue — is no response at all. For those charities which would participate in donee reporting, having sensitive donor information would create an incentive for hackers of all types, painting a target on charities as new sources of information for identity theft.

3. **The proposed regulations would impose an unrealistic, intolerable burden on public charities.** As demonstrated above, the new reporting system suggested by the proposed regulations is unnecessary. The NPRM offers not only no evidence contrary to the fact that the system is functioning well, but also cites to the Treasury Department and IRS statements that the CWA system "works effectively." Moreover, public charities already are required to

send a CWA to donors of $250 or more. *See* IRS Publication 1771, "Charitable Contributions — Substantiation and Disclosure Requirements" (rev. July 2013). Such gift acknowledgment letters appear to serve two fundamental purposes. First, they substantiate donations, since donors of $250 or more need their contributions documented. Second, such letters present public charities with an opportunity to thank donors personally, to build lasting relationships with them, and to garner future support. Is there any public charity that seeks public support and does not have a system or practice of sending CWA letters to substantial donors? The NPRM does not say, but obviously such organizations cannot possibly be great in number.

The alternate reporting system envisaged in the NPRM is built on the false implied premise that the CWA letter system is not functioning well. The NPRM proposes a system whereby charities — instead of sending CWA letters — would devise and implement a record-development and storage system that presumably would be expensive and certainly would be fraught with disclosure risk. In addition, the proposed regulations provide that any information return under IRC section 170(f)(8)(D) would need to be filed by the donee no later than February 28 of the year following the year in which the contribution were made (with a copy being provided to the donee by the same date). An information return not filed timely with the IRS, with a copy provided to the donor, would not qualify under section 170(f)(8)(D). The IRS fails to demonstrate why any public charity — which could instead merely send CWA letters to its donors — would choose to implement such an optional system.

The NPRM, expressly acknowledging that the CWA system works well, nowhere discusses the likely impact, or even the possible impact, upon tax-exempt organizations of the proposed regulations, if and when they were actually adopted. Instead, the NPRM disclaims any significant impact because the clearly burdensome system it proposes would be optional for donee organizations. In so doing, the NPRM is telling the public, *sotto voce*, that the system it proposes would exist in name only, and would not be a burden because no public charity would undertake to implement it — at least for now.

4. **The proposed regulations are officious, and would further complicate a complicated tax system.** As discussed above, the system proposed in the NPRM is unnecessary, and — even if the regulations were adopted — would accomplish nothing of significance. What they would bring about would be more government regulation in an area that should be left alone, and not subjected to unnecessary additional regulation. The proposed regulations not only would not make a positive contribution to the regulatory scheme that now exists, they would be disruptive of that scheme.

The statutory exception that the NPRM seeks to cement with its proposed regulations — requiring public charities to implement a forbidding system of reporting donor information if CWA letters are not used — is undoubtedly contrary to what Congress had in mind in enacting IRC section 170(f)(8)(D). The statute, it is submitted, offered a possible exception to the substantiation requirement otherwise mandated by IRC section 170(f)(8). The regulations proposed in the NPRM would effectively eliminate that exception.

The complete absence in the NPRM of any treatment of the impact of the proposed regulations on the tax-exempt community is evidence that the IRS either has not studied the matter, or, if it has, that the IRS has made a determination not to publicize the results of such a study. FSC and FSDEF submit that the underpinning for regulations such as those being proposed by the IRS — which would further over-complicate an incredibly intricate and voluminous tax regulatory system, and which would certainly affect the programs of numerous IRC section 501(c)(3) organizations — must reasonably include an impact statement. In other words, the IRS should not be going forward with new regulations which clearly would impact the exempt organization community without exploring what effect such regulations would have on that community, measured against what such regulations would hope to accomplish. The NPRM has given the public very little to go on with respect to the hoped-for accomplishments of the proposed regulations, which, the IRS claims, have been cobbled together in an attempt to eliminate a potential argument in a few tax disputes.

5. **What is being proposed as an option could become mandatory.** Although the proposal is being offered as an option, and would be limited to IRC section 501(c)(3) organizations, many mandatory requirements have arisen in a similar manner – by first making them optional and hoping that few would object. It is not beyond imagination that the IRS could in the future seek to make the optional program mandatory, and even expand its scope to IRC section 501(c)(4) organizations. We learn from James Madison that, for all of the reasons stated in this letter, now is the time to object:

> Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens, and one of the noblest characteristics of the late Revolution. The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. [James Madison, "Memorial and Remonstrance against Religious Assessments," June 20, 1785.]

CONCLUSION

These commenters undoubtedly join a long list of individuals and organizations who, upon reading the NPRM, are incredulous that the government would submit proposed regulations, similar to those now under discussion, to address a non-existent problem, with no

evidence or convincing rationale offered in their support. The proposed regulations should be withdrawn and abandoned.

Respectfully submitted,

/s/ *William J. Olson*

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