December 16, 2015

CC:PA:LPD:PR (REG-138344-13)
Room 5203
Internal Revenue Service
PO Box 7604, Ben Franklin Station
Washington, DC 20044

RE: Substantiation Requirement for Certain Contributions
(Proposed Gift Substantiation Regulation) REG-138344-13

Dear Madam/Sir:

The National Council of Nonprofits submits the following Comments in response to the Notice of Proposed Rulemaking by the Department of Treasury and Internal Revenue Service ("the agencies") published in the Federal Register (80 FR 55802) on September 17, 2015 ("Notice"), which requests "comments on all aspects of the proposed rules."

The Interests of the National Council of Nonprofits

The National Council of Nonprofits, a 501(c)(3) charitable nonprofit, is a trusted resource and advocate for America's charitable nonprofits. Through our powerful network of state associations of nonprofits and 25,000-plus member organizations – the nation's largest network of nonprofits – we serve as a central coordinator and mobilizer to build connections, leverage capacity, and amplify voices to achieve greater collective impact in local communities across the country. We identify emerging trends of concern to nonprofits, share proven practices, and develop solutions for the benefit of nonprofits and the communities they serve.[1] For this rulemaking, we reached out to our network for input from nonprofits across the country to gain their insights and perspectives to assist the agencies in making an informed decision.

The National Council of Nonprofits strongly opposes the proposed gift substantiation regulation (IRS REG-138344-13), on both procedural and substantive grounds. Procedurally, Treasury and the IRS failed to follow multiple immutable rulemaking principles; namely, the Notice provides no evidence that either agency conducted a meaningful costs-benefits analysis, or sought in advance the informed views of the affected communities, or avoided proposing regulations that would be completely inconsistent and incompatible with other executive, judicial, and legislative acts. Their failure to apply these common sense principles have cost the nonprofit community tens of thousands of hours already, and created confusion for the public. Substantively, our primary concern is that the proposed rules will help scam artists hurt the public by giving them new tools to illicitly access Social Security numbers, engage in identity theft, and commit fraud. Additionally, the proposed rules would cast a chill over charitable giving by creating disincentives for donors to support the work of charitable nonprofits – thereby hurting the public – and impose significant costs and burdens on nonprofits, governments, and taxpayers. We call on officials at Treasury and the IRS, after withdrawing the proposed gift substantiation regulation, to immediately strive to undo the damage that this rulemaking has caused to the fight against identity theft by publicly declaring that Social Security numbers should not be used or sought in the context of charitable solicitations.

[1] Learn more at www.CouncilofNonprofits.org.

1001 G Street NW, Suite 700E | Washington, DC 20001 | 202.962.0322 | www.councilofnonprofits.org

Background

The Notice states that the proposed rules seek to implement an alternative reporting regime authorized by legislation enacted in 1993. It concedes that "in 1997 the Treasury Department and the IRS specifically declined to issue regulations … to effectuate donee reporting."[2] Most importantly, now with more than 20 years of experience, the Treasury Department and the IRS report that the "present … system works effectively, with minimal burden on donors and donees." Plus, they admit that in the 20-plus years they "have received few requests … to implement [an alternative] donee reporting system." In plain language, the current system works just fine; it is not broken or in need of fixing.

Under the current system, organizations and individuals (taxpayers) that claim a charitable deduction for contributions of $250 or more must obtain substantiation in the form of a contemporaneous written acknowledgement (CWA) from the charitable nonprofit (donee) receiving the donation. Section 170(f)(8)(A). The CWA (usually referred to as a "receipt" even though it is often in letter form) must present (1) the amount of the cash donation or a description (but not value) of the non-cash property donated; (2) a statement whether any goods and services were provided by the donee organization in exchange or consideration for the donation; and (3) a description and good faith estimate of the value of any goods and services provided by the donee or a statement that such goods and services consist of intangible religious benefits. Section 170(f)(8)(B).[3]

The proposed rules would permit, but not mandate, charitable nonprofits to file a new, separate information return with the IRS (in addition to the Form 990) by February 28 every year to substantiate contributions of more than $250 in value. The new form ("Donee Report") would require the nonprofit opting into this alternative system to collect the donor's name, address, and Social Security number or other taxpayer identification number. Nonprofits taking this option would also be required by that date to provide a copy to each donor listed (but only the portion that contains "information related to that donor"). We understand that the IRS views the proposed rules as allowing individual nonprofits to pick and choose which donors to report, although this is not very clear in the Notice.

The Internal Revenue Code provides that donors will be exempt from their requirement to secure a CWA if the charitable organization reports the donation to the IRS. Specifically, the statute states that the CWA gift acknowledgement requirement "shall not apply to a contribution if the donee organization files a return, on such form and in accordance with such regulations as the Secretary may prescribe, which includes the information described in subparagraph (B) with respect to the contribution." Section 170(f)(8)(D).

The proposed regulation seeks to create the process through which nonprofits report contributions directly to the IRS. It is important to note that any new Donee Report form proposed in the rulemaking would *duplicate* the existing requirements for gift acknowledgements, plus add a fourth requirement: **reporting the taxpayer's Social Security number or other taxpayer identification number**.

It is this last provision – asking for Social Security numbers – that causes the National Council of Nonprofits and many other nonprofits, their professional advisors, donors, and state charity regulators to express strenuous objection and insist that the proposed rule be withdrawn.

---

[2] We do not know the rationale for that decision, but we note that the decision was made when Executive Order 12866 was fresh, including its directive that "In deciding whether and how to regulate, agencies shall assess all costs and benefits … including the alternative of not regulating." See Section 1(a).

[3] See IRS Publication 1771.

Analysis

I. Procedurally, the Rulemaking Process Suffers Multiple Flaws and Should Be Withdrawn.

The Treasury Department and the IRS failed to apply basic common sense principles relating to administrative rulemaking. Accordingly, the proposed rules should be withdrawn.

We emphasize that we do not ascribe any malicious intent for the agencies' failure to follow rulemaking processes that are designed to protect the public. We believe that officials and employees at Treasury and the IRS earnestly find themselves in an awkward position given (1) specific decisions made by others two decades ago to not operationalize a subsection of the Internal Revenue Code that authorizes (but does not mandate) a separate donee reporting regime regarding "contemporaneous" proof of donations, and (2) pending litigation by a few individuals challenging the IRS' interpretation of what constitutes "contemporaneous." Even pure intent, however, is no excuse for ignoring laws governing the rulemaking process. Those laws – expressly mandated in two Executive Orders – have not been followed. As a result, this rulemaking is fundamentally flawed and must halt.

A. The current rulemaking failed to comply with immutable rulemaking principles set forth in two Presidential Executive Orders.

In 1993, President Clinton signed Executive Order 12866 (Regulatory Planning and Review),[4] articulating the federal government's "Regulatory Philosophy" and core "Principles of Regulation." Among many other things, it directs federal agencies planning to launch rulemaking proceedings to first conduct costs-benefits analyses. It also instructs federal agencies that they "shall avoid regulations that are inconsistent [or] incompatible … with its other regulations or those of other Federal agencies." Subsection 10. In 2011, President Obama issued Executive Order 13563 (Improving Regulation and Regulatory Review),[5] reaffirming E.O. 12866 and expressly including a directive that federal agencies seek the views of those most likely to be affected by a proposed rulemaking *before* issuing a notice of proposed rulemaking, which would protect the public from expending considerable resources pointing out obvious fundamental flaws and avoid the government from being embarrassed by not recognizing those fundamental flaws themselves.

None of these three provisions is novel or unique; each represents formal reminders of basic common sense principles undergirding sound administrative procedures and practices. So the assertion in the Notice that "Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 1356," is puzzling. The Notice cites no legal authority for being exempt from the formal mandates of the Executive Orders. More importantly, it could never cite legal authority that Treasury or the IRS are exempt from the timeless common sense rulemaking principles that those Executive Orders simply rearticulate. The process used for the current proposed rules fails to apply basic, timeless, common sense principles for responsible rulemaking.

1. Failure to first make a reasoned decision to proceed based on a costs-benefits analysis.

The very first section of Executive Order 12866 commands, "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating." That admonition is strengthened by directives in Executive Order 13563 that agencies may "***propose*** or adopt a regulation ***only*** upon a ***reasoned*** determination that its benefits justify its costs," that rulemaking "must take into account benefits and costs, both quantitative and

[4] http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf

[5] https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf

qualitative," and that "each agency is ***directed*** to use the best available techniques to ***quantify*** anticipated present and future benefits and costs." (Emphasis added.) Again, the two Executive Orders simply codify common sense: it would be nonsensical and inefficient for regulatory agencies to impose rules when the costs of complying would be greater than the benefits gained. Americans expect their governments to be efficient and effective, not imposing unreasonable burdens.

Yet here, the Notice is completely silent as to whether Treasury or the IRS conducted a costs-benefits analysis or made a ***reasoned*** decision before proceeding that the benefits would exceed the costs. The agencies concede that before the rulemaking they knew benefits would occur only in an "extremely low percentage of cases," so for a rulemaking to proceed, a "reasoned determination" would have required a conclusion that the costs would be even lower than "extremely low." Yet the irrefutable facts prove the contrary: the costs would be quite high, far exceeding any possible benefits.

The Notice expressly admits that the current CWA "system works effectively, with minimal burden on donors and donees," and that over the past 20-plus years "the Treasury and the IRS have received few requests … to implement [an optional] donee reporting system." The agencies then openly admit that the benefits will be "extremely low." "Given the effectiveness and minimal burden of the CWA process, it is expected that donee reporting will be used in an extremely low percentage of cases." Now compare the "extremely low" benefits against the high costs. As spelled out in more detail throughout these Comments, the costs of introducing a new parallel Donee Reporting regime are extremely high, including (but certainly not limited to):

- Costs of the IRS assisting bad actors to gain easy access to individuals' otherwise private Social Security numbers, allowing those bad actors to commit identity theft and fraud.
- Costs imposed on other federal agencies, as well as state, tribal, and local governments, all of which will be forced to respond to complaints filed by individuals, businesses, and nonprofits fleeced by swindlers using the proposed rules to their advantage, leading to increased identity theft and related fraud, which in turn will increase the workloads and costs on the law enforcement system, ranging from costs for FBI and state and local police investigations, costs on the court system, costs of incarceration, and more.
- Costs from the chilling effect on contributions, leading to fewer and smaller donations. To put the potential losses in perspective, even if just one-tenth of one percent of giving is scared away, that would be a $358 million loss taken away from charitable work.[6]
- Costly new administrative burdens on nonprofits, ranging from dealing with dual reporting systems and investing more resources in technological security systems to paying for higher Director & Officer insurance and working harder to recruit board members willing to take on the higher risk of liability for community service.
- Costs to governments and taxpayers that would have to fill the void and no longer benefit from the positive impact of the charitable work in communities.
- Costs to private businesses, which are victimized when fraud is perpetrated against them by the bad actors who obtained the Social Security numbers and are able to steal identities.
- Costs to federal taxpayers, given the admission in the Notice that the new "donee reporting information return will be sent to the IRS, which must have a means to store, maintain, and readily retrieve the return information for a specific taxpayer" – none of which exists now, would have to be created and maintained, and would cost tax dollars.

---

[6] The charitable nonprofit sector receives about $358 billion from private contributions. Brice McKeever, *The Nonprofit Sector in Brief 2015* (Urban Institute; Oct. 2015) at page 1.

In the face of the long litany of easily identifiable, known costs of a parallel Donee Reporting system, and the Notice's projection that benefits would be "extremely low," it is both unfortunate and disappointing that Treasury and the IRS launched this unwarranted rulemaking.

2. **Failure to consult those most likely to be affected before issuing a notice of proposed rulemaking, harming others by imposing unnecessary costs on them.**

It appears that Treasury and the IRS did not follow common sense principles, rearticulated in both Executive Orders, to first reach out to the regulated community for input before even issuing a proposed set of regulations.[7] A key rationale for the pre-launch review, of course, is to intercept any blatant problems to avoid wasting the public's and the agencies' time on an inherently flawed idea.

Had the agencies followed the timeless teachings expressed in the Presidents' Orders, they would have learned in advance the dangerous nature of the proposed rule, gathered more facts to conduct quantitative and qualitative costs-benefits analyses, and avoided giving scam artists new arguments and tools. Instead, the agencies have forced tens of thousands of board members and staff members of charitable nonprofits, their advisors, donors, law enforcement officials, and many others to devote tens of thousands of hours reading, analyzing, and coming to the same conclusion to oppose this unsafe and unnecessary regulation. In our view, Treasury and the IRS have needlessly wasted vast resources of the public and nonprofits by prematurely launching this dangerous rulemaking.

Importantly, by pausing to first talk informally with others in the field – such as its own external Advisory Committee on Taxation (ACT), whose members include nonprofit accountants, attorneys, and other professionals[8] – the IRS would have learned instantly the sector's strong negative reaction would be to handling Social Security numbers, and how disruptive and problematic the proposed regulation would be for nonprofits. Those tens of thousands of wasted hours could have remained focused on nonprofit missions in local communities if the IRS had simply consulted with others as sounding boards and received informed insights.

Treasury and the IRS also could have learned ways to make the current system – which they have described as "effective" over 20-plus years – even better and more user friendly, obviating the need for an alternative Donee Reporting system. For instance, the IRS could promote, support, and improve the current CWA system by simply providing sample language options that organizations could see as approved and useful recommendations. Whether sharing such optional language ideas in IRS Publication 1771, on the IRS website, and/or elsewhere, that easy act could encourage voluntary compliance, which is what everyone desires. Currently there is lack of clarity from the IRS on what is acceptable. Rather than prescribing new forms, a more efficient and effective approach would be to simply offer some model language to assist in gift substantiation.

---

[7] See Executive Order 12866 §6(a)(1) ("***before*** issuing a notice of proposed rulemaking, each agency should … seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation"); Executive Order 13563 §2(c)("***Before*** issuing a notice of proposed rulemaking, each agency … ***shall*** seek the views of those who are likely to be affected, including those who are likely to benefit and those who are potentially subject to such rulemaking") (emphasis added).

[8] Current ACT members including, among others, the head of the national Standards for Excellence Institute (who could have explained the harmful repercussions on nonprofit operations), the leader of Columbia Law School's Charities Project of the National State Attorneys General Program (who could have shared regulators' informed fears about negative impacts on the public, nonprofits, and law enforcement), and the leader of the Association of Fundraising Professionals (who could have described the adverse impact on fundraising).

3. **Failure to avoid proposing rules that are inconsistent with other regulations of other federal agencies – and Acts of Congress.**

The common sense notion that agencies "***shall*** avoid regulations that are inconsistent [or] incompatible … with its other regulations or those of other Federal agencies" is expressed in Executive Order 12866 §1(b)(10) (emphasis added). Yet, as explained in more detail below (see pages 7-9), the IRS has done the complete opposite here. Instead of avoiding inconsistent or incompatible regulations and guidance from federal agencies, as well as Acts of Congress, the IRS is much like a salmon traveling upstream against the vast current of seemingly countless federal and state laws and advice that all discourage the public from disclosing their private Social Security numbers. Every other law enforcement agency in the country tells the public to guard and protect their Social Security numbers, while the IRS now proposes to authorize charitable nonprofits to ask people for their confidential SSNs. This proposal adopts a position that is inconsistent and incompatible with all other governmental decrees, and would help imposters pretending to be legitimate nonprofits gather private information from innocent people.

It remains unclear whether the IRS legitimately claims that it is exempt from the regulatory impact assessment and other legal elements of the two Presidential Executive Orders. However, the agencies certainly are not exempt from the common sense principles that the Executive Orders articulate: that administrative rulemaking processes should be launched only if the benefits will exceed the costs, only after informal consultation with those likely to be impacted, and only if the position proposed is consistent with other authority. The current rulemaking fails all three common sense tests; the proposed rules must be withdrawn.

II. Substantively, the Proposed Rules Threaten Public Health and Safety, Nonprofit Organizations, and Those Whom Nonprofits Serve, and Therefore Should Be Withdrawn

The many concerns with the substance of the proposed rule are not just on behalf of charitable nonprofits. Rather, we are most concerned about the individuals and communities that nonprofits serve. Every donation not given means another senior who won't receive a meal, a child who won't receive life-saving medical care, another individual not inspired by art, another soul not touched in a religious congregation, and much more. The proposed voluntary reporting system is inappropriate because the regime could impose significant costs and burdens on nonprofit organizations, would create public confusion and disincentives for donors to support the work of nonprofits, and could lead fraudulent actors to increase targeting donors and reputable nonprofit organizations.

A. "Never" is the better answer.

The proposed rules would open the door for scam artists, even if not a single nonprofit in the country adopts the "voluntary" reporting system. Although the Notice provides that the proposed regulation wouldn't *require* nonprofits to collect the Social Security numbers, the mere existence of the rule opens the door for bad actors. The IRS shouldn't help them by creating confusion – especially when the agencies' own proposal admits that they have received only a "few requests" to set up this alternative reporting regime and the current "system works effectively."

A charitable nonprofit should **never** be asking a donor for her or his Social Security number when soliciting donations; if someone is asking in relation to a donation, that should be considered a sign of a scam or fraudulent solicitation. That is the consistent message being promoted by law enforcement now. Rather than create a regime in which some nonprofits occasionally require donors to provide their SSNs, Treasury and the IRS would better serve the public by getting behind one consistent message that donors should never be asked to provide their SSNs for gift substantiation purposes.[9]

The fact that the proposed reporting regime is currently presented as a voluntary option does not change the reality that the federal government, through this rulemaking, is undercutting a clear and consistent message and is guaranteed to confuse the public and lead to exploitation by bad actors. This weakening of the universal message of protecting Social Security numbers will create confusion that can cause negative ripple effects elsewhere as the law of unintended consequences plays out. The losers in the resulting ambiguity are the donating public, charitable nonprofits that suffer by association and lost support, the public then not served, and the integrity of law enforcement efforts.

B. The proposed regime runs counter to federal and state government policies on uses for Social Security numbers.

Since at least 2007 and as recently as this year, the Office of Management and Budget, the Government Accountability Office, and Congress have instructed government agencies to reduce their reliance on Social Security numbers for administrative purposes. The proposed regulation and report form undermine the significant progress in removing SSNs from regular information exchange.

In 2007, OMB instructed federal agencies to "review their use of social security numbers in agency systems and programs to identify instances in which collection or use of the social security number is superfluous."[10] Since then, federal departments and agencies have been required to "participate in government-wide efforts to explore alternatives to agency use of Social Security Numbers as a personal identifier for both Federal employees and in Federal programs (e.g., surveys, data calls, etc.)." In recent years, both the Department of Defense and the Veterans Administration have changed their identification systems away from reliance on SSNs and established unique personal identification numbers.

Earlier this year, Congress took action to correct a significant risk to individual identity security that parallels the challenges created by the proposal at issue in the current rulemaking. The ''Medicare Access and CHIP Reauthorization Act of 2015" requires the Department of Health and Human Services to issue new Medicare cards that do not display, code, or embed SSNs.[11] Medicare advises senior citizens to carry their cards at all times, but, as the Inspector General of the Social Security Administration correctly observes, "doing so makes them more vulnerable to identity theft."[12] This common-sense solution – removing Social Security numbers from the easy public access of Medicare cards – took many years of expressed concerns about public safety and research by the Inspector General, the Government Accountability Office, and others.

---

[9] We recognize that Social Security numbers are required in different contexts, such as when an individual steps forward to donate a vehicle (see IRS Publication 4302) or volunteers to work with certain populations that the law protects by requiring detailed background tests. Those circumstances are completely different, however, because they do not lend themselves to scam artists calling people randomly asking for their Social Security numbers.

[10] Safeguarding Against and Responding to the Breach of Personally Identifiable Information, OMB Memorandum M-07-16, May 22, 2007.
https://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-16.pdf

[11] http://www.gpo.gov/fdsys/pkg/BILLS-114hr2enr/pdf/BILLS-114hr2enr.pdf

[12] "New Medicare Cards Will Not Display Social Security Numbers," Office of the Inspector General, Social Security Administration, April 29, 2015. http://oig.ssa.gov/newsroom/blog/apr29-medicare-card-SSN

Identity theft is a major and growing problem. The Government Accountability Office reports that in 2010, seven percent of households in the United States, or about 8.6 million households, had at least one member age 12 or older who experienced identity theft. Theft of this information can also result from a data breach — the unauthorized disclosure of a beneficiary's personally identifiable information.[13]

This year alone, hackers have accessed sensitive employee data at the federal Office of Personnel Management (with hackers stealing the Social Security numbers of more than 22 million people), as well as penetrated the CIA, State Department, and even the White House, all sophisticated entities with the resources and commitment to fighting security breaches. This very week the government is alerting journalists who are accredited by federal agencies that their SSNs may have been stolen by hackers. And, even more to the point, the IRS was in the news this week for being sued because the IRS computer system was hacked; criminals stole more than 330,000 Social Security numbers. To avoid liability, the IRS reportedly has invoked sovereign immunity, which is not an option for nonprofits. The federal government has spent billions of dollars and has thousands of people dedicated to keeping government information secure. And yet, hackers could not be thwarted. Nonprofits have neither the financial resources nor sufficient staffing to combat hackers who will see an easy source for Social Security information. It is irresponsible for Treasury and the IRS to propose a system that calls on nonprofits to collect, store, and protect SSNs when identity theft is a growing challenge that even the federal government is not yet able to prevent or avoid.

With Congress, OMB, GAO, and others scouring laws to eliminate use of Social Security numbers in administrative settings, it is most puzzling for the IRS to go in the completely opposite direction of trying to use SSNs in a new, optional governmental reporting regime. It is far better to prevent the risk of fraud and abuse from the outset than to enact laws in the future to correct the mistakes of using SSNs when not absolutely necessary.

The results of this rulemaking could put the IRS in a confusing, self-conflicting position: on the one hand, through the proposed rule the IRS is telling nonprofits that they are authorized to ask for individual's private Social Security numbers, while on the other hand the IRS currently warns taxpayers on its website and on a YouTube video to only give out their Social Security numbers when "absolutely necessary." Historically, the IRS has stood consistently with all other law enforcement entities by urging individuals to protect their Social Security numbers. Just last month, the IRS, state revenue departments, and the tax industry released the first in a series of special tax tips designed to help individuals protect their tax and financial data. A video produced as part of the effort states emphatically that to protect oneself from tax-related identity theft, the best advice to individuals is "not giving out your Social Security number."[14] The Inspector General of the Social Security Administration is even more succinct, advising that to help prevent identity theft, individuals should "**never** provide your personal information when receiving unsolicited calls or contacts."[15] (Emphasis added.)

[13] Medicare: Action Needed to Remove Social Security Numbers from Medicare Cards, Government Accountability Office, GAO-12-949T, August 1, 2012. http://www.gao.gov/products/GAO-12-949T

[14] Identity Theft Tax Tips Available; Special Series to Help Taxpayers Available Through January, Internal Revenue Service, IR-2015-132, November 23, 2015; the video can be found at https://www.youtube.com/watch?v=aMH8TBeA4IE (0:52).

[15] "Fraud Advisory: Beware Identity Thieves Seeking to Redirect Your Social Security Benefits," Office of the Inspector General, Social Security Administration, May 3, 2015. http://oig.ssa.gov/newsroom/news-releases/may3advisory

Ironically, and disturbingly, the agencies' proposed voluntary system essentially authorizes nonprofits to do the exact opposite of what the IRS normally advises: ask donors to give out their SSNs when it is not absolutely necessary. Voluntary and "absolutely necessary" are polar opposite instructions that undermine taxpayer protections and public confidence – public confidence in both the IRS and innocent charitable nonprofits.

C. Requests for Social Security numbers could result in reduced charitable contributions, harming public health and safety.

The thousands of Americans who filed comments in opposition to the proposed rules readily see how the rules would cast a chill over charitable giving. Even if not a single nonprofit in the country adopts the "voluntary" reporting system, the damage is done.

The mere existence of such rules would frighten the public, who – well-trained by years of consistent messaging from law enforcement warning to withhold and protect their private Social Security numbers – will hesitate before making a donation. Donors who contribute using checks suddenly will be leery of making a contribution for fear that they will be asked later to hand over their Social Security numbers, not sure who will have access to that information. Even the theoretical threat that people may be asked at some time in the future to supply their confidential Social Security number may eliminate charitable giving. And if not eliminate it, significantly reduce it as generous supporters in the past may start giving donations of $249 to avoid triggering the possible $250 reporting mark.

The proposed rules also potentially disrupt the ease of online giving. People already are hesitant to provide even generic demographic or location information when making a donation. To be asked to share their address, their credit card number, and potentially their Social Security number all in the same place would be enough to scare even the most committed donors to decline to give. As much as they may want to support good works in their community, it wouldn't justify taking the risk of their identity being stolen.

Recognize that predictions of reduced charitable giving are not the rantings of hyped nonprofit advocates. Consider, for instance, the concern from the President of the National Association of State Charity Officials, and the Deputy Attorney General of Tennessee in charge of charity regulation, who "predicted that donors to legitimate charities would be scared off if asked for their Social Security numbers."[16]

Consider as well the concerns expressed by the Government Accountability Office in May 2009 when it studied an earlier proposal to make such a reporting regime mandatory. Under the heading, "**Requiring information reporting could result in reduced cash contributions**," GAO identified the following threats to charitable giving:

- "Taxpayers may reduce giving because they are reluctant to provide Social Security numbers to charities given concerns over identity theft …
- Donors may perceive that charities will not adequately safeguard their Social Security numbers

[16] "Charity Regulator Slams IRS Proposal on Donor Data," *Chronicle of Philanthropy*, December 1, 2015, interviewing Janet Kleinfelter, Deputy Attorney General of Tennessee. https://philanthropy.com/article/Charity-Regulator-Slams-IRS/234411

- Many charities rely on volunteers, to whom donors may not want to provide their Social Security numbers "[17]

The GAO researched the concept, conducted its own costs-benefits analysis, and concluded that a mandatory information reporting regime "could result in reduced charitable cash contributions from taxpayers, for example, because taxpayers may not want the federal government to know to which charities they donate, particularly for donations to religious organizations." There is no reason to believe that the same reporting system, currently envisioned as voluntary, would be considered any less invasive and objectionable by donors.

D. The new reporting regime, if followed, would result in costly administrative burdens and potentially lead to crippling liability for board members and organizations.

Collection, storage, and reporting of Social Security numbers to the IRS is a costly endeavor that can impose significant risks on entities that are hacked. To protect sensitive donor information, nonprofits would have to divert resources from mission to purchase expensive data security systems that have no guarantee of protecting the public.

In addition to federal laws designed to protect privacy and individual rights, many states actively regulate how and when organizations must take measures to protect personal information. From breach notification laws to laws placing specific obligations on how organizations are to safeguard personal information to avoid its unintended disclosure, the states have been and continue to be at the forefront of data security legislation. At least 44 states, as well as the District of Columbia and Puerto Rico, have enacted laws imposing some form of notification obligation on an organization that learns of an unauthorized access to, or acquisition of, personal information.[18] Six states in particular – Connecticut,[19] Massachusetts,[20] Michigan,[21] New Mexico,[22] New York,[23] and Texas[24] – have enacted laws or regulations that require organizations that collect or use SSNs to implement policies to protect those SSNs and, in some instances, to make their SSN protection policies available to the public or to their employees.

These laws are deemed essential protections for individuals and are extremely expensive for nonprofits and others to follow. The risk of charitable nonprofits failing to comply fully with state and federal laws, however, goes beyond what for-profit businesses face. One state charity regulator has

[17] Requiring Information Reporting for Charitable Cash Contributions May Not Be an Effective Way to Improve Compliance, Government Accountability Office, GAO-09-555, May 2009. http://www.gao.gov/assets/290/289664.pdf

[18] Privacy and Data Security Update, Morrison & Foerster, December 9, 2008.

[19] Ct. H.B. 5658.

[20] 201 Mass. Code Regs. §§ 17.01–17.04.

[21] Mich. Comp. Laws § 445.84.

[22] N.M. Stat. §§ 57-12B-2–57-12B-3.

[23] N.Y. Gen. Bus. Law § 3990dd(4).

[24] Tex. Bus. & Com. Code § 35.581 (effective through March 31, 2009); Tex. Bus. & Com. Code § 501.051 – 501.053 (effective April 1, 2009).

suggested that collection of SSNs and improperly protecting them could open nonprofits and their board members to lawsuits asserting a breach of fiduciary duty.[25]

E. The dangerous interplay with the "new" Form 1023-EZ and related expedited process. We find it rather ironic, and sad, that the nonprofit community – the regulated community in this instance – is yet again filing comments in opposition to proposed IRS rules that would aid bad actors while hurting nonprofits and the general public.

In 2014, the IRS ignored the detailed opposition to the proposed Form 1023-EZ and related expedited approval process for obtaining charitable tax-exempt status. The IRS proposal was opposed by, among others, the IRS' own Advisory Tax Committee after having studied it in great detail, the National Association of State Charity Officials which unanimously opposed it, the National Council of Nonprofits, and ultimately the Taxpayer Advocate. We had, and still have, as do the others, grave concerns that the new Form 1023-EZ eliminates the longstanding requirement that an organizational applicant prove it is indeed an organization rather than just a lone individual, a potential bad actor who could then operate fraudulently in the tax-exempt environment.

Combining that bad decision with this proposal would truly grant fraudsters and swindlers an open-door pass to commit crimes. Individuals could fill out the new Form 1023-EZ, lie about being an incorporated nonprofit, obtain their charitable tax-exempt status from the IRS, and then be calling up people asking for their Social Security numbers. These cheats will have "legitimate" cover for their bad acts, all thanks to the IRS. Unfortunately, when it happens, too many individuals will be victimized and the nonprofit community will suffer the blame, notwithstanding our efforts, informed state charity regulators, your own expert ACT, and the Taxpayers Advocate, all beseeching the IRS to not aid and abet crooks. The IRS needs to stop this rulemaking and go back and rescind the expedited approval process ushered in with the Form 1023-EZ.

F. Nonprofits could receive outside pressure to comply with the "voluntary" reporting regime. The reporting system envisioned in the pending rulemaking is expressly presented as a voluntary option for charitable nonprofits, and the agencies make no indication that they will view nonprofits as "good" or "bad" for complying with the Donor Reporting form. Setting aside the point raised earlier that a "mandatory" reporting regime was considered and rejected almost a decade ago, history suggests that voluntary IRS reporting could well become a watchdog group's idea of a "best practice." For example, the revised Form 990 that most charitable nonprofits submit to the IRS each year includes several questions about governance practices that are considered best practices but that are not mandated by statute. The manner in which nonprofits answer those questions is addressed in media stories and perhaps evaluations by donors and watchdog groups. This proposed regulation encouraging nonprofits to seek sensitive and private Social Security numbers should not be given credence, however well intentioned.

III. Moving Forward

The current rulemaking process must end now, due to basic procedural flaws and complete lack of merit on the substance. If Treasury and the IRS – after seeing the significant costs and extremely limited benefit – decide to still do something on this issue, then they must start all over again,

[25] "Charity Regulator Slams IRS Proposal on Donor Data," *Chronicle of Philanthropy*, December 1, 2015, interviewing Janet Kleinfelter, Deputy Attorney General of Tennessee, who stated: "As a regulator, I would look at that as a breach of fiduciary duty." https://philanthropy.com/article/Charity-Regulator-Slams-IRS/234411

complying every step of the way with the full panoply of common sense principles and federal requirements for rulemaking.

If new rulemaking is deemed reasonable and necessary, we urge Treasury and the IRS to heed the observation by the Government Accountability Office in 2009, that remains valid today: "*An alternative means to uniquely identify donors, that is, for IRS to provide separate, unique numbers for this purpose, could alleviate donor concerns about identity theft but could be burdensome to implement*."[26]

# # #

In closing, the National Council of Nonprofits calls on Treasury and the IRS to withdraw the proposed regulations, re-join the rest of law enforcement agencies, and join the nonprofit community in publicly stating that there is not a legitimate reason for nonprofits to ask individuals to divulge their Social Security numbers to people soliciting donations. The federal government must take action to remove the confusion created by the pending rulemaking. When it comes to Social Security numbers, we ask the federal government to state clearly that "never" is the better answer when a solicitor seeks a taxpayer identification number.

The National Council of Nonprofits and the nonprofit community as a whole would welcome the opportunity to work together with the IRS and Treasury to reduce burdens on taxpayers, nonprofits, and agency staff. We can all see areas for improvement and working together in the future will avoid conflicts like this, and save the time and resources of the IRS and Treasury. Together, we can all be better stewards of taxpayer resources and earning the public's trust.

Respectfully submitted,

Tim Delaney
President and CEO

David L. Thompson
Vice President of Public Policy

[26] Requiring Information Reporting for Charitable Cash Contributions May Not Be an Effective Way to Improve Compliance, Government Accountability Office, GAO-09-555, May 2009.
http://www.gao.gov/assets/290/289664.pdf