COUNCIL on FOUNDATIONS

December 16, 2015

Mr. Martin L. Osborne and Mr. Robert Basso
Office of the Associate Chief Counsel,
Income Tax and Accounting
CC:PA:LPD:PR (REG-138344-13)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Notice of Proposed Rulemaking on Substantiation Requirement for Certain Contributions

Dear Messrs. Osborne and Basso;

The Council on Foundations ("Council") is the largest and leading association of grant-making organizations in the United States. We represent independent, operating, community, public and company-sponsored foundations, and corporate giving programs in the United States and abroad. As a national voice for philanthropy, our mission is to provide the opportunity, leadership, and tools needed for philanthropic organizations to expand, enhance, and sustain their ability to advance the common good.

The Council is committed to working closely with the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") to help create a policy environment in which philanthropy can grow and thrive. We appreciate this opportunity to comment on the proposed regulations implementing an exception to the "contemporaneous written acknowledgement" requirement for substantiating charitable deductions, published for comment in the Federal Register on September 17, 2015. As an alternative to providing a contemporaneous gift receipt to donors, the proposed rule would permit charitable organizations, such as community foundations, to file an additional information return by February 28th to substantiate gifts of $250 from the previous year, and to provide a copy to each affected donor. The information return would be required to contain private information about donors, including Social Security or taxpayer identification numbers.

While the Council understands and supports the need to ensure accurate reporting of charitable gifts to prevent erroneous taxpayer claims for the charitable income tax deduction, we have four primary concerns with the proposed rules that our comments will address. First, the alternative reporting regime would create new, significant, administrative costs associated with determining how to collect and safely maintain individual donor information, particularly in instances where funds are raised

through third parties like workplace campaigns. Second, recent public data breaches in the private sector and government raise very real concerns about the ability of third-party organizations, such as charities, to adequately safeguard private donor information such as Social Security numbers required to be provided in an information return. Third, donors may be wary of providing private data to charities, which could deter cautious donors from contributing altogether. Fourth, while voluntary under the proposed rule, precedent tells us that a voluntary practice, regardless of whether it is effective, can easily morph into a best practice and from there to a mandatory requirement.

Issues for Comment

Burden on Charitable Organizations

While optional under the proposed rules, a new, separate information return could pose significant administrative costs for charities. As a 2009 Government Accountability Office report to the Senate Finance Committee found, "Charities could incur substantial costs and burdens if they were required to file information returns with IRS and taxpayers on the cash contributions they receive."[1] These additional costs would be incurred because charitable organizations would need to allocate valuable staff time and technology resources to implement a system for collecting and storing individual donor data, and then providing the additional information return to the IRS and each individual donor.

In many cases, donors are not likely to willingly hand over their personal information when making a charitable gift and may not have the opportunity to provide this data in instances where funds are raised through third parties. For example, when a donation over $250 is proffered through a workplace giving campaign and pooled with other employees, individual donors may not even be identified to the recipient charity. Even in cases where individual donors are readily known to the charitable organization, staff would need to spend time tracking down personal information from each individual donor when it is not provided upfront. This process could drag on indefinitely and place an unmanageable strain on charity staff.

Charities will also need to allocate resources to determine how to safeguard individual donor information from a security breach—a task that may prove impossible for all but the most sophisticated and well-resourced organizations.

In sum, the proposed regulations will impact the bottom line for charities and reduce valuable charitable resources. Compliance costs associated with preparing and filing a new information return,

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[1] U.S. Government Accountability Office Report to the Senate Finance Committee, GAO-09-555, *Tax Gap: Requiring Information Reporting for Charitable Cash Contributions May Not be an Effective Way to Improve Compliance*, *available at*: http://www.gao.gov/assets/290/289664.pdf

tracking down, storing, and protecting personal information of individual donors would divert countless charitable dollars away from mission work. More charitable dollars would go towards administrative costs to maintain the staffing and systems necessary to provide the new information returns to the IRS and individual donors, detracting from core charitable programs and services.

Donor Privacy and Fraud Protection

In recent history, we have witnessed wide-scale data breaches from government agencies like the IRS and the Office of Personnel Management, retail giants like Target and Home Depot, and even nonprofit organizations like the Urban Institute. These breaches have eroded public confidence in the ability of a third party to protect private information. While the proposed regulations explain that Treasury and the IRS plan to develop a "specific-use information return"[2] for donee reporting in order to "better protect donor privacy," there is no evidence to assure the public that a new, special form would do anymore to effectively protect this data than the current system. If federal agencies cannot always maintain the security of sensitive data in the face of sophisticated hackers, it seems unreasonable to expect this of charitable organizations.

After a data breach occurs, fraud and identity theft perpetrated with stolen personal information is a real and persistent challenge. The reporting system proposed in these rules would exacerbate opportunities for opportunistic criminals to perpetrate fraud and identity theft on charitable donors. Simultaneously, the rules would place an unreasonable and unrealistic burden on charitable organizations to safeguard the personal information of their donors. The proposed regulations ask for comments on "whether additional guidance is necessary regarding the procedures a donee should use in soliciting and maintaining a donor's taxpayer identification."[3] It is our position that additional guidance on this issue would not alleviate the primary objection to these rules—concern over the unwarranted collection of personal donor data.

The most effective means to minimize inadvertent data leaks and more sinister compromises of personal information is to not charge charities with collecting the information in the first place. The IRS should not adopt a voluntary reporting regime that makes charities responsible for safeguarding personal donor information.

Deterrent Effect on Charitable Contributions

Charitable giving has a deep and rich history in our country. The charity-donor relationship is often cross-generational, spanning years of mutual engagement built on trust in the integrity of the

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[2] Department of the Treasury, 80 Fed. Reg. 55802, 55803 (proposed September 15, 2015) (amending 26 C.F.R. Part 1).

[3] *Id.* at 55804.

charitable organization. Charitable organizations rely on the generosity of their donors to support programs and services in communities, and in turn, donors trust these organizations with the safekeeping of their hard-earned resources.

If charities were to begin asking their donors for personally identifying information, this relationship could be strained. The IRS itself explicitly advises taxpayers to never provide private information like Social Security numbers unless "absolutely necessary."[4] The implication behind this advice is that someone asking for this information from taxpayers may well be engaged in a scam or fraudulent solicitation. Following years of advice from government agencies along with the personal experience many of us have with theft of our personal information, taxpayers have been conditioned to not provide information such as Social Security numbers.

Donors attuned to messages about protecting your personal data may not readily provide this information and charities would be compelled to pester them for it—an affront to donors and a tremendous burden to charities. Worse still, donors may balk at the request for this personal information and opt to not give to charity at all, resulting in an immeasurable loss in charitable contributions. Ultimately, charities may see donor relationships stressed or severed and charitable gifts decline as a result of using the acknowledgment option proposed in these rules.

Slippery Slope to Mandatory Reporting

In 2009, the Government Accountability Office ("GAO") provided a report to the Senate Finance Committee on the extent to which individual taxpayers overstate the amount of the deduction they report on their income tax return for cash donations to charity. This report was produced at the request of the Committee Chair and Ranking Member because of the Committee's keen interest in taxpayer compliance and concern about widespread misreporting of charitable contributions.

In response to a proposal at that time to make a separate information return with donor information mandatory, the GAO found that "requiring information reporting for charitable cash contributions may not be an effective way to improve compliance."[5] The report also raised doubts as to whether taxpayers would willingly provide their private data to charities due to fears about fraud and identity theft, and the impact potential of a mandatory reporting system on the flow of charitable gifts.

These same questions and concerns over a donee reporting system persist. Yet, if implemented through these rules, a voluntary system—however flawed and ineffective at improving compliance—could quickly be touted as a "best practice" for the sector, elevating the likelihood of an eventual

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[4] Internal Revenue Service, *Identity Protection Tips*, https://www.irs.gov/Individuals/Identity-Protection-Tips (last visited December 3, 2015).

[5] Government Accountability Office Report to the Senate Finance Committee, *supra* note 1.

mandatory system. Mandatory donee reporting was considered previously and rejected because of the same concerns we raise today. In the absence of a powerful new rationale for creating a donee reporting system, we urge Treasury and the IRS to reconsider this proposal.

Conclusion

We appreciate the desire of Treasury and the IRS to ensure that deductions claimed for cash gifts are accurate and attributed to the proper donor. Yet, the proposed reporting system is riddled with issues for charities and taxpayers alike, and is not guaranteed to improve compliance.

The stricter documentation requirements for claiming a deduction that the Pension Protection Act of 2006 implemented will continue to augment a successful system that Treasury and the IRS admits "works effectively, with minimal burden on donors and donees."[6] Furthermore, Treasury and the IRS state in the proposed rules that they have "received few requests . . . to implement a donee reporting system."[7]

In their own words, Treasury and the IRS admit that they have not identified a compelling policy reason to adopt a parallel reporting regime that will pose significant new burdens for charities and jeopardize the private information of donors. Without an overwhelming need to disrupt the effective existing contemporaneous written acknowledgement system, the reporting system proposed in these rules should be rejected.

Respectfully submitted,

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[6] Department of the Treasury, 80 Fed. Reg. 55802 (proposed September 15, 2015) (amending 26 C.F.R. Part 1).
[7] *Id.* at 55803.