Council on Foundations

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November 02, 2026

Internal Revenue Service
CC:PA:01:PR (REG-119986-25)
Room 5503
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**RE: Comments on Proposed Regulations, Racial Nondiscrimination in Private Schools, 91 Fed. Reg. 56,811 (Sept. 4, 2026) (REG-119986-25; RIN 1545-BS05)**

The Council on Foundations (the "Council") is writing to provide comments to the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") on the proposed regulations under section 501(c)(3) of the Internal Revenue Code addressing racial nondiscrimination requirements for private schools, published at 91 Fed. Reg. 56,811 (Sept. 4, 2026). Below we are offering recommendations based on the practical implications of how these proposed regulations will affect the philanthropic sector and the schools and students it supports.

The Council is a nonprofit membership association that serves as a guide for philanthropies as they advance the greater good. Building on our 75-year history, the Council supports over 1,000 member organizations in the United States and around the world to build trust in philanthropy, expand pathways to giving, engage broader perspectives, and co-create solutions that will lead to a better future for all. Our members include private foundations, community foundations, corporate giving programs, and other grantmaking organizations that collectively manage billions of dollars in charitable assets and fund programs across every sector of American life—including education. Council members provide scholarships and funding to a variety of programs in and connected to schools that will be directly affected by these proposed regulations.

**The Council urges Treasury and the IRS to withdraw the proposed regulations in their entirety.** As detailed below, the proposed regulations violate the Administrative Procedure Act (the "APA") by reversing fifty years of settled guidance without reasoned explanation; rest upon a misreading of controlling judicial authority; conflict with existing Treasury regulations and longstanding IRS administrative practice; rest on a deficient analysis of economic costs; and impose an unworkable applicability date.

Our foundation members and their nonprofit partners would be profoundly affected by these proposed regulations. The Council's concerns are organized below under the following headings:

I. The APA requires a reasoned explanation for policy reversals

II. Treasury's failure to provide a reasoned explanation is compounded by its misreading of the very authority it invokes

III. The proposed regulations conflict with existing Treasury regulations and longstanding IRS practice

IV. The economic analysis fails to consider material costs

V. The proposed applicability date is insufficiently prospective

## I. The APA requires a reasoned explanation for policy reversals

For half a century, Revenue Procedure 75-50, 1975-2 C.B. 587, as modified by Revenue Procedure 2019-22, 2019-22 I.R.B. 1260, has provided the governing framework for racial nondiscrimination in private schools. Critically, the second sentence of Section 3.02 expressly permits programs "favor[ing] racial minority groups with respect to admissions, facilities and programs, and financial assistance" when "the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students." The third sentence of Section 4.05 provides that scholarships and loans made pursuant to financial assistance programs "favoring members of one or more racial minority groups" that are "designed to promote a school's racially nondiscriminatory policy will not adversely affect the school's exempt status." The fourth sentence extends the same treatment to "[f]inancial assistance programs favoring members of one or more racial groups that do not significantly derogate from the school's racially nondiscriminatory policy."

The proposed regulations would delete these provisions and reverse the IRS' longstanding position.

The preamble's only stated reason for deleting Rev. Proc. 75-50's race-conscious safe harbors is that they "would be incompatible with the new rules." 91 Fed. Reg. at 56,815. That reasoning is circular: the guidance is deleted because it conflicts with the rule being written. When an agency reverses a prior policy, the Administrative Procedure Act requires "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Where a prior policy has "engendered serious reliance interests"—as Revenue Procedure 75-50 has for decades—the agency must provide "a more detailed justification than what would suffice for a new policy created on a blank slate." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016). Stating that old guidance is "incompatible" with the new rule is not a reasoned explanation; it is the absence of one.

## II. Treasury's failure to provide a reasoned explanation is compounded by its misreading of the very authority it invokes.

The U.S. Supreme Court in *Bob Jones* held that entitlement to exemption under § 501(c)(3) depends on an institution being "charitable" in the common-law sense—serving a public purpose and not acting contrary to established public policy—and because racial discrimination in education violates a most fundamental national public policy, a private school that maintains racially discriminatory admissions policies confers no public benefit, is therefore not "charitable" within §§ 170 and 501(c)(3), and is not entitled to tax-exempt status. The Court then cabined the authority it had upheld:

> Guided, of course, by the Code, the IRS has the responsibility, in the first instance, to determine whether a particular entity is 'charitable' for purposes of § 170 and § 501(c)(3). This in turn may necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of "charitable" status. We emphasize, however, that **these sensitive determinations should be made only where there is no doubt that the organization's activities violate fundamental public policy. On the record before us, there can be no doubt as to the national policy. In 1970, when the IRS first issued the ruling challenged here, the position of all three branches of the Federal Government was unmistakably clear.** 461 U.S. at 597-98 (emphasis added).

The *Bob Jones* majority grounded this fundamental public policy limitation in the common law of charitable trusts. *See* 461 U.S. at 591 (citing Restatement (Second) of Trusts § 377, cmt. c (1959)). Principles of charitable trust law are not static, and "[q]uestions of public policy are not fixed and unchanging, but vary from time to time and from place to place." *Green v. Connally*, 330 F. Supp. 1150, 1160 (D.D.C. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971). The Third Restatement of Trusts, which did not exist at the time of the *Bob Jones* decision, provides that common law has long recognized the distinction the proposed regulations seek to collapse: the difference between invidious discrimination and remedial action. The Restatement (Third) of Trusts explains that when assistance "explicitly excludes potential beneficiaries on the basis of membership in a particular racial, ethnic, or religious group, the restriction is ordinarily invidious and therefore unenforceable." Restatement (Third) of Trusts § 28 cmt. f. But the law of charitable trusts "does not object to" programs "attempting to respond to a social problem in its own terms, at least as reasonably perceived by a substantial (even if not majority) segment of society or of the affected community." *Id.*

Prior IRS guidance recognized precisely this distinction. General Counsel Memorandum 39792 (June 30, 1989) analyzed race-conscious charitable restrictions under the public policy doctrine and concluded that a racial restriction violates the fundamental public policy against discrimination only if "it is of a type that excludes from participation in or denies the benefits of a program or activity to individuals solely on the

basis of race so that it can reasonably be expected to aggravate the disparity in the educational, economic or social levels of that group when compared with society as a whole." The GCM emphasized that "not all racially restrictive provisions are necessarily in conflict with fundamental public policy" and directed "an examination of the facts and circumstances on a case-by-case basis . . . to determine whether . . . a trust actually fosters racial discrimination"—an inquiry the proposed regulations would eliminate.

Treasury, in its proposed regulations, invokes *Bob Jones* as authority for the public policy doctrine on which it relies, but Treasury cannot satisfy the standard that *Bob Jones* itself establishes. *Bob Jones* permits the IRS to act only where "there is no doubt that the organization's activities violate fundamental public policy." 461 U.S. at 598. As illustrated in the evolving interpretive work of the federal judiciary, the shifting positions of administrations over a two year period, and the lack of guidance from Congress there does exist such doubt with respect to the subject matter of the proposed regulations, and that doubt is currently being litigated in real time.

Treasury, in its proposed regulations, seizes on, and attempts to expand the scope of, the Supreme Court decision *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*SFFA*") at a moment when there is considerable doubt whether the activities at issue violate fundamental public policy, and when the position of the three branches of the Federal Government is anything but unmistakably clear. Indeed, two federal courts have enjoined agency action extending *SFFA* beyond its holding.

The Court in *SFFA* did not address programs other than federally funded higher education admissions programs: It did not address scholarships, primary and secondary schools, financial aid, pipeline programs, schools that receive no federal or state funding, the definition of charitable, or the exemption under section 501(c)(3).

Because *SFFA* is limited in its application and cannot be read to impose a blanket prohibition on race-conscious programs, federal courts continue to interpret the contours and limitations of relevant issues stemming from the Court's holding. In *American Federation of Teachers v. Department of Education*, 779 F. Supp. 3d 584 (D. Md. 2025), the court granted a preliminary injunction against a Department of Education Dear Colleague Letter that warned educational institutions that race-conscious programs could violate Title VI, holding that the government "at a minimum, misapprehended the scope of Title VI and *SFFA*," and that "[e]ven extrapolating *SFFA*'s holding, as the government does, to extend far beyond college admissions, it does not proscribe any particular classroom speech, or relate at all to curricular choices." The District of New Hampshire enjoined the same guidance on other grounds. *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 149 (D.N.H. 2025).

Similarly, the proposed regulations rest, in part, on the current administration's executive orders as evidence that opposition to race-conscious programs reflects a *"fundamental public policy."* But executive orders are, in this situation, ephemeral and administration-specific. The recent history of executive action on this subject proves the point. On January 20, 2021, Executive Order No. 13,985 declared that *"[a]ffirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government."* 86 Fed. Reg. 7009, § 1 (Jan. 25, 2021). As part of this order there was a specific recognition of the need for federal agencies to advance equity for "people of color and others who have been historically underserved, marginalized and adversely affected by persistent poverty and inequality." Four years later, Executive Order 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025), directed agencies to terminate diversity, equity, and inclusion mandates, programs, and activities, and Executive Order 14,173, 90 Fed. Reg. 8633 (Jan. 21, 2025), imposed related certification requirements on federal contractors and grantees.

This whipsaw in four years illustrates precisely why the current administration's executive orders cannot establish the kind of durable, cross-branch consensus that *Bob Jones* requires. A policy position that changes with a presidential transition—and may change again in the next—is not one about which there is *"no doubt."*

The Court in *SFFA* explicitly provided that courts had accepted that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," can be a compelling government interest to allow for race-based government actions. 600 U.S. at 207. The proposed regulation both ignores this history and creates a rule for entirely private organizations where there is no government action and prohibits activities that are clearly within the common law definition of charitable. It applies to discrimination "for any purpose," without regard to legality, context, justification, or magnitude. A scholarship fund established to remedy documented historical exclusion is treated identically to a policy of racial exclusion. A mentorship program designed to expand opportunity for underrepresented students is treated the same as one designed to restrict it. The proposed rule draws no distinction between programs that expand the pool of educational opportunity and those that limit it. And it reaches categories of organizations and school programs the Court did not address: scholarships, financial aid, pipeline and outreach initiatives, support services, and completely private K-12 education. This overbreadth is not compelled by *SFFA*; it is a policy choice that Treasury has made contrary to the statutory mandate for tax-exemption for charitable organizations and without the "no doubt" consensus that *Bob Jones* requires.

Treasury cannot satisfy the *Bob Jones* standard, and the agency actions it mirrors are the subject of active and ongoing challenges. *Bob Jones* permits the IRS to act only where there is no doubt, and the Court satisfied itself on that record that the position of all three branches was unmistakably clear. Here, federal courts remain divided on the scope of *SFFA*. *Compare Am. Fed'n of Tchrs.*, 779 F. Supp. 3d at 584 (holding

agency guidance "misapprehended the scope of Title VI and *SFFA*"), *with Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431 (N.D. Tex. 2024) (applying *SFFA* strict scrutiny framework outside the admissions context). That division illustrates the very doubt *Bob Jones* requires Treasury to dispel before it may act. Where the judicial branch is itself divided on the scope of *SFFA*, there can be no claim that all three branches have converged on the policy Treasury asserts as applicable.

## III. The proposed regulations conflict with existing Treasury regulations and longstanding IRS practice

The proposed regulations expressly leave Treasury's existing definition of "charitable" intact. Treasury Regulation § 1.501(c)(3)-1(d)(2) provides that "[t]he term 'charitable' is used in section 501(c)(3) in its generally accepted legal sense" and enumerates among its meanings the "promotion of social welfare by organizations designed to . . . eliminate prejudice and discrimination." The courts have consistently read this language as incorporating common law charitable trust principles into section 501(c)(3), principles under which the elimination of prejudice and discrimination has long been recognized as a valid charitable purpose. *See Green v. Connally*, 330 F. Supp. 1150, 1157 (D.D.C. 1971) (noting that because "charitable" is used "in its generally accepted legal sense," "strong analogy can be derived from the general common law of charitable trusts"); *Bob Jones Univ. v. United States*, 639 F.2d 147 (4th Cir. 1980) (holding that § 501(c)(3) "must be read against the background of charitable trust law"), aff'd, 461 U.S. 574 (1983).

The preamble to the proposed regulations acknowledges this tension and attempts to reconcile the new rule with existing § 1.501(c)(3)-1(d)(2) by providing that the regulations "would not disturb the continued ability of an organization (including a private school) to take actions or adopt policies intended to eliminate prejudice and discrimination, consistent with existing § 1.501(c)(3)-1(d)(2), provided the organization achieves these purposes by means other than actions or policies that discriminate on the basis of race, color, or national or ethnic origin." 91 Fed. Reg. at 56,815. That reservation does not resolve the conflict; it states it. The proposed regulations preserve the charitable end while effectively prohibiting the means by which a school might pursue it. The effect on private schools would be to amend Treasury's own definition of "charitable," reading the elimination of racial prejudice and discrimination out of a category the regulation and the common law clearly include. A school may still set out to eliminate prejudice and discrimination, presumably including racial prejudice and discrimination, provided it never notices race in doing so. For a substantial category of programs—including scholarships for students from communities historically excluded from a field, outreach designed to reach underrepresented communities, mentorship aimed at students who have faced racial discrimination and prejudice or other barriers the program exists to dismantle—that reservation leaves the preserved purpose without content.

The same tension extends to Treasury's regulations governing private foundation grants. Under 26 C.F.R. § 53.4945-4(c)(1)(i), a private foundation seeking advance approval of an individual grant program must demonstrate that its "grant procedure includes an objective and nondiscriminatory selection process." Treasury has interpreted this standard for decades, and its interpretation directly contradicts the proposed rule.

Example 2 in § 53.4945-4(b)(5), which would remain undisturbed should the proposed regulations be finalized, provides that a foundation may establish a scholarship program "for members of a certain ethnic minority" and that doing so "utilizes objective and nondiscriminatory criteria in selecting scholarship recipients," within a charitable class. The example concludes that such a program "[i]s consistent with the existence of the foundation's exempt status under section 501(c)(3)." This regulatory safe harbor has governed foundation grantmaking for half a century.

The IRS has issued private letter rulings approving race-conscious scholarship programs under § 53.4945-4 spanning multiple administrations. *See, e.g.*, PLR 200116045 (Apr. 20, 2001); PLR 201104049 (Jan. 28, 2011); PLR 201132026 (Aug. 12, 2011); PLR 201638025 (Sept. 16, 2016) (approving scholarship program requiring that applicants "be African-American"); PLR 202426018 (June 28, 2024) (approving, nine months after *SFFA*, scholarship and educational grant procedures for a foundation that represented that some awards would "restrict eligibility to recipients who are of [a specified] heritage"). Although private letter rulings may not be cited as precedent, I.R.C. § 6110(k)(3), they demonstrate a pattern of agency practice establishing that "nondiscriminatory" encompasses race-conscious criteria designed to expand opportunity, not to exclude.

The conflict is highlighted when it is considered in the context of how these scholarships operate. In the structures the IRS has approved, the award is paid to the recipient's educational institution and applied to the student's account, whether by the foundation directly or through an administering public charity. *See* PLR 201132026 (award "paid directly to the institution attended by the recipient," with a registration form sent to the bursar or financial aid office before disbursement); PLR 201104049 (administering organization "makes payment of the award through the financial aid office of the institution"); PLR 201638025 ("[p]ayments are made directly to the college or university"); PLR 202426018 ("[s]cholarships will be paid directly to the educational institution"). Under the proposed regulations, the school that accepts and applies those funds, and not the payor, is the entity whose exemption is at risk. Treasury has not explained how a school can accept scholarship funds awarded through a selection process that Treasury's own regulations deem "nondiscriminatory" while simultaneously losing exemption for administering a "discriminatory" program.

The District Court of Maryland found a comparable extension of *SFFA* arbitrary and capricious precisely because it conflicted with the agency's own regulations, which permit recipients to give special

consideration to race in order to make program benefits more widely available. *Am. Fed'n of Tchrs. v. Dep't of Educ.*, 779 F. Supp. 3d 584, 617-18 (D. Md. 2025).

**IV. The economic analysis fails to consider material costs**

An agency rule is arbitrary and capricious where the agency has "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Treasury concedes at four separate points that it lacks the "readily available parameters and models" needed to assess the costs its rule would impose, and separately acknowledges that it lacks "the data to model" the costs of changes to admission criteria. 91 Fed. Reg. at 56,816-18.

The preamble's analysis relies on a 1994 GAO survey—data that is now 32 years old. It asserts that "scholarship dollars funded by any restricted endowment (restricted by race, ethnicity or any other criterion) represent no more than 16 percent of total scholarship dollars." 91 Fed. Reg. at 56,817. But this figure conflates race-restricted scholarships with scholarships restricted by geography, religion, field of study, and other donor-specified criteria—categories the proposed rule does not reach. Treasury has made no attempt to isolate the scholarships actually at issue or to quantify the compliance costs, enrollment effects, cy pres burdens, or donor-relations consequences the proposed rule would impose. The Council's members can attest that those costs are substantial.

Treasury also failed to consider cy pres costs. Many charitable trusts held by the Council's members contain donor-imposed restrictions that may fall within the scope of the proposed regulations. If the proposed regulations render such provisions unlawful for tax-exemption purposes, trustees will face cy pres litigation requiring court supervision and, in many states, involvement of the state attorney general. The preamble's suggestion that schools simply "work with donors or the donors' heirs" ignores that many endowments are decades old, donors are deceased, and cy pres litigation is costly and uncertain.

**V. The proposed applicability date is insufficiently prospective**

The proposed applicability date does not provide a workable transition. The regulations would apply to taxable years beginning after May 31, 2027. A substantial proportion of private schools operate on a fiscal year beginning July 1, so their first covered year would begin one month after that date, and commitments for the 2027-2028 academic year will already have been made. Many of the Council's members report that their grantmaking cycles typically operate 12 to 18 months in advance. Foundations that fund multi-year scholarship programs have already made commitments for the 2027-2028 academic year. If Treasury proceeds with any version of these regulations, which the Council continues to urge against, a significantly longer transition period would be essential.

**Conclusion**

Even if the proposed regulations apply only to private schools, their underlying interpretation of charitable purpose creates uncertainty for foundations and other grantmakers supporting work that addresses racial disparities and discrimination. Treasury has not adequately explained how its proposal can be reconciled with existing regulations and longstanding administrative practice recognizing these charitable activities, leaving grantmakers to question which programs they can support and on what terms.

These unresolved conflicts reinforce the concerns detailed above. The Council urges Treasury and the IRS to withdraw the proposed regulations in their entirety. The proposed regulations are substantively misguided, procedurally defective, and practicably unworkable. Each of these shortcomings would independently warrant withdrawal; taken together, they compel it.

Thank you for considering this input as part of the rulemaking process. To discuss the Council's recommendations in further detail or to explore options for collaborating with the philanthropic sector at large, please reach out to me at govt@cof.org.

Sincerely,
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