December 9, 2015

Via Federal eRulemaking Portal at www.regulations.gov (IRS REG-138344-13)

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

cc: Ms. Ruth M. Madrigal, Attorney Advisor, Office of Tax Policy,
    Department of Treasury (via email)

Ms. Catherine Hughes, Department of Treasury (via email)

Re: Comments on Proposed Treasury Regulations Section 1.170A-13(f)(18) (IRS REG-138344-13)

Ladies and Gentlemen:

We appreciate the opportunity to submit the enclosed comments, which represent the views of the Section of Real Property, Trust and Estate Law (“RPTE”) of the American Bar Association (“ABA”). This submission has not been approved by the Board of Governors or the House of Delegates of the ABA and, accordingly, in no way represents the policy of the ABA as a whole.

Although the attorneys who prepared this submission may have clients who would be affected by the federal tax principles addressed, or may have advised clients on the application of such principles, neither they nor their respective firms have been engaged by a client to make this submission or to otherwise influence the development or outcome of, the specific subject matter of these comments.

Thank you in advance for your consideration.
Representatives of RPTE’s Charitable Planning and Organizations Group are available to respond to any questions. Its designated contact person is Grace Allison (phone 505/277-6559).

Very truly yours,

Robert J. Krapf  
Section Chair  
ABA Section of Real Property, Trust and Estate Law

Enc.: Comments on Proposed Treasury Regulations Section 1.170A-13(f)(18)  
(IRS REG-138344-13)
I. INFORMATION ON THE DRAFTING OF THIS RESPONSE

The following comments are submitted on behalf of the American Bar Association Section of Real Property, Trust and Estate Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

These comments were prepared by members of the Charitable Planning and Organizations Group of the Trust and Estate Division of the Section of Real Property, Trust and Estate Law (the “Section”) of the American Bar Association. Grace Allison, as Chair of the Charitable Planning and Organizations Group, supervised the preparation of these comments and participated in their preparation. Principal drafting responsibility was exercised by Toni Ann Kruse, and substantive contributions were made by Jonathan Ackerman and Grace Allison. These comments were reviewed by Ellen Harrison on behalf of the Section’s Committee on Governmental Submissions.

Contact person: Phone Number:
Grace Allison (505) 277-6559

Although the members of the Charitable Planning and Organizations Group who participated in preparing these comments may have clients who would be affected by the federal tax principles addressed, or may have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a submission
with respect to, or to otherwise influence the development or outcome of, the specific subject matter of these comments.

II. BACKGROUND

I.R.C. Section 170(f)(8) was enacted 22 years ago as part of the Omnibus Budget Reconciliation Act of 1993\(^1\). In general, it strengthens the substantiation requirements relating to charitable contributions. In particular, it amends I.R.C. Section 170(f) to provide that no deduction is allowed for any contribution of $250 or more unless the taxpayer substantiates the contribution with a contemporaneous written acknowledgment (“CWA”) from the donee organization.

Notably, the legislative history makes clear that the reporting requirement is imposed, not upon the charity, but upon the donor/taxpayer. Both the relevant House Report and the relevant House Conference Report emphasize that:

This provision does not impose an information reporting requirement upon charities; rather, it places the responsibility upon taxpayers. . . .\(^2\)

I.R.C. Section 170(f)(8)(B) states that the CWA must contain (i) the amount of cash and a description of any property other than cash contributed; (ii) whether any goods or services were provided by the charity in consideration; and (iii) a description and good faith estimate of the value of any goods or services provided by the donee organization or a statement that such goods and services consist solely of intangible religious benefits. Although the provision specifies the content of the written acknowledgment, no particular form is required.\(^3\)

Substantiation must be contemporaneous with the contribution. Under I.R.C. Section 170(f)(8)(C) and Treas. Reg. Section 1.170A-13(f)(3), a CWA will be considered contemporaneous if it is obtained by

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the taxpayer by the earlier of (i) the date the taxpayer files his or her return for the taxable year in which the contribution was made, and (ii) the due date, including extensions, for filing the taxpayer’s return for that year.

I.R.C. Section 170(f)(8)(D) sets forth an exception to the general rule: a CWA is not required if the donee organization files a return with the Internal Revenue Service (“I.R.S.”), “in accordance with such regulations as the Secretary may prescribe,” that includes the same content as would be required in a CWA under I.R.C. Section 170(f)(8)(B).

On September 17, 2015, the Internal Revenue Service and Treasury (the “Government”) issued a Notice of Proposed Rulemaking (the “Notice”) proposing regulations under I.R.C. Section 170(f)(8)(D) (the “Proposed Regulations”) and requesting comments thereon from the public. Specifically, Prop. Treas. Reg. Section 1.170A-13(f)(18)(ii) requires that a donee who chooses to report to the I.R.S. under I.R.C. Section 170(f)(8)(D) must report not only the information described in I.R.C. Section 170(f)(8)(B), but also the donor’s taxpayer identification number.4

We appreciate the opportunity to comment on the Proposed Regulations and welcome an opportunity to discuss them further with you.

III. SPECIFIC COMMENTS SOUGHT IN THE NOTICE.

As indicated, the Proposed Regulations set forth donee reporting requirements under I.R.C. Section 170(f)(8)(D). The Government seeks comments on: (i) the scope of the information needed to verify substantiation of charitable contribution deductions under donee reporting; (ii) whether further guidance is needed regarding the procedures a donee should utilize to solicit and maintain a donor’s taxpayer identification number and address to mitigate risk; (iii) how the

donee reporting process may be better designed to minimize donee burden, and how it may interact with the requirement under I.R.C. Section 6115 to provide donors information regarding quid pro quo contributions; and (iv) the use of February 28th as the due date for filing a donee return and providing a copy to the donor.

IV. SUMMARY RECOMMENDATION

We recommend that the Government rely, as it has for the past 22 years, on the CWA rules of I.R.C. Section 170(f)(8) and the Treasury Regulations promulgated thereunder. In so doing, we emphasize that I.R.C. section 170(f)(8)(E) only authorizes the Secretary to propose “such regulations as may be necessary or appropriate.” (Emphasis added.)

As the Government admits in its preamble to the Proposed Regulations, donee reporting is not administrable unless the report includes a taxpayer identification number:

The donor’s taxpayer identification number is necessary in order to properly associate the donation information with the correct donor.\(^5\)

In an age of heightened privacy concerns and widespread identify theft, this requirement makes the Proposed Regulations inappropriate. In addition, based on the experience of the past 22 years, the Proposed Regulations are unnecessary.

We recommend that the Proposed Regulations be withdrawn and not be adopted as final regulations.

V. COMMENTS

The statute itself places the burden of proof concerning a charitable deduction on the donor, not the donee organization. As noted above, the

legislative history⁶ is instructive on this point, and the Proposed Regulations are inconsistent with that intent.

A. Scope of the information requested

The Proposed Regulations require a donee report which includes the following:

(A) The name and address of the donee;
(B) The name and address of the donor;
(C) The taxpayer identification number of the donor;
(D) The amount of cash and a description (but not necessarily the value) of any property other than cash;
(E) Whether any good and services were provided by the donee organization in consideration, in whole or in part, for the contribution by the donor; and
(F) A description and good faith estimate of the value of any goods and services provided by the donee organization or a statement that such goods and services consist solely of intangible religious benefits.7

Traditionally, a donor’s taxpayer identification number has not been collected or maintained by a donee charity for any purpose. A taxpayer identification number is a highly sensitive piece of information, particularly today when identity theft, through computer hacking and other means, is ubiquitous.

Moreover, by requiring a disclosure of the donor’s taxpayer identification number, Proposed Regulations exceed the authority granted in the statute. I.R.C. Section 170(f)(8)(D) mandates only that the form include “the information described in subparagraph (B)”8; tellingly, this information does not include a taxpayer identification number. The legislative history supports the intent of lawmakers to avoid the taxpayer identification number morass. In this regard, the relevant House Report specifically states:

8 I.R.C. Section 170(f)(8)(D).
The substantiation need *not* contain the taxpayer’s social security number or taxpayer identification number (TIN).⁹

We share the Government’s concern about

. . . the potential risk of 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.¹⁰

However, we do not believe a taxpayer identification number, however administratively helpful, is necessary for a report to meet the requirements of I.R.C. Section 170(f)(8)(D).

**B. Procedures to Mitigate Risk**

The risk associated with donee organizations having access to their donors’ taxpayer identification numbers makes the Proposed Regulations untenable. There is no fail-safe procedure to protect this information. As recent history has illustrated, no organization—including the Internal Revenue Service—is safe from the risks of cyber hacking. If large corporations and government agencies are not immune, it is unreasonable to expect the charitable sector (which includes many underfunded small charities) to meet this challenge successfully.

**C. Design of the donee reporting process and interaction with I.R.C. Section 6115**

In the “Special Analyses” section of the preamble to the Proposed Regulations, the Government acknowledges that:

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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.\textsuperscript{11}

What the Special Analyses section neglects to point out is that the optional reporting process described in the Proposed Regulations will rarely, if ever, be used because it is too risky for donee organizations. Unlike I.R.C. Section 170(f)(8)(A), it places the burden of compliance on the donee, not the donor: in contrast, under the express language of I.R.C. Section 170(f)(8)(A), it is the donor’s responsibility, not the donee’s, to see that he or she has the CWA in hand.

True, donee reporting mitigates risk for the donor, i.e., it preserves the income tax charitable deduction if the donor fails to obtain and maintain the CWA. For the donee organization, however, it increases risk, creating a new universe of potential liability. What if the donee organization’s report is late or inaccurate? What if the donor’s taxpayer identification number is stolen from the donee’s files? The Proposed Regulations raise the specter of civil lawsuits—and, perhaps equally expensive, civil settlements.

Despite considerable effort, we have been unable to imagine, in today’s world, a reporting regime under I.R.C. Section 170(f)(8)(D) that is both “necessary” and “appropriate.” We understand that the Government is concerned because certain donors, under examination, have argued that a failure to substantiate:

may be cured if the donee organization files an amended Form 990 . . . that includes the information described in section 170(f)(8)(B) for the contribution at issue.\textsuperscript{12}

We respectfully submit that the solution here is for the Government to issue administrative guidance clarifying that the

\textsuperscript{11}Id.
\textsuperscript{12}Id. at 55803.
Secretary must prescribe regulations in order for the exception of I.R.C. Section 170(f)(8)(D) to apply, and the Secretary has no intention of doing so in the foreseeable future. This was the approach taken in 1996 in T.D. 8690, where the Government wisely declined to exercise its regulatory authority:

Section 170(f)(8) authorizes the Secretary to prescribe regulations to satisfy the requirements of section 170(f)(8) by filing a return that includes the information described in section 170(f)(8)(B). The I.R.S. and Treasury have decided not to implement this suggestion at this time.\textsuperscript{13}

To repeat, we cannot imagine any acceptable alternative—other than administrative restraint—to the reporting requirement proposed by the Government.\textsuperscript{14}

\textbf{D. Due date of February 28th}

In view of our position that the Proposed Regulations should be withdrawn, it is unnecessary for us to comment on the proposed February 28 reporting deadline. We note, however, that small charities, in particular, already face various filing deadlines and, if Form 990-N compliance is any indicator, have failed in many cases to meet those obligations because of the limited resources at their disposal. They do not need another form to file or deadline to meet.

\textsuperscript{13} T.D. 8690, 1997-1 C.B. 5.
\textsuperscript{14} Assuming \textit{arguendo} that donee reporting were an acceptable option, nothing would be gained by coordinating the reporting rules of I.R.C. Section 170(f)(8)(D) with the disclosure requirement under I.R.C. Section 6115. Although both provisions are likely to apply only to a limited set of donors, it is unlikely that the same donor would be affected by both provisions in the same tax year; accordingly, no reporting economies would be gained. There is also no logic in such a combination: the two provisions serve very different purposes, unlike, for example, the provisions underlying Form 982 (relating to I.R.C. Section 108).
VI. CONCLUSION

In our view, the proper purpose of a regulation is to elucidate the underlying statute. In contrast, the acknowledged aim of this regulation is to ensure that the underlying statutory subsection will “rarely be used,” a bad precedent, in our view, from a public policy perspective. Worse yet are the potential unintended consequences. For example, if one large charity decides to offer IRC Section 170(f)(8)(D) reports to its donors as a marketing ploy, other charities may feel compelled to follow suit. The unintended result would be increased compliance complexity, and, most importantly, and contrary to legislative intent, a shift in the burden of risk to the charitable sector, as well as a greater potential for identity theft.

We appreciate your consideration of our comments and welcome the opportunity to discuss them further with you.