December 16, 2015

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on Substantiation Requirement for Certain Contributions

Dear Commissioner Koskinen:

Enclosed please find comments on the substantiation requirement for certain contributions (“Comments”). Please note that these Comments were previously submitted as an addendum to a letter by American Bar Association President, Paulette Brown. These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

CCs: William Wilkins, Chief Counsel, Internal Revenue Service
Erik Corwin, Deputy Chief Counsel (Technical), Internal Revenue Service
Victoria Judson, Associate Chief Counsel (Tax Exempt & Government Entities), Internal Revenue Service
Sunita Lough, Commissioner, Tax Exempt & Government Entities Division, Internal Revenue Service
Tamera Ripperda, Director, Exempt Organizations, Internal Revenue Service
Mark Mazur, Assistant Secretary (Tax Policy), Department of the Treasury
Emily McMahon, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Caroline W. Waldner and Justin Zaremby of the Exempt Organizations Committee of the Section of Taxation. The Comments were reviewed by David A. Shevlin, Chair of the Exempt Organizations Committee. The Comments were further reviewed by Celia Roady of the Section’s Committee on Government Submissions; by Stewart M. Weintraub, Council Director for the Exempt Organizations Committee; and by Peter H. Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments. Additionally, while the Section’s diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: December 16, 2015
On September 17, 2015, the Department of the Treasury (“Treasury”) and the Internal Revenue Service (the “Service”) issued a Notice of Proposed Rulemaking (the “NPRM”) containing a proposed regulation (the “Proposed Regulation”) regarding the substantiation of charitable contributions made to organizations exempt from federal income tax under section 501(c)(3). Treasury and the Service have requested comments on all aspects of the proposed rules, including whether the proposed collection of information described in the NPRM is necessary for the proper performance of the functions of the Service and whether it will have practical utility.

Background

Section 501(c)(3) organizations rely on donations to function, and the availability of the charitable income tax deduction provides strong motivation for donors to give. As such, section 501(c)(3) organizations face a practical imperative to provide donors with the documentation they need to claim their deduction. The Proposed Regulation relates to the procedures regarding how section 501(c)(3) organizations provide written substantiation for charitable contributions to their donors.

Under legislation enacted in 1993, section 170(f)(8)(A) requires a donor to substantiate any contribution of at least $250, by obtaining a contemporaneous written acknowledgment (“CWA”) from the donee organization in order to be eligible for a charitable contribution deduction. The CWA must disclose: (i) the amount of cash and a description of any property other than cash contributed; (ii) whether any goods and services were provided by the donee organization in consideration of the contribution; and (iii) 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 (the “Contribution Disclosure Information”). In order for the CWA to be contemporaneous, section 170(f)(8)(C) states that the donor must receive it on or before the earlier of the date the donor files a return for the taxable year in which the contribution was made, or the due date for filing the taxpayer’s return for that taxable year. The related Treasury Regulations further clarify that the donor must receive the CWA on or before the earlier of the date the donor files an original return for

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3 References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.
the taxable year in which the contribution was made, or the due date for filing the
taxpayer’s original return for that taxable year.⁴

Although neither the Code nor the Treasury Regulations prescribe a particular
form for the CWA, the standard acknowledgment letter sent by donee organizations to
donors is widely used and recognized. The Code also provides an exception to the CWA
obligation (the “CWA Exception”). Section 170(f)(8)(D) states that a donor does not
need to obtain a CWA if the donee organization files a return, using a form prescribed by
the Secretary of the Treasury, which contains the Contribution Disclosure Information.
Although the CWA Exception was included in the original substantiation legislation
enacted in 1993,⁵ the Proposed Regulation is the first explanation by Treasury and the
Service of the requirements for donee organizations to use the CWA Exception.

The NPRM explains the reason that Treasury and the Service have chosen to
address the use of the CWA Exception now, more than 20 years after section
170(f)(8)(D) was enacted. According to the NPRM, although neither Treasury nor the
Service has prescribed a form for the CWA Exception, some taxpayers have nevertheless
attempted to avail themselves of the CWA Exception. These taxpayers, who were unable
to substantiate their charitable contributions with a CWA as part of an audit, argued that
donee organizations could invoke the CWA Exception by filing amended Forms 990 with
the relevant information, sometimes years after the donation was made. The NPRM
states that the Service has consistently maintained that the CWA Exception is not
available until final regulations prescribing the method by which it may be accomplished
are issued by Treasury and the Service. In the NPRM, Treasury and the Service
explicitly reject the use of Form 990 for the CWA Exception.

Summary of the Proposed Regulation

The Proposed Regulation states that the Service will create a specific-use
information return (the “CWA Return”) which can be used for reporting by donee
organizations. Donees that elect to use the CWA Exception, rather than provide a CWA,
will be required to provide a copy of the CWA Return to the donor and the Service. The
CWA Return will require disclosure of the Contribution Disclosure Information as well
as the donor’s name, address, and taxpayer identification number. The CWA Return
must be filed with the Service and sent to the donor no later than February 28 of the
calendar year following the calendar year in which the donation is made. The NPRM
does not indicate when the Service will issue the CWA Return. Further, the NPRM does
not indicate how the Service will make use of filed CWA Returns. While the NPRM
indicates that the Service “must have a means to store, maintain, and readily retrieve the
return information for a specific taxpayer if and when substantiation is required in the
course of an examination,” it is unclear how the Service intends to match the information
provided by the donee organization on the CWA Return to a taxpayer’s individual tax
return.

⁴ Reg. § 1.170A-15(c).

⁵ Section 170(f)(8) was enacted by section 13172(a) of the Omnibus Budget Reconciliation Act of 1993,
Public Law 103-66 (107 Stat. 312, 455 (1993)).
Comments on the Proposed Regulation

When section 170(f)(8)(A) was enacted more than 20 years ago, it imposed significant new requirements on donors to obtain written substantiation of charitable contributions and this required section 501(c)(3) organizations to provide such information in a timely fashion on a donor-by-donor basis. It also imposed new burdens on donors to retain these written acknowledgements in order to claim their charitable contribution deduction. Congress provided the CWA Exception as a potentially convenient centralized process for section 501(c)(3) organizations and their donors. Since that time, however, there have been several changes that make the CWA Exception of limited, if any, utility. First, section 501(c)(3) organizations have implemented the existing CWA process and made that an integral part of donor communications. Second, donors have become accustomed to retaining CWAs as part of their annual tax preparation. Third and most importantly, issues of privacy and identity theft have taken on new urgency, making it unlikely that donors will feel comfortable providing taxpayer identification numbers (including social security numbers) to their donees, and equally unlikely that section 501(c)(3) organizations will want to assume responsibility for the data security of such private donor information. Since the existing CWA process appears to be working well for all but a few taxpayers, we do not believe that development of the CWA Return is in any way necessary for the proper performance of the functions of the Service. Moreover, given the substantial issues of privacy and data security associated with collection of taxpayer identification numbers, we think it is unlikely that the CWA Return will have practical utility.

The development of the CWA Return is likely to require a significant outlay of resources from the Service. Further, use of the CWA Return would only enhance taxpayer compliance if the Service also develops a matching program whereby the Service can match the information provided by the donee organization to a taxpayer’s individual tax return. Without such a program, the collection of the CWA Returns will be largely useless to the Service, as no comparison could be made between contribution deductions claimed by taxpayers and contributions reported by donee organizations. Developing such a matching program may require a significant outlay of resources both in terms of personnel time and expense. The Service operates on limited resources and such a significant commitment of resources would be warranted only if there is reason to believe that section 501(c)(3) organizations will make substantial use of the CWA Return rather than continuing to use the existing CWA process. The NPRM suggests that “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.” For the following reasons, we think that is very likely to be the case.

- The existing CWA process works well for section 501(c)(3) organizations because it allows the organizations to provide substantiation to donors while at the same time thanking donors in a personal and meaningful way. Because section 501(c)(3) organizations generally want to thank their donors in a personalized way and would take steps to do so even if donors were not required to obtain such an acknowledgment, the CWA does not pose much of an additional burden.
• Section 501(c)(3) organizations have developed processes around issuing the CWA and, because those processes are already in place, the organizations are unlikely to use an alternate approach if the CWA method of compliance is still available.

• Like all entities, section 501(c)(3) organizations are justifiably concerned about data breaches that could compromise private donor information. For this reason, we believe it would be unlikely that organizations would want to be responsible for collecting and retaining donors’ taxpayer information numbers, as required by the Proposed Regulation for inclusion on the CWA Return. Similarly, we believe that donors would have the same concerns regarding data breaches and identity theft and would be reluctant to disclose sensitive personal information for use on the CWA Return. We note as well that concerns about cybersecurity are receiving increased attention and have, in one matter, brought the Service to federal court.  

In summary, we believe that the existing CWA process works well and that the CWA Return is not necessary for the proper administration of the tax laws. Moreover, we think very few organizations would be likely to use the CWA Return because they will not be willing to assume the risks inherent in collecting and safeguarding taxpayer identification numbers. Under these circumstances, we do not believe that development of the CWA Return and the matching program that would be necessary to make the CWA Return useful would be a sensible use of the Service’s limited resources.

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6 See Nat’l Org. for Marriage, Inc. v. United States, 24 F.Supp.3d 518 (E.D. VA 2014) (after its Form 990 Schedule B was published by the Huffington Post, a 501(c)(4) social welfare organization alleged that the Schedule was leaked by the Service).