

Legal Sidebar

IRS Proposes Controversial Regulations Regarding Charity Donors' SSNs

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The Internal Revenue Service (IRS) has issued a controversial [notice of proposed rulemaking](#) relating to the substantiation requirements that taxpayers must comply with in order to deduct charitable contributions. The proposed regulations would provide an alternative to [current law](#), under which donors must substantiate charitable deductions of \$250 or more by obtaining a contemporaneous written acknowledgement (CWA) from the donee organization, such as a §501(c)(3) charity. The CWA must include the amount of cash donated, a description of any donated property, and whether any goods or services were provided in exchange for the donation. Under existing law, the donee organization gives the CWA to the donor, and the IRS does not receive a copy. The donor will only have to provide the CWA to the IRS if specifically requested to do so (e.g., during an audit).

Under the proposed regulations, donee organizations would have the option of either (1) providing a CWA to the donor as they currently do or (2) filing a special form with the IRS and sending a copy of it to the donor. The form would include the same information as the CWA, as well as the donor's name, address, and taxpayer identification number. It would have to be provided to the IRS and donor no later than February 28 of the year following the donation.

[Section 170\(f\)\(8\)\(D\) of the Internal Revenue Code](#) authorizes the IRS to develop an alternative to the CWA substantiation requirement. Under it, a CWA is not required if a donee organization "files a return, on such form and in accordance with such regulations as the Secretary [i.e., IRS] may prescribe." If the proposed regulations are finalized, they would be the first time the IRS has issued regulations under this authority. In other words, no existing regulations provide an alternative to the CWA requirement.

It appears the IRS is attempting to address an issue raised by certain donors regarding the meaning of "contemporaneous" within the current CWA requirement. As the applicable [statute](#) and [regulation](#) make clear, in order to be contemporaneous, the donor must obtain the CWA on or before the earlier of (1) the date he or she files an original (non-amended) return for the year in which the donation was made or (2) the due date (including extensions) for filing that return. [As the IRS has long maintained](#), "A written acknowledgment obtained after a taxpayer files the original return for the year of the contribution is not contemporaneous within the meaning of the statute."

Nonetheless, [according to the IRS](#), some donors have argued that their failure to obtain a CWA before these deadlines can be fixed by the donee organization subsequently amending its [Form 990](#) (the annual IRS information return filed by tax-exempt organizations) for the year of the donation to include the information that was supposed to be in the CWA. These donors have argued that an amended Form 990 is a permissible CWA alternative under Section 170(f)(8)(D). [The IRS strongly disagrees](#), particularly since the agency (1) has never issued regulations providing for an alternative to the CWA; and (2) does not believe the Form 990 is suitable for this purpose. It does not appear that any court has addressed whether an amended Form 990 complies with the Section 170 substantiation requirement.

The proposed regulations would address this issue by (1) creating a special form, separate from the Form 990, to be used to substantiate charitable contributions and (2) providing for timely reporting by instituting a February 28 deadline for filing the form. Furthermore, since the form, unlike a CWA, would be filed with the IRS, the agency could use the information on it to substantiate charitable contribution deductions through the matching of donors and donations.

The proposed regulations have been controversial, largely due to the requirement that the donee organization provide donors' taxpayer identification numbers. For most donors, this number will be their Social Security number (SSN). As such, an organization that chooses to file the form with the IRS would be required to collect their donors' SSNs and maintain such records for a period of time. This has raised concerns about identity theft and fundraising scams, as well as increased burdens on charities (see, e.g., [here](#) and [here](#)).

The [IRS has explained](#) that the taxpayer identification numbers would be necessary because:

Unlike a CWA, which is not sent to the IRS, the 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 if and when substantiation is required in the course of an examination

The IRS did note the risk of identity theft and specifically requested public comments on “whether additional guidance is necessary regarding the procedures a donee should use in soliciting and maintaining a donor's taxpayer identification number and address to mitigate the risk.”

In the 114th Congress, Senator Roberts has introduced legislation ([S.2370](#), Protecting Charitable Contributions Act of 2015) that would prevent the IRS from finalizing the regulations or taking similar actions. Specifically, the act would (1) provide that the relevant Section 170 “definitions and regulations in effect on January 1, 2015 ... shall apply on and after” the act's enactment and (2) prohibit the IRS from “issu[ing], revis[ing], or finaliz[ing] any regulation, ... revenue ruling, or other guidance not limited to a particular taxpayer” that relates to these definitions and regulations. As such, it appears that if this bill were enacted into law, the IRS would be prohibited from creating any alternative to the CWA requirement.

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