December 5, 2019

Via Electronic Submission System

The Honorable Charles P. Rettig
Commissioner, Internal Revenue Service
U.S. Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on IRS Reg-102508-16: "Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations"

Dear Commissioner Rettig:

Campaign Legal Center ("CLC")[1] respectfully writes to comment on the proposed rule of the Internal Revenue Service ("IRS") that would cease to require tax-exempt organizations, other than those incorporated under Sections 501(c)(3) and 527 of the Internal Revenue Code (the "Code"), to report the names and addresses of their substantial contributors on Schedule B of Forms 990 and 990-EZ.[2]

The proposed rule would effectively invite illegal foreign spending in U.S. elections, cripple future enforcement of campaign finance laws, and hamstring efficient tax administration. CLC strongly urges the IRS not to adopt the proposed rule as written. CLC additionally requests a public hearing.

I. The proposed rule would invite illegal foreign spending in U.S. elections and hamper future efforts to contain its growth.

For over 40 years, IRS rules have provided that all nonprofits organized under Section 501(c) of the tax code confidentially report the names and addresses of all

---

[1] CLC is a nonpartisan, non-profit organization that represents the public interest in administrative and legal proceedings to promote the enforcement of political disclosure, campaign finance, and election laws. *See* CAMPAIGN LEGAL CENTER, http://www.campaignlegal.org (last visited Dec. 2, 2019).

[2] Internal Revenue Service, Notice of Proposed Rulemaking, Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47447 (Sept. 9, 2019).

contributors who give $5,000 or more annually.[3] Among other things, the proposed rule would eliminate that requirement for 501(c)(4) social welfare organizations and 501(c)(6) trade associations,[4] the tax-exempt entities most commonly used by wealthy special interests to anonymously influence elections.[5] This change would further enable foreign entities to donate millions of dollars to such organizations for the purpose of influencing U.S. elections without any risk of scrutiny by federal regulators.

The federal prohibition on foreign spending in our elections is the broadest prohibition in all of U.S. campaign finance law.[6] The law bans any foreign national from contributing to candidates or spending money to influence any federal, state, or local election.[7] The law also prohibits any person from soliciting, accepting, or receiving a contribution from a foreign national.[8] Federal regulations further prohibit any person from "knowingly provid[ing] substantial assistance" in the solicitation or making of such a contribution or expenditure.[9] As noted by then-Judge Kavanaugh in *Bluman v. Federal Election Commission*, these strict prohibitions are "fundamental to the definition of our national political community."[10]

The rise of "dark money" in U.S. elections has made it easy for foreign entities to contravene these laws by funneling money into U.S. elections through groups that that do not publicly disclose their donors, such as 501(c)(4) social welfare organizations and 501(c)(6) trade associations.[11] Indeed, "dark money" spending has exploded in recent years. More than half of all 2018 election spending by outside groups was dark money.[12] The largest dark money spender in that election, Majority Forward, a liberal 501(c)(4) group, dropped more than $45 million.[13] In all, since the

---

3 *See* Treasury Decision 7122, 36 Fed. Reg. 11025 (June 8, 1971); *see also* 26 C.F.R. §§ 1.6001-1(c), 1.6033-2(a)(2)(ii)(f).

4 84 Fed. Reg. at 47451. Specifically, the rule eliminates this reporting requirement for all 501(c) organizations other than those described in section 501(c)(3). *Id.*

5 *See* Dark Money Basics, Center for Responsive Politics, https://www.opensecrets.org/dark-money/basics.

6 *See* 52 U.S.C. § 30121; *see also* Brendan Fischer, *Examining Foreign Interference in U.S. Elections: A Report from the Campaign Legal Center*, CAMPAIGN LEGAL CENTER 12 (Jan. 2018) ("Campaign Finance Law in the 21st Century"), https://campaignlegal.org/sites/default/files/2018-Report-interactive-pages.pdf.

7 52 U.S.C. § 30121(a)(1). *See Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 284 (D.D.C. 2011) (Kavanaugh, J.), *aff'd mem.*, 565 U.S. 1104 (2012) (construing this ban expansively to prohibit foreign nationals "from contributing to candidates or political parties; from making expenditures to expressly advocate the election or defeat of a political candidate; and from making donations to outside groups when those donations in turn would be used to make contributions to candidates or parties or to finance express-advocacy expenditures").

8 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g).

9 11 C.F.R. § 110.20(h)(1).

10 *Bluman*, 800 F. Supp. 2d at 288.

11 *See Dark Money Matters*, CAMPAIGN LEGAL CENTER (June 12, 2017), https://campaignlegal.org/sites/default/files/Dark%20Money%20Issue%20Brief.pdf; *Follow the Shadow of Dark Money*, OPENSECRETS.ORG (last visited Dec. 2, 2019), https://www.opensecrets.org/dark-money/shadow-infographic.php.

12 Anna Massoglia, *State of Money in Politics: Billion-dollar 'dark money' spending is just the tip of the iceberg*, OPENSECRETS.ORG: OPEN SECRETS BLOG (Feb. 21, 2019), https://www.opensecrets.org/news/2019/02/somp3-billion-dollar-dark-money-tip-of-the-iceberg.

13 *Id.; see also* Anna Massoglia & Karl Evers-Hillstrom, *Liberal 'dark money' group gets an early start targeting GOP Senators ahead of 2020*, CENTER FOR RESPONSIVE POLITICS (Jan. 31, 2019), https://

Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*,[14] more than $820 million in dark money has been spent, much of it by 501(c)(4) and 501(c)(6) organizations.[15]

The potential for foreign entities to use tax-exempt organizations to make illicit contributions and expenditures in U.S. elections is not hypothetical. Although such schemes are difficult to detect due to the lack of public disclosure, recent reporting suggests that foreign individuals and domestic PACs can and do seek to use the corporate form to circumvent the foreign contribution ban.[16]

In 2016, for example, *The Telegraph* conducted an undercover investigation which showed representatives of Great America PAC offering to help a fictitious Chinese businessman illegally contribute $2 million to the PAC by first routing the funds through a consulting firm and then through two separate 501(c)(4)s to avoid disclosure.[17]

According to another report, the FBI investigated whether Russian banker Alexander Torshin—who has deep ties to the Kremlin—had funneled money to the 501(c)(4) arm of the National Rifle Association ("NRA"), which spent $30 million on the 2016 presidential election.[18]

---

www.opensecrets.org/news/2019/01/lib-dark-money-group-majority-forward-targeting-gop-senators-2020.

[14] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that corporations, including tax-exempt organizations, could not be restricted from making independent expenditures in U.S. elections).

[15] *See Outside Spending by Disclosure, Excluding Party Committees*, CENTER FOR RESPONSIVE POLITICS (last visited Dec. 2, 2019), https://www.opensecrets.org/outsidespending/disclosure.php; *Political Nonprofits (Dark Money)*, CENTER FOR RESPONSIVE POLITICS (last visited Dec. 2, 2019), https://www.opensecrets.org/outsidespending/nonprof_summ.php?cycle=2020&type=type.

[16] *See, e.g.*, Anna Massoglia & Karl Evers-Hillstrom, *Malaysian fugitive and ex-Fugees rapper indicted for funneling foreign money to back Obama*, CENTER FOR RESPONSIVE POLITICS (May 10, 2019), https://www.opensecrets.org/news/2019/05/malaysian-fugitive-funneling-foreign-money-to-back-obama/; Jon Schwarz & Lee Fang, *The Citizens United Playbook: How a Top GOP Lawyer Guided a Chinese-Owned Company into U.S. Presidential Politics*, THE INTERCEPT (Aug. 3, 2016, 1:10 PM), https://theintercept.imgix.net/wp-uploads/sites/1/2016/07/APIC-graphics-14.png?auto=compress,format&q=90. *See generally* Liz Kennedy & Alex Tausanovitch, *Secret and Foreign Spending in U.S. Elections: Why America Needs the DISCLOSE Act*, CENTER FOR AMERICAN PROGRESS (July 17, 2017), https://cdn.americanprogress.org/content/uploads/2017/07/14143822/ForeignMoneyElections-brief.pdf.

[17] *See* Fischer, *supra* note 4, at 17; Investigations Team, *Exclusive investigation: Donald Trump faces foreign donor fundraising scandal*, THE TELEGRAPH (Oct. 24, 2016), https://www.telegraph.co.uk/news/2016/10/24/exclusive-investigation-donald-trump-faces-foreign-donor-fundrai.

[18] Peter Stone & Greg Gordon, *FBI investigating whether Russian money went to NRA to help Trump*, MCCLATCHY (Jan. 18, 2018), https://www.mcclatchydc.com/news/nation-world/national/article195231139.html. In a prosecution of Torshin's assistant, Maria Butina, the Department of Justice described a conspiracy whereby Torshin and Butina utilized the NRA to gain access to U.S. political officials "for the benefit of the Russian Federation." United States' Memorandum in Aid of Sentencing at 4, *United States v. Maria Butina*, No. 18-CR-218-TSC (D.D.C. Apr. 19, 2019) https://assets.documentcloud.org/documents/5972875/4-19-19-US-Sentencing-MemoButina.pdf. In April 2019, Butina pled guilty to one count of conspiracy to act as a foreign agent in the United States without registration. Sara Murray & David Shortell, *Alleged Russian agent Maria Butina sentenced to 18 months in prison on conspiracy charge*, CNN (April 27, 2019) https://www.cnn.com/2019/04/26/politics/maria-butina-sentencing/index.html.

For many politically active nonprofits, the confidential Schedule B is the only report filed with any federal agency disclosing the identities of their large contributors. Through this rulemaking, therefore, the IRS proposes to discontinue collecting some of the most important available information with which federal regulators could detect schemes to inject foreign money into U.S. elections.

In response to this concern, the IRS notes only that "Congress has not tasked the IRS with enforcement of campaign finance laws."[19] But Congress has explicitly directed the IRS to "consult and work with" the Federal Election Commission on rulemakings regarding campaign finance matters.[20] And collection of major donor information by the IRS aids campaign finance enforcement activities.[21] For example, it gives law enforcement quick and efficient access—subject to appropriate protections—to donor information during investigations of foreign contribution schemes involving 501(c) organizations.[22] It also enables investigators to get that information without prematurely tipping off any implicated organizations. Moreover, the act of disclosure itself may be a deterrent to would-be foreign meddlers. Confidential disclosure also encourages due diligence by tax-exempt organizations to verify that their foreign contributors are not illegally supporting political activities.

As discussed further below, the IRS has no pressing reason to discontinue the collection of major donor information from 501(c) organizations. Indeed, the donor names and addresses at issue are nonpublic and confidential, and tax-exempt organizations have complied with these minimal obligations for decades.[23] But ceasing to collect this information, as the IRS proposes in this rulemaking, would give foreign interests seeking to interfere secretly in our elections a bright green light. For this reason alone, the IRS should not adopt IRS-2019-0039.

II. The current rule is not unconstitutional, and the risk of inadvertent public disclosure is minute.

Some commenters claim that requiring disclosure of financial contributors on Schedule B of Form 990 is, in itself, a substantial restraint on the right of speech and

---

19 84 Fed. Reg. at 47452.

20 *See* 52 U.S.C. § 30111(f) (requiring that the IRS "consult and work with" the Federal Election Commission "to promulgate rules, regulations and forms which are mutually consistent").

21 *See Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976) ("[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations [of campaign finance laws].").

22 *See* Investigations Team, *supra* note 17 (illustrating the possibility of using more than one tax-exempt organization to conceal foreign political donations); Julie Patel, *Transfers allow nonprofits to spend more money on campaigns, says expert*, THE CENTER FOR PUBLIC INTEGRITY (July 28, 2014), https://publicintegrity.org/federal-politics/transfers-allow-nonprofits-to-spend-more-money-on-campaigns-experts-say (explaining how tax exempt organizations can obscure the sources of political spending and evade limits on electoral intervention by making transfers to other tax-exempt organizations); Dan Glaun, *Super PACs Utilize Secretive Nonprofits to Hide Funding in Pennsylvania, Utah*, CENTER FOR RESPONSIVE POLITICS (Aug. 13, 2012) https://www.opensecrets.org/news/2012/08/super-pacs-funneling-money-through/ (describing how the identities of donors to "super PACs" can be obscured if the contribution is made through a tax exempt organization).

23 26 U.S.C. § 6103.

association.[24] But this claim has been rejected by every appellate court that has considered it.

For instance, in *Center for Competitive Politics v. Harris*,[25] the Ninth Circuit considered a facial challenge to the California Attorney General's requirement that tax-exempt organizations submit an unredacted copy of Schedule B including the names and addresses of substantial contributors to state tax regulators. The court rejected the plaintiff's "novel theory" that the nonpublic regulatory reporting requirement was an injury to its rights of speech and association, noting that "no case has ever held or implied that a disclosure requirement in and of itself constitutes a First Amendment injury."[26]

In *Citizens United v. Schneiderman*,[27] the Second Circuit considered a virtually identical challenge to New York's Schedule B filing requirement, yielding much the same result. In response to the plaintiffs' argument that disclosure to state regulators substantially infringed on First Amendment associational rights, the court responded:

> Any form of disclosure-based regulation—indeed, any regulation at all—comes with some risk of abuse. This background risk does not alone present constitutional problems. And requiring disclosure is not itself an evil: anonymity can protect both those whose unpopular beliefs might subject them to retaliation and those who seek to avoid detection (and consequences) for deceptive or harmful activities that governments have legitimate interests in preventing.[28]

The court noted that plaintiffs could seek a narrow as-applied exemption from the state Schedule B filing requirement, but only upon a showing that disclosure would result in *actual* restraints on its associational rights—as measured by a "reasonable probability" that disclosure will give rise to serious threats, harassment, or reprisals.[29] The court concluded that the risk of any serious infringement was low because donors' identities on Schedule B could only be known to state regulators or the IRS and could not be shared publicly.[30] And plaintiffs failed to allege that disclosing donor identities to state and federal regulators would subject them to any

---

24 *See* Institute for Free Speech, Comment on REG-102508-16: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations 1-2 (Nov. 4, 2019), https://www.regulations.gov/contentStreamer?documentId=IRS-2019-0039-1645&attachmentNumber=1&contentType=pdf (asserting that compelled disclosure of financial contributors to civil society organizations is in itself a First Amendment injury); *see also* People United for Privacy, Comments on REG-102508-16: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations 1-2 (Nov. 13, 2019), https://www.regulations.gov/contentStreamer?documentId=IRS-2019-0039-1719&attachmentNumber=1&contentType=pdf.

25 *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1309-10 (9th Cir. 2015).

26 *Id.* at 1316.

27 *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018).

28 *Id.* at 383.

29 *Id.* (citing *Citizens United*, 558 U.S. at 367 (requiring "reasonable probability that disclosure of [a group's] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private entities") and *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (requiring a "likelihood of substantial restraint" on the right of association)).

30 *Id.* at 384.

form of reprisal.[31] In addition, whatever "small extent of speech chilling [was] more than commensurate with the government's goals" in "preventing fraud and self-dealing in charities."[32]

In *Americans for Prosperity Foundation v. Becerra*,[33] the Ninth Circuit rejected an as-applied claim that California's Schedule B filing requirement substantially infringed on a charitable organization's First Amendment rights. Americans for Prosperity Foundation ("AFPF") argued there, as its 501(c)(4) arm claims in its comment regarding this proposed rule,[34] that the risk of inadvertent public disclosure of Schedule B forms would deter contributors and subject charitable donors to threats, harassment, and reprisals.[35] The court held that plaintiffs failed to show that contributors had been deterred or that they would face any serious reprisals as a result of California's nonpublic collection of Schedule B donor information.[36]

Regarding the prospect of inadvertent disclosure, the Ninth Circuit held that the risk was "slight": California law prohibits public disclosure of Schedule B information, and the "sheer possibility" of a future confidentiality lapse—whether occasioned by human error or cybersecurity breach—did not establish a reasonable probability that the Schedule B requirement would subject the plaintiffs to threats, harassment, or reprisals.[37] The court acknowledged past errors in uploading paper-copy Schedule B's to the state's website, but concluded that such lapses could be and had been remedied with standard protocols such as "quality checks" and monitoring.[38]

In this rulemaking, the IRS also cites concerns about inadvertent public disclosure as a justification for its proposed rule.[39] Certainly, nonpublic information should remain secure and confidential. But as noted in the Ninth Circuit's decision, the risk of inadvertent public disclosure of Schedule B information is exceedingly small, even at the state level, and it is no doubt smaller at the federal level because the IRS has already taken steps to reduce the possibility of accidental public disclosure.[40] Moreover, "[n]othing is perfectly secure on the Internet."[41] But the background risk of inadvertent public disclosure is minute, can be addressed in other ways, and does not support repealing the current rule.

---

[31] *Id.* at 385.
[32] *Id.* at 384.
[33] *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000 (9th Cir. 2018).
[34] *See* Americans for Prosperity, Comment on Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, *supra* note 23, at 3-5.
[35] *Americans for Prosperity Foundation*, 903 F.3d at 1013.
[36] *Id.* at 1013-17 ("The evidence presented by the plaintiffs here does not show that disclosure to the Attorney General will 'actually and meaningfully deter contributors,' or that disclosure would entail 'the likelihood of a substantial restraint upon the exercise by [their contributors] of their right to freedom of association.").
[37] *Id.* at 1004, 1019 ("The risk of inadvertent disclosure of *any* Schedule B information in the future is small, and the risk of inadvertent disclosure of *the plaintiffs'* Schedule B information in particular is smaller still.").
[38] *Id.* at 1018.
[39] 84 Fed. Reg. at 47452.
[40] *See Americans for Prosperity Foundation*, 903 F.3d. at 1019.
[41] *Id.* at 1018.

Finally, every appellate court that has considered the constitutionality of Schedule B disclosure requirements has held that collecting this information serves important governmental interests in policing fraud and self-dealing in tax-exempt organizations.[42] As the Ninth Circuit noted, "quick access" to donor information improves "investigative efficiency" and enables regulators to easily "flag suspicious activity," sometimes "obviat[ing] the need for expensive and burdensome audits."[43]

The IRS has stated that it seeks to balance its need for Schedule B information against the costs and risks associated with reporting the information.[44] In fact, the risks associated with reporting Schedule B information are minimal. And the need for this information is great, both to police fraud among tax-exempt organizations and to protect our democracy from foreign political spending. For these reasons, we urge the IRS not to adopt the proposed rule.

CLC additionally requests a public hearing on the proposed rule, and for the opportunity to testify at this hearing.

Respectfully submitted,

/s/
Brendan Fischer
Director, Federal Reform Program
Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20005

/s/
Aseem Mulji
Legal Fellow/Law Clerk
Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20005

---

42 *See Americans for Prosperity Foundation*, 903 F.3d at 1011; *Center for Competitive Politics*, 784 F.3d at 1311, 1317; *Schneiderman*, 882 F.3d at 382 ("Collecting donor information on a regular basis from all organizations 'facilitates investigative efficiency,' and can help [regulators] to 'obtain a complete picture of [the] charities operations' and 'flag suspicious activity' simply by using information already available to the IRS.").

43 *Americans for Prosperity Foundation*, 903 F.3d at 1010.

44 84 Fed. Reg. at 47451.