



July 24, 2019

Mr. Ward L. Thomas  
Associate Chief Counsel  
Office of Chief Counsel (EEE)  
Internal Revenue Service  
1111 Constitution Ave, NW  
Washington, DC 20224

Ms. Amber L. MacKenzie  
Associate Chief Counsel  
Office of Chief Counsel (EEE)  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

**Re: Notice 2017-73 – Application of Excise Taxes with Respect to Donor Advised Funds in Certain Situations**

Dear Mr. Thomas and Ms. MacKenzie:

The American Institute of CPAs (AICPA) appreciates the efforts of the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) to address the need for guidance related to the changes to section 4967<sup>1</sup> as enacted under Pub. L. No. 109-280, which was signed into law on August 17, 2006, that address certain longstanding issues regarding donor advised funds (DAFs) and their sponsoring organizations.

On December 4, 2017, Treasury and the IRS issued Notice 2017-73 – Request for Comments on Application of Excise Taxes With Respect to Donor Advised Funds in Certain Situations (the “Notice”). This letter is in response to the request by the IRS and Treasury for comments on the rules described in the Notice.

Specifically, the AICPA recommends that Treasury and the IRS provide guidance on the following issues related to the changes to section 4967:

- I. General Comments
  1. Expanded Definition of Incidental Benefit
  2. Data Collection Burden and Privacy
- II. Certain distributions from a donor advised fund providing more than an incidental benefit to a donor, donor advisor, or a related person (Section 3 of the Notice)
- III. Certain distributions from a donor advised fund permitted without regard to a charitable pledge made by a donor, donor advisor, or related person (Section 4 of the Notice)

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<sup>1</sup> “All section references in this letter are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated there under, unless otherwise specified.”

- IV. Preventing attempts to use a donor advised fund to avoid “public support” limitations (Section 5 of the Notice)
- V. Request for specific public comments (Section 6 of the Notice)
  1. How private foundations use donor advised funds in support of their purpose
  2. Whether, consistent with section 4962 and its purposes, a transfer of funds by a private foundation to a donor advised fund should be treated as a qualifying distribution only if the donor advised fund sponsoring organization agrees to distribute the funds for section 170(c)(2)(B) purposes (or to transfer the funds to its general fund) within a certain timeframe
  3. Additional considerations relating to donor advised funds with multiple unrelated donors under the proposed changes described in Section 5 of the Notice

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have questions, please contact Richard J. Locastro, Chair, AICPA Exempt Organizations Taxation Technical Resource Panel at (301) 951-9090, [rlocastro@grfcpa.com](mailto:rlocastro@grfcpa.com); Elizabeth Young, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9247, or [elizabeth.young@aicpa-cima.com](mailto:elizabeth.young@aicpa-cima.com); or me at (408) 924-3508, or [chris.hesse@CLAconnect.com](mailto:chris.hesse@CLAconnect.com).

Sincerely,



Christopher W. Hesse, CPA  
Chair, AICPA Tax Executive Committee

cc: The Honorable David J. Kautter, Assistant Secretary for Tax Policy, Department of the Treasury  
The Honorable Charles P. Retting, Commissioner, Internal Revenue Service  
The Honorable Michael J. Desmond, Chief Counsel, Internal Revenue Service  
Mr. Thomas West, Tax Legislative Counsel, Department of the Treasury  
Ms. Elinor Ramey, Attorney Advisor, Department of the Treasury  
Mr. David Horton, Acting Commissioner, Tax Exempt & Government Entities, Internal Revenue Service

Mr. Robert Choi, Acting Deputy Commissioner, Tax Exempt & Government Entities, Internal Revenue Service

Ms. Janine Cook, Deputy Associate Chief Counsel, Employee Benefits, Exempt Organizations & Employment Taxes, Internal Revenue Service

Ms. Victoria Judson, Associate Chief Counsel, Employee Benefits, Exempt Organizations & Employment Taxes, Internal Revenue Service

Mr. Stephen Tackney, Deputy Associate Chief Counsel, Employee Benefits, Exempt Organizations & Employment Taxes, Internal Revenue Service

Ms. Margaret Von Lienen, Director, Exempt Organizations, Tax Exempt & Government Entities, Internal Revenue Service

## AMERICAN INSTITUTE OF CPAs

### Notice 2017-73 – Application of Excise Taxes with Respect to Donor Advised Funds in Certain Situations

July 24, 2019

#### **BACKGROUND**

The Notice describes approaches and requests comments related to future intended guidance that the IRS and Treasury are considering under section 4967 that will address certain issues related to DAFs and their sponsoring organizations.

Per section 4966(d)(2), a DAF is a fund or account owned and controlled by a sponsoring organization, which is separately identified by reference to contributions of a donor or donors, and with respect to which the donor, or any person appointed or designated by such donor (donor advisor), has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of the funds. A DAF generally allows a deduction for a charitable contribution without the requirement to also make a final decision with regard to how funds will be used at the initial occurrence of the donation. The donor has advisory privileges with respect to the distribution or investment of amounts held in the fund or account.

Section 4966(d)(2)(B) provides exceptions from the definition of DAF. For example, section 4966(d)(2)(B)(i) provides an exception for any fund or account “which distributes only to a single identified organization or governmental entity” and section 4966 (d)(2)(B)(ii) provides an exception for the donor or any person appointed or designated by the donor to advise for making grants to individuals for travel, study, or other similar purposes.

Any forthcoming proposed regulations are expected to cover the following areas:

- When certain distributions from a DAF, which enable a donor or donor advisor or related person under section 4958(f)(7) (collectively referred to as “Donor/Advisor”) to attend or participate in a charity-sponsored event, provide for a “more than incidental benefit” to the Donor/Advisor resulting in an excise tax under section 4967.
- When distributions from a DAF to a charity will not result in a more than incidental benefit to a Donor/Advisor under section 4967 merely because the Donor/Advisor has made a charitable pledge to the same charity (regardless of whether the charity treats the distribution as satisfying the pledge).
- How changes to the public support computation will be implemented for publicly supported charities described in sections 170(b)(1)(A)(vi) and 509(a)(2) treating a distribution from a DAF as an indirect contribution from the Donor (or Donors) who originally funded the DAF rather than as a contribution from the DAF’s sponsoring organization.

## **I. General Comments**

### **1. Expanded Definition of Incidental Benefit**

#### Overview

Throughout the Notice, the concepts between the law related to donations and transactions with public charities and excess benefit transactions are intertwined with the concepts and law related to private foundations and self-dealing with disqualified persons.

The term “more than incidental benefit” is used when describing transactions between a private foundation as defined in section 509(a) and disqualified persons as defined in section 4946 to determine if the transaction is considered a prohibited act of self-dealing under section 4941. The transactions in question throughout the Notice which may provide a prohibited benefit are between a sponsoring organization (as defined in section 4966, which must by definition be a public charity as described under section 170(c), other than a government or private foundation) and the contributing Donor/Advisor. The term “insubstantial benefit” is used under section 170, which deals with limiting or reducing the value of donations when such benefit is received by a donor. Under this section, donors reduce the charitable deduction by the fair market value of any quid pro quo benefit received from the public charity. Section 4967(d) refers to the public charity definition of disqualified persons under section 4958.

#### Recommendations

The AICPA agrees with Treasury and the IRS that guidance and clarification are needed with respect to transactions with DAFs as defined in section 4966(d)(2) and certain transactions with a Donor/Advisor. This clarification should be mindful of commingling concepts between private foundations and public charities that may create confusion and the need for further clarification.

The AICPA recommends that the IRS and Treasury include an expanded definition of incidental benefit (as it relates to the term used in section 4967) to clarify that incidental benefits in the context of DAFs align with insubstantial benefits that reduce the value of contributions (under section 170).

#### Analysis

Although DAFs are often used as an alternative to private foundations, only a public charity may sponsor a DAF. In order to qualify as a DAF, the sponsoring organization must provide donors written evidence they have made a completed gift and forfeited all but advisory privileges over the funds.

We understand the guidance within the Notice is based upon the Pension Protection Act of 2006 (PPA).<sup>2</sup> The language in the PPA commingled the concepts and terms of public charities and private foundations by prohibiting a more than an incidental benefit as found in section 4967(a)(1). However, the definition “more than incidental benefit” according to the Joint Committee reports

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<sup>2</sup> Pub. L. No. 109-280, 120 Stat. 780 (2006).

for PL 109-280 is as follows: “the result of a distribution from a donor advised fund, a donor, donor advisor, or related person with respect to such fund receives a benefit that would have received (or eliminated) a charitable contribution deduction if the benefit was received as part of the contribution to the sponsoring organization.” The example provided references a donation from a DAF to a Girl Scouts organization in which the donor’s daughter is a member. The indirect benefit the donor receives because of the contribution is considered incidental under the provision as it generally would have reduced or eliminated the donor’s deduction. The example aligns a more than insubstantial benefit with the quid pro quo rules under section 170. The legislative language attempts to prohibit donors from using a DAF to make contributions and receive benefits indirectly that they could not receive directly. These benefits include insubstantial benefits (which are indexed annually) and a no substantial return benefit.

## **2. Data Collection Burden and Privacy**

### Overview

Section 5 of the Notice proposes a change in the public support test for recipient organizations. The proposed change would require aggregation of donations from the original donors to the DAF with all other donations to the recipient charity.

### Recommendation

We recommend removing the proposed change in the public support test which is outlined in Section 5 of the Notice.

### Analysis

There are several reasons why we recommend removing the proposed change in the public support test including the difficulty in obtaining reliable data on the underlying donor(s) to the DAF unless there is a taxpayer ID number available. The taxpayer ID number allows Treasury and the IRS to trace the specific donor; however, the access to this information causes additional privacy and identify theft concerns. Treasury has removed previous proposals to obtain donor tax identification numbers from previous regulations.<sup>3</sup> In addition, Congress has removed the possibility of Treasury receiving a donor acknowledgment form with the revision to section 170 in the TCJA.<sup>4</sup> On numerous occasions, based upon privacy and identity theft concerns, Treasury has determined the risk of obtaining the information outweighed the benefit (e.g., aggregation of direct and indirect gifts through a DAF, which is legislatively a completed gift). Also, there is difficulty in the ability to match the donors to determine who is an excess contributor.

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<sup>3</sup> See Prop Treas. Reg. § 1.170A-13(f)(18)(i) ([September 17, 2015](#)). Noting the concerns expressed by the public, the IRS withdrew the proposed regulations on January 7, 2016.

<sup>4</sup> Section 13705 of the TCJA repeals section 170(f)(8)(D), an inactive provision that exempted donors from substantiating charitable contributions of \$250 or more through a contemporaneous written acknowledgment, provided that the donee organization filed a return with the required information. The repeal of section 170(f)(8)(D) applies to contributions made in tax years beginning after December 31, 2016.

## **II. Certain distributions from a DAF providing more than an incidental benefit to a donor, donor advisor, or a related person (Section 3 of Notice)**

### Overview

Section 3 of the Notice mentioned that several commenters requested that the IRS and Treasury issue guidance related to the treatment of a distribution from a DAF to a section 501(c)(3) public charity (charity) which then allows a Donor/Advisor to attend or participate in an event held by the charity or receive some other benefit, such as a membership. The guidance is intended to clarify whether this type of transaction provides a more than incidental benefit under section 4967 to the Donor/Advisor.

It is the view of IRS and Treasury that payment from the sponsoring organization that allows the attendance at an event or provides some other quid pro quo always results in a more than incidental benefit to the Donor/Advisor. This more than incidental benefit results even when the DAF donates the contribution portion of the cost and the Donor/Advisor contributes the fair market value of the exchange portion. However, the net tax result of this transaction is the same as if the donor engaged in the transaction directly.

### Recommendation

The AICPA recommends that the IRS and Treasury provide an expanded definition of what constitutes an incidental benefit for transactions between DAFs, Donor/Advisors and public charities.

### Analysis

The proposed guidance in Section 3 of the Notice prohibits taxpayers from engaging in an activity indirectly that they could otherwise engage in directly because Treasury is applying code sections applicable to private foundations rather than code sections applicable to public charities. A contribution to a DAF is a donation to a public charity. The distribution from the DAF is also made to a public charity. If the limitation on benefits provided to Donor/Advisor is no more than “insubstantial” return benefits (not “incidental” return benefits), the transaction should not be prohibited. This threshold would be allowed if the donor were provided a full deduction on the original contribution to the sponsor of the DAF. The amount of insubstantial benefits is indexed annually. The donee charities may certify they are not providing more than insubstantial benefits to Donors/Advisors (e.g., a more than *de minimis* or token benefit as defined in section 170(f)(8)).

The position in the Notice prohibiting bifurcation of the purchase price of special event tickets follows Private Letter Ruling (PLR) 9021066.<sup>5</sup> It was designed to prohibit officers of a for-profit corporation from inappropriately raiding the assets of the corporate private foundation to attend fundraising events for their personal enjoyment without committing an impermissible act of self-dealing.

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<sup>5</sup> See also Rev. Rul. 77-160.

Prohibiting bifurcation is inappropriate for several reasons. Applying the position in PLR 9021066 to a DAF creates additional complexity for individuals and companies as they undertake charitable gift planning during a time when it is otherwise understood there is a goal of simplifying overall tax compliance/administration and encouraging continued support of the charitable community. At a minimum, additional work is required to project what types of charity events donors might support in the future that could not be supported through the DAF. The DAF would become funded with the estimated remaining charitable budget, which may cause an overfunding or underfunding of the total charitable support budget. The donor could have provided the contribution directly, and the portion in excess of the quid pro quo amount would become fully deductible under the law (not treated as any excess benefit or incidental benefit). It is overly complex and restrictive to determine a different result because the charitable portion is paid to a qualifying public charity from funds the donor previously contributed to a DAF administered by an independent sponsoring organization.

It is arguable that the same statement can be made for Section 4 of the Notice, which reaches the opposite conclusion by stating: “Because the relationship between a private foundation and its disqualified persons typically is much closer than the relationship between a DAF sponsoring organization and its Donor/Advisors, this special rule...would apply for purposes of section 4967 only.” The DAF must exercise independent funding approval from the advice of the Donor/Advisor. If the funding approval is exercised, the charity is receiving its charitable funds, the Donor/Advisor is paying the quid pro quo portion, and the charity receives the entire amount. The Donor/Advisor has no decision-making authority over the distributions from the DAF. This position is consistent with the conclusion in Section 4 of the Notice (as opposed to PLR 9021066 discussed above).

Many charities’ budgets depend significantly on events-based fundraising and their overall goals include both dollars raised and actual event attendance (often attendance at such a function is a significant part of donor engagement and relationship building). If potential donors cannot fund an otherwise charitable contribution (i.e., the amount in excess of any quid-pro quo determination) from funds they have already irrevocably donated to charity through a DAF, the added cost of supporting the event through a separate contribution pool provides another reason for them to deny support. Alternatively, they will reject the offer of tickets provided in order to comply with the tax law, causing a negative financial impact on the charity due to smaller event attendance. Overall, there are substantial benefits to organizations having donors attend various charity events. These benefits provide an incentive to allow the use of funds currently held in DAFs to be used for the charitable portion of these events if these funds are transferred out of the DAFs and into the charitable sector.

### **III. Certain distributions from a DAF permitted without regard to a charitable pledge made by a donor, donor advisor, or related person (Section 4 of Notice)**

#### Overview

Section 4 of the Notice proposes guidance on donations to public charities from DAFs when the Donor/Advisor has a pledge with the recipient charity. Per the Notice, Treasury and the IRS are of the view it is up to the recipient charity to determine if a pledge is legally binding and whether



the donation from the DAF fulfills the Donor/Advisor's pledge. It is not a more than incidental benefit to the Donor/Advisor if the recipient charity fulfills the pledge without the sponsoring organization referencing the pledge during the contribution transaction.

#### Recommendation

Other than clarification on the application of the law between the use of the terms incidental and insubstantial, as previously described, the AICPA agrees with the conclusion of Treasury and the IRS in allowing the recipient charity to determine if a pledge is legally binding and whether the donation fulfills the pledge.

#### Analysis

The proposed guidance relieves the burden on the sponsoring organization for a legal determination of a contractual obligation while promoting the distribution of funds to public charities and ultimately the community at large.

### **IV. Preventing attempts to use a DAF to avoid “public support” limitations (Section 5 of Notice)**

#### Overview

The proposed guidance attempts to prevent abuse of organizations avoiding private foundation status by receiving indirect contributions from a DAF versus the donor directly. The IRS and Treasury have presented circumstances when DAF distributions would be treated as coming from the donor, treatment of DAF distributions without an identified donor, and notification a sponsoring organization can make when distributions are not from a DAF, or when no Donor/Advisor advised the distribution.

#### Recommendation

The AICPA recommends the IRS follow the guidance already in place for section 509(a)(3) supporting organizations. Treasury Reg. § 1.509(a)-4(f)(5) addresses the abuse of supporting organizations by a donor who may control a supported organization.

#### Analysis

The positions outlined in Section 5 of the Notice create significant complexity and administrative burden for publicly supported organizations receiving contributions from sponsoring organizations. Treasury and the IRS acknowledge additional work by the recipient charity will result (as well as the sponsoring organization that will likely receive many requests and will be required to review and revise many procedures).

While the Notice states the additional work “would only be needed if the donee organization intends to treat a distribution from a sponsoring organization as public support,” most donee organizations would seek it. In addition, this “look through” approach seems to ignore that

contributions to the sponsoring organization into the DAF are completed contributions and the sponsoring organization has exclusive legal control (and thus oversight) over the assets contributed.

The rules set forth for determining the amount of public support state that a donee organization must treat, “all anonymous contributions received (including a DAF distribution for which the sponsoring organization fails to identify the donor that funded the DAF) as being made by one person.” While the sponsoring organization may not identify the specific donor that funded the DAF, it could provide some level of detail (e.g., donor 1, donor 2, etc.) if more than one DAF or donor participated. The complex provisions which create an undue burden on public charities could become overlooked by smaller organizations.

While using a DAF distribution to circumvent public support is likely rare, we acknowledge there is a potential for abuse. A significant form of this abuse would possibly occur where a controlling donor prefers to structure an organization as a public charity rather than a private foundation, but the donor does not intend to seek broad public support.

When applying the section 509(a)(3) controlling donor rule, if a public charity receives a donation from a DAF that was created or substantially funded by any of the following persons, the public charity must look through the contribution from the DAF to report it as being from the original donor of the DAF:

- A person (other than an organization described in section 509(a)(1), (2), or (4)) who directly or indirectly controls, either alone or together with persons described in paragraphs (f)(5)(i)(B) or (C) of this section [Treas. Reg. § 1.509(a)-4], the governing body of the public charity receiving funds from the donor advised fund;
- A member of the family (determined under section 4958(f)(4)) of an individual described in paragraph (f)(5)(i)(A) of this section; or
- A 35-percent controlled entity (as defined in section 4958(f)(3) by substituting “clause (i) or (ii) of section 509(f)(2)(B)” for “subparagraph (A) or (B) of paragraph (1)” in paragraph (f)(3)(A)(i) thereof).<sup>6</sup>

It is likely rare that a donor advised grant provided to a public charity will cause that organization to become a private foundation. If the recipient is exempt under section 509(a)(1), the facts and circumstances test allows the public support percentage from contributions to fall as low as 10%, making it unlikely the donations from DAFs are large enough to hinder the public support test. If the public support tracking change proposed in the Notice is applied to all public charities, the burden becomes excessive to public charities that have no public support issues and with a board of directors broadly representative of the general public. As noted above, this change to the public support test would require tracking by donor identification number to provide certainty the recipient organization was aggregating and limiting contributions from the correct donors with a proposed solution that mirrors the controlling donor rules for 509(a)(3) organizations. The IRS

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<sup>6</sup> Treas. Reg. § 1.509(a)-4(f)(5) regarding contributions from controlling donors under the supporting organizations rules.

and Treasury could curtail what are likely the most egregious cases of abuse while relieving compliant public charities of excessive administrative burden.

## **V. Request for Specific Public Comments (Section 6 of Notice)**

### **1. How private foundations (PF) use DAFs in support of their purpose**

#### Recommendation

The AICPA recommends that the IRS and Treasury propose regulations that allow private foundations to utilize DAFs in support of their purpose in a number of ways, including donating to DAFs prior to liquidation, facilitating international grantmaking, leveraging joint grantmaking efforts, and utilizing DAFs in grant making decisions.

#### Analysis

Private foundations and DAFs have historically worked together to provide a greater benefit to the philanthropic community. Some private foundations donate to DAFs prior to the decision to liquidate into a DAF because a DAF is a more efficient contributing vehicle for the donor. Some DAF sponsors work in specific communities. Many private foundations utilize the resources of those community foundation sponsored DAFs to fund projects and build on the local knowledge of those foundations.

In addition, there are also DAF sponsors with extensive expertise in international grantmaking. Private foundations may utilize DAFs with these DAF sponsors to leverage from their international grant making knowledge, which enables the private foundation to make international grants more effectively without having to directly perform expenditure responsibility oversight reporting or make an equivalency determination as they are able to rely on the work of the DAF sponsor. Private foundations also utilize DAFs to make better grant making decisions based on the community data that the sponsoring organization typically gathers in suggesting donee organizations or areas that would make the most impact in the community. Multiple private foundations can co-fund into a single DAF sponsored by a public charity around a program area such as homelessness, poverty, or early childhood education creates leverage and the ability to pool resources without the necessity for the foundations to track expenditure responsibility reports and out of corpus reporting between foundations.

- 2. Whether, consistent with section 4962 and its purposes, a transfer of funds by a private foundation to a DAF should be treated as a “qualifying distribution” only if the DAF sponsoring organization agrees to distribute the funds for section 170(c)(2)(B) purposes (or to transfer the funds to its general fund) within a certain timeframe.**

### Recommendations

The AICPA recommends that the IRS and Treasury propose regulations that state that a transfer of funds by a private foundation to a DAF is treated as a qualifying distribution only in specific circumstances. The AICPA provides the following recommendations and observations:

- We support the requirement of a specific time frame, as requested in section 6 of the Notice, to redistribute funds and recommend a five-year period if a disqualified person does not have advisory privileges over the DAF, which is also consistent with the general provisions of section 4942(g)(3).
- We recommend treating a gift as a completed grant in the year of distribution if the DAF sponsoring organization receives a grant from a private foundation and the private foundation has less than 50% of the DAF advisory privileges.
- We recommend that a redistribution from the DAF should occur where the PF has less than 50% of the Donor/Advisory privileges. The DAF sponsor should report to each PF/DAF donor on the redistribution of the DAF funds on a pro rata FIFO basis. Failure to make a distribution after 5 years would be considered an out of corpus distribution subject to recapture or prior period qualifying distribution.
- We recommend that distributions to a DAF where the PF has greater than 50% of the advisory privileges should count as a qualifying distribution in the year the donation to the DAF is made.
- We recommend subjecting the donation to a redistribution requirement by the close of the subsequent tax year, which is also consistent with section 4942(g)(3).
- We recommend that if the funds are redistributed by the close of the sponsoring DAFs tax year end, the funds remain as qualifying distributions. If not, they should be treated as failed qualifying distributions in the subsequent tax period and reported as failed out of corpus distributions.
- We ask that the IRS and Treasury also consider the following items when issuing proposed regulations:
  - Allow DAFs receiving funds from a PF controlled by a disqualified person with regard to the PF to redistribute the funds or move the assets into the general fund of the DAF sponsor by the close of the following tax year of the DAF sponsor; and
  - Require a specific purpose and a five-year redistribution requirement for grants that are part of a pooled DAF fund.

### Analysis

In addition to the altruistic reasons for using DAFs, private foundations may also utilize DAFs as a tool to qualify for the 1% excise tax rate or as an alternative to requesting a ruling for a qualified set-aside. The positive outcomes from private foundations using DAFs outweigh the potential

negative effects of allowing PFs to distribute to DAFs. Future guidance should not prohibit treating grants to DAFs as qualifying distributions. We understand the concern that private foundations that create the DAF might use this mechanism as a circumvention of the minimum distribution requirement and delay funds of public charities. The recommended timeframe of 5 years is comparable to the set-aside rules under section 4942(g)(2), but without the requirement of establishing the funds are set-aside to accomplish a specific project.

Grants distributed to DAFs from private foundations should enhance philanthropic efforts of private foundations and relieve administrative burdens, but not allow private foundations to thwart laws enacted to prevent abuses.

Allowing private foundations to continue establishing DAFs is beneficial. DAFs should be categorized as those where the PF has greater than 50% advisory privileges or no more than 50% advisory privileges. The advisory privileges are the surrogate for control under section 4942(g)(3) and the ability to take the distribution as a qualifying distribution with an out of corpus redistribution requirement. All DAFs are sponsored by public charities; therefore, it is reasonable to not require expenditure responsibility oversight because this oversight is presumed a requirement of the sponsor's exempt status with the IRS.

The same holds true with private foundations pooling resources to work together with other private foundations. There is no need to require the private foundations to issue expenditure responsibility reports to each other. Also, if one foundation does not control the DAF, it is reasonable to allow the DAF up to five years on the FIFO basis to redistribute the funds in a thoughtful manner. If the funds are redistributed, the DAF sponsor need report only the funds that have been redistributed for the purpose that the fund was established.

Similarly, a DAF sponsor accepting and redistributing funds for international grants must exercise expenditure responsibility oversight. There is no need to require the oversight twice (once by the private foundation and once by the DAF sponsor).

### **3. Any additional considerations relating to DAFs with multiple unrelated donors under the proposed changes described in Section 5 of this Notice.**

#### Recommendations

Please see previous comments and recommendations in Section IV, *Preventing attempts to use a DAF to avoid "public support" limitations (Section 5 of the Notice)*. If these recommendations are not followed, the AICPA alternatively suggests that the IRS and Treasury propose regulations related to the following items:

- Add additional clarity regarding when a fund with multiple unrelated donors is considered a DAF due to the numerous fact patterns, not all of which should be subject to the DAF provisions
- Provide guidance related to DAFs used as vehicles for employee matching programs
- Treat DAF distributions from funds with multiple donors as gifts from the sponsoring organization

- Consider applying a test similar to the public support test to DAFs to prove the sponsoring organization is at all times organized and operated for a qualified exempt purpose and not to further the private business interests of its for-profit founder. This similar test could be accomplished by:
  - Requiring disclosure whether there a founder/creator who is benefiting from the sponsoring DAF organization existing and providing significant services to the sponsoring organization which is currently required on Schedule L. However, Schedule L does not currently define the founder or creator of an exempt organization
  - Requiring the organization provide other non-DAF related charitable activities similar to the public support test, which must constitute 33 1/3% of the organizations' activities, but which can constitute as little as 10% based upon facts and circumstances

### Analysis

If funds distributed are from multiple unrelated donors, the donee charity should not have to consider the funds as received from a single source for purposes of the public charity test. DAFs set-up by unrelated individuals and DAFs established by related individuals often serve different purposes.

Many employers also use DAFs to allow employees to contribute income to a charitable giving fund, for employers to make matching gifts into the fund, or to make equivalent charitable payments for volunteer hours to which employees may direct to the specified organization as a cash contribution. Employers are engaging charitable organizations that sponsor individual DAFs for each employee similar to Section 3 of the Notice. The DAF is used to manage individual employees' accounts for matching contributions, volunteer time/matching contributions and employee advised distributions. If the employee receives no more than insubstantial (as described in section 170), rather than incidental, benefits, the distributions from the accounts are permissible and will not result in penalties to the employer or the employee recipient.

### *Private inurement and benefit potential*

Private inurement and benefit potential that a for-profit organization may gain by being the founder/creator of a nonprofit organization established to sponsor a DAF is another area that Treasury and the IRS should consider. Treasury has a long-standing policy of prohibiting exploitive exempt organizations or the creation of an exempt organization solely to enhance the business interests of the for-profit company.

There are DAF sponsors that have received tax-exempt status from the IRS and have no other substantial programs other than the collection, management and distribution of DAF funds. In addition, sometimes the board of directors has no unrestricted funds over which it has grantmaking authority outside of the DAF, which have been garnered from broad outside public support. Also, there are circumstances for which the organization exists solely to move funds from an investment management firm's individual clients' personal investment accounts into a separate account identifiable only by name within the overall portfolio and investment portal. The DAF is

maintained as a managed investment vehicle over which the investment company maintains control and garners investment management fees. The individual investor cannot discern that the DAF is in a separate entity or that the funds are no longer the property of the donor. This result occurs as the funds appear aggregated with other funds of the donor under management.