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**Section of Real Property,
Trust & Estate Law**
321 North Clark Street
Chicago, Illinois 60654-7598
FAX: (312) 988-5262
www.americanbar.org
E-mail: rppte@americanbar.org

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March 5, 2018

Internal Revenue Service
CC:PA:LPD:PR (Notice 2017-73), Room 5203
P.O. Box 7604
Ben Franklin Station, Washington, DC 20044,

Attn: Amber L. MacKenzie and Ward L. Thomas
Office of Associate Chief Counsel (TEGE).

RE: Comments to IRS Notice 2017-73 relating to donor advised funds and
Internal Revenue Code Sections 4966, 4967 and 4958

Dear Ms. MacKenzie and Mr. Thomas:

We appreciate the opportunity to submit the enclosed comments, questions and recommendations in response to IRS Notice 2017-73 pertaining to donor advised funds and Internal Revenue Code Sections 4966, 4967 and 4958, on behalf of the Section of Real Property, Trust and Estate Law (“RPTE”) of the American Bar Association (“ABA”). The comments represent the views of RPTE only and have not been approved by the ABA’s House of Delegates or Board of Governors and therefore do not represent and should not be construed as representing the position of the ABA.

The attached submission was prepared by the following members of RPTE: Christopher R. Hoyt, Ray Prather, Stephanie Casteel, Toni Ann Kruse, Jessica Baggenst, Turney Berry, Sally Venverloh, Kim Heyman, Richard Mills, and Phil Purcell, as well as Elaine Wilson. They were reviewed by Pam H. Schneider of the Section's Committee on Trust and Estate Governmental Submissions (“COGS”).

Although the attorneys who participated in preparing these Comments have clients who may be affected by the legal issues addressed by the Comments, no such member (or firm or organization to which any such member belongs) has 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.

RPTE appreciates the opportunity to submit the Comments, and we respectfully request that the Service consider our recommendations. We are available to meet

and discuss these matters with the Service and its staff to respond to any questions. The principal contact for discussion is Christopher Hoyt, who can be reached at (816) 235-2395.

Very truly yours,



Elizabeth C. Lee
Section Chair
ABA Section of Real Property, Trust and Estate Law

Enclosures

cc: Mary L. Smith, Secretary, ABA
Thomas M. Susman, Director of Governmental Affairs, ABA

**COMMENTS OF THE AMERICAN BAR ASSOCIATION, SECTION OF
REAL PROPERTY, TRUST AND ESTATE LAW, CONCERNING IRS
NOTICE 2017-73, ADDRESSING CERTAIN ISSUES REGARDING
DONOR ADVISED FUNDS OF SPONSORING ORGANIZATIONS UNDER
INTERNAL REVENUE CODE
SECTIONS 4966, 4967 AND 4958**

I. INFORMATION ON THESE COMMENTS

The following comments were prepared by the Charitable Planning and Organizations Group (the “Charitable Group”) of the American Bar Association, Section of Real Property, Trust and Estate Law (the "Section"). We have prepared the attached comments concerning donor advised funds in response to the request for comments in IRS Notice 2017-73. The comments represent the views of the Section only and have not been approved by the ABA’s House of Delegates or Board of Governors and therefore do not represent and should not be construed as representing the position of the ABA.

The principal responsibility for drafting these comments was exercised by Professor Christopher R. Hoyt, Univ. of Missouri (Kansas City) School of Law, Kansas City, Missouri with the participation of Group and Committee chairs Ray Prather, Stephanie Casteel, Toni Ann Kruse, Jessica Baggenstos, Turney Berry, Sally Venverloh, Kim Heyman, Richard Mills, and Phil Purcell, as well as Prof. Elaine Wilson. They were reviewed by Pam H. Schneider of the Section's Committee on Trust and Estate Governmental Submissions.

II. EXECUTIVE SUMMARY

In Notice 2017-73, the Service made proposals and requested comments relating to four categories of issues concerning donor advised funds (“DAFs”). Initially, we wish to express our appreciation for the Service’s willingness to address these issues in a more timely fashion than is possible with comprehensive proposed regulations and to solicit comments and suggestions. As a broad overview, we believe the Notice represents an impressive effort to address certain important and practical concerns of taxpayers and practitioners with respect to DAFs. We applaud you for doing so.

The primary purpose of the laws that regulate donor advised funds is to assure that the assets held in these funds are used exclusively for exempt purposes. We believe that this can be accomplished with regulations that are clear and easy to comply with.

Clarity and simplicity are a practical necessity. Donor advised funds typically have much smaller balances than private foundations, make numerous small grants (e.g., as little as \$50), and are often established by individuals who have less tax sophistication than their private foundation counterparts. The governing bodies of the sponsoring organizations that administer donor advised funds usually do not know the individuals who recommend grants as well as the governing bodies of private foundations know their founders. In order for donor advised funds to operate both efficiently and effectively, the laws that regulate these funds need to be clearer and simpler than the very complicated and technical laws that apply to private foundations.

A summary of our specific comments in response to the Notice with respect to each of the four categories addressed, followed by a more detailed explanation of our comments is below.

1. BIFURCATED GRANTS (SECTION 3 OF THE NOTICE)

The Service proposes treating a DAF's payment of the charitable portion of a bifurcated grant as providing a donor with a "more than incidental benefit." Thus, if a donor/advisor personally pays for the meal portion of a charitable fund-raising event, but applies a grant from a DAF toward the charitable portion, then the donor/advisor would be subject to the 125% penalty described in Section 4967 for the payment of that charitable portion.

>> *We did not reach a consensus with respect to this proposal.*

A majority of us agreed with several commenters who cited section 170 as the appropriate test of whether a benefit is "merely incidental" or "more than incidental." Thus, no penalty would be imposed on the donor/advisor, since the payment would qualify for a charitable income tax deduction.

A minority, however, agreed with your proposal, believing that the 125% penalty on the donor was appropriate on the rationale expressed by the commenter described in the Notice who stated that "but for" the payment of the charitable portion from the DAF, an individual would have had to use considerably more of his or her personal funds to get a personal benefit, such as attending a charitable fund-raising event or receiving a charitable gift annuity. These positions are elaborated in greater detail below.

2. PLEDGES (SECTION 4 OF THE NOTICE)

We agree that the Service’s proposal regarding a DAF’s payment of a charitable pledge made by a donor to that DAF is appropriate, but have one caveat. The imposition of the IRC section 4967 125% penalty on the donor/advisor if a sponsoring organization makes a reference to the existence of a charitable pledge seems unduly harsh. We do not believe that the mere mention by a grant-making charity of a pledge should convert the grant into one that contains a “more than incidental benefit” to the donor/advisor, triggering the 125% penalty on that donor/advisor.

3. HOW GRANTS RECEIVED FROM DAFs COUNT TOWARD A CHARITY’S PUBLIC SUPPORT TEST (SECTION 5 OF THE NOTICE)

The Service proposes that when computing the public support test, a recipient of a grant from a DAF must treat:

- (1) the sponsoring organization’s distribution from the DAF as coming from the donor (or donors) that funded the DAF rather than from the sponsoring organization; and
- (2) 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.

We are generally supportive of the objectives of the Service and the outcomes that it proposes, but recognize that the proposal presents practical challenges in administration. We make the following observations:

First, for this arrangement to be effective, there might have to be a duty imposed on sponsoring organizations to identify when grants are made from DAFs, since it is not always obvious.

Second, to reduce administrative burdens, we propose a safe harbor that there be no penalties imposed on charities that fail to classify grants received from DAFs in the manner described in Notice 2017-73 if those charities would have easily passed the public support test if those grants had been classified in the manner proposed in that Notice. A “no harm, no foul” rule.

4. HOW PRIVATE FOUNDATIONS USE DAFs IN SUPPORT OF THEIR PURPOSES (SECTION 6, TOPIC (1) OF THE NOTICE)

One example of the way private foundations use DAFs in support of their purposes cited by several of us is as a solution to disputes among those in control of the private foundation, including in the context of a will contest.

MORE DETAILED OBSERVATIONS ON PROPOSALS CONTAINED IN IRS NOTICE 2017-73

BIFURCATED GRANTS (SECTION 3 OF THE NOTICE)

The Service proposes treating a DAF's payment of the charitable portion of a bifurcated grant as a "more than incidental benefit". A donor/advisor who wishes to attend an event where he or she receives goods or services (such as a meal at a charitable fund-raising event) should instead pay the entire amount, including the charitable portion, without the involvement of a DAF.

>> *We did not reach a consensus on this proposal.*

MAJORITY VIEW A majority of us believe that the "more than incidental benefit" standard should mean that the benefit that the donor/advisor received was so substantial that it would have prevented an individual from claiming a charitable income tax deduction under Section 170 for the payment.

The logic is: if a person can claim a charitable income tax deduction for a payment, then any benefit that the donor receives is, by definition, only an incidental benefit. Thus, attending a charitable fund-raising event is merely an incidental benefit, but the value of the food is a "more than incidental benefit." If merely attending the event had greater value, then the donor should not be able to claim a charitable income tax deduction.

The majority gave several arguments for this position:

First, such a legal standard is consistent with the legislative history of section 4967.²

Second, a legal standard based on deductibility under section 170 would provide greater legal clarity, thereby improving the administration of the tax laws.³ Taxpayers can easily

² The committee report stated: "*[I]n general . . . there is a more than incidental benefit if, as a 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 reduced (or eliminated) a charitable contribution deduction if the benefit was received as part of the contribution to the sponsoring organization.*" See Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," ("JCT Report") (JCX-38-06), August 3, 2006 at p. 350.

³ Such a standard would clarify controversies over many issues that would otherwise require guidance from the Service. For example, under a Section 170 standard, "token benefits" (described in Rev. Proc. 90-12, such as coffee mugs with charity logos) could clearly be accepted by a donor/advisor without being treated as a "more than incidental benefit."

understand such a legal standard. By comparison, there is legal uncertainty when taxpayers don't know when a payment that would qualify for a charitable income tax deduction (if paid directly by a taxpayer) might be considered a "more than incidental benefit" that would trigger a 125% penalty on the donor/advisor.

Third, permitting such grants will reduce the "timing delay" of a DAF. A taxpayer claimed a charitable income tax deduction in the year of the contribution to the DAF, and those funds typically enter the broader charitable sector in a later year when a grant is made from the DAF. Policies should encourage dollars to flow from DAFs rather than remain bottled-up in DAFs. The Service's policy on pledges does exactly that. Similarly, by permitting grants to be applied toward the charitable portion of charitable fund-raising dinners and other bifurcated grants, funds will leave DAFs faster and get into the larger charitable economy sooner.

Finally, anecdotal comments demonstrate that many donors don't find certain charitable events to be particularly enjoyable. Business donors often have their arms twisted to sponsor a table at a charitable event and to also find the people to fill those seats.

MINORITY VIEW: A minority of us agree with the logic of PLR 9021066: the donor/advisor who paid only the cost of meal could thereby attend a prestigious charitable event that others could not attend unless they personally paid considerably more money than that donor/advisor. But for the subsidy from the DAF, that individual might not otherwise attend.

Allowing bifurcated grants could also permit donor/advisors to recommend grants from DAFs to pay the charitable portion of a charitable gift annuity, with the donor/advisor paying the amount that would not qualify for a charitable income tax deduction. The donor/advisor would thereby obtain the benefit of annuity income for life in part because a distribution was made from a DAF. This would be an example of a "more than incidental benefit," even though the payment of the charitable portion would otherwise qualify for a charitable income tax deduction if made directly by the donor.

Thus, in the opinion of a minority of us, anytime a payment to a charity is not fully deductible, the personal benefit element taints the charitable component. Grants should not be made from DAFs when there is a split-benefit. Such a policy would also conform with the rules that govern charitable grants from IRAs. An IRA distribution is a qualified charitable distribution "only if a deduction for the entire distribution would be allowable under section 170". Section 408(d)(8)(C).

PLEDGES (SECTION 4 OF THE NOTICE)

The Service stated that a distribution from a DAF to a charity to which a donor/advisor has made a charitable pledge (whether or not enforceable under local law) will not be

considered to result in a more than incidental benefit to the donor/advisor, provided that three requirements were satisfied.

We agree with the Service's position generally, but disagree with the proposed requirement that the sponsoring organization make no reference to the existence of a charitable pledge when making the DAF distribution. We recognize that the proposal is intended as a solution to a practical problem by effectively imposing a "don't ask, don't tell" policy to the payment of a pledge. This seems to be an odd approach. Moreover, it is difficult to understand why a grant-making charity's mention of a pledge should be considered a "a more than incidental benefit" to the donor/advisor that would trigger the 125% penalty on the donor/advisor.

HOW GRANTS RECEIVED FROM DAFs COUNT TOWARD A CHARITY'S PUBLIC SUPPORT TEST (SECTION 5 OF THE NOTICE)

The Service proposes that when computing the public support test, a recipient of a grant from a DAF (administered by a sponsoring organization) must treat:

- (1) the sponsoring organization's distribution from the DAF as coming from the donor (or donors) that funded the DAF rather than from the sponsoring organization;
- (2) 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; and
- (3) distributions from a sponsoring organization as public support without limitation only if the sponsoring organization specifies that the distribution is not from a DAF or states that no donor or donor advisor advised the distribution [for example, a grant received from a field of interest fund at a community foundation].

In general, we believe that the proposal is a fair way to treat grants from DAFs as being attributable to the funder of the DAF. Only a few organizations would be impacted, and those are organizations that struggle to pass the public support test. The proposed policy fairly addresses those situations. But we think that two matters should be addressed.

First, to operate effectively, the recipient charity needs to be informed that that the grant was made from a DAF. Except when grants are received from well-known sponsoring organization, such as national donor advised funds and community foundations, it may not be obvious whether a grant-making charity is a sponsoring organization or not. Many sponsoring organizations (such as universities that hold DAFs) might have only a few DAFs that are dwarfed by the larger operations of the organization. Therefore, we believe that a sponsoring organization might have to be subject to an obligation to notify the recipient charity that the grant was made from a DAF. However, to avoid excessive

administrative burdens, there should only be a duty on the sponsoring organization to disclose the identity of the donors of that particular DAF if requested by the recipient charities.

Second, in order to reduce the administrative burden on recipient charities, there should be no penalty for failure to learn the identity of the DAF donor if the charity would have easily passed the public support test (that is, it has greater than 33 1/3% public support) had the DAF grant been properly classified as “anonymous” or traced to the donor. For example, a charity that receives thousands of donations and that passes the public support test with a ratio of 80% shouldn’t be penalized for failing to properly classify a \$100 check from a DAF.

HOW PRIVATE FOUNDATIONS USE DAFs IN SUPPORT OF THEIR PURPOSES (SECTION 6, TOPIC (1) OF THE NOTICE)

One example of the way private foundations use DAFs in support of their purposes cited by several of us is as a solutions to disputes among those in control of the private foundation, including in the context of a will contest. For example, after the death of parents who established a private foundation, their four feuding children were fighting amongst themselves over a variety of issues. The ability for all four children to agree that one fourth of the private foundation’s assets would be distributed to a DAF that would be advised by one of the four children was an effective mechanism to achieve a solution.