From:	Marx, Nancy P.
To:	Notice Comments
Subject:	Notice 2017-73 -- Comments on Attorney Ramey"s remarks of February 9 to the EO Committee of the ABA Tax Section
Date:	Wednesday, February 28, 2018 11:30:50 AM

My comments (yellow highlighted text) below regarding Attorney Elinor Ramey's remarks on Notice 2017-73 as recorded at the February 9 meeting of the EO Committee of the ABA Tax Section:

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From the Desk of Paul Streckfus,
Editor, EO Tax Journal

Email Update 2018-42 (Wednesday, February 28, 2018)

3 – News from the IRS and Treasury (Part 2)

Representatives from the IRS and Treasury Department discussed topics of current interest to exempt organizations practitioners on February 9 to members of the EO Committee of the ABA's Tax Section

Moderator: LaVerne Woods, Davis Wright Tremaine LLP, Seattle, WA
Panelists:
Victoria A. Judson, Associate Chief Counsel, IRS Office of Associate Chief Counsel (TEGE), Washington, DC
Elinor C. Ramey, Attorney-Advisor, Office of Tax Policy, Department of Treasury, Washington, DC

Ramey: Now you have two different ways of dealing with benefits from charitable contributions in this area. You have the section 4941 self-dealing rules in which bifurcation isn't allowed. The private foundation can't pay the deductible portion for something that the foundation managers then get some benefit from. Then you have the 170 rules where obviously there is a deductible portion.

A lot of the questions have been, well, if I'm giving money, me, myself, giving money to an organization and there's deductible portion and a non-deductible portion I can still go to an event and that's fine and it's not a quid pro quo, everything works so that I get the deductible portion, and that's the same as me giving money to my DAF and advising money out of the DAF to the organization for the deductible portion.

So why say that you're going to get a more than incidental benefit as the donor when you're getting the exact same benefit that you would have gotten if you gave directly. The question is that in the private foundation area under 4941, that is self-dealing, that would be considered self-dealing if the manager got that benefit even if the foundation manager was the original donor.

Woods: The use of the funding.

Ramey: Right, use of the funding. There's some sort of benefit that comes back. When

donor advised funds start being not the money of the original donor and so the person who is receiving the benefit isn't actually the original donor [THE DAF IS NOT THE MONEY OF THE ORIGINAL DONOR FROM THE DAY THE MONEY IS GIVEN; THE DONOR CANNOT DIRECT ITS USE AND CANNOT GET IT BACK – FORGET THE GENERATIONAL DIFFERENCES, FROM DAY ONE, THE DAF IS NO DIFFERENT THAN ANY OTHER CHARITY – IT CANNOT USE ITS CHARITABLE FUNDS FOR IMPERMISSIBLE PRIVATE BENEFIT WHICH IS WHAT BENEFIT TICKETS AND ANY OTHER BENEFIT WOULD BE – DO NOT TREAT THE SPONSORING CHARITY OF A DAF PROGRAM AS ANYTHING OTHER THAN WHAT IT IS CLASSIFIED AS BEING – A 501(C)(3) CHARITABLE ORGANIZATION], that situation starts looking more like the foundation manager situation where the foundation money and the charitable assets are going to benefit somebody else.

That's one of the issues that we're looking at. One of the thoughts that went into this is that as you're starting to get generational differences, the donor advisor isn't necessarily the person who gave the money originally, so it's not necessarily equivalent to the person giving directly. That's the thought process. Again, we are happy to get comments. Some of that was some of what the thoughts are.

Reid: Just a little quick response. So then, with that logic, in a private foundation context, would there not be a self-dealing transaction if the person who put the money into the foundation was the one receiving the benefit?

Ramey: Right, that's the response that it would still be a self-dealing transaction and it's more than an incidental benefit, so it makes it a parallel with the private foundation rules.

Reid: But you're saying if the person who gets the benefit is the person who put the money in, then it's not an issue.

Ramey: I'm saying that that's the argument we have heard from people is saying that there shouldn't be a prohibition to that if it's going through the DAF. I'm not saying that that's right. I am not changing the rule for 4941. I'm just saying that this situation starts looking more like the private foundations and the private foundation section 4941 rules are where things ended up.

Judson: One other way to look at this because of your puzzled faces. I think the idea is that normally you'd get dinged, it violates it, but you're making an exception and the exception is the idea I could have done it myself. Then Elinor is saying you aren't entitled to that exception if it is no longer you doing it yourself. I think you're right. You could say you shouldn't even have this exception. The rules work or don't and definitely see that as well but that's what I see, am I correct?

Ramey: We're making a rule that says this is the same as the private foundation rule [AND THE SAME RULE THAT WOULD APPLY TO ALL 501(C)(3)S – NO USE OF CHARITABLE ASSETS FOR AN IMPERMISSIBLE PRIVATE BENEFIT – ATTENDING A FUNDRAISING EVENT OR RECEIVING OTHER PRIVATE BENEFITS IS NOT ACCEPTABLE UNLESS THE BENEFIT IS PART OF THE CHARITY'S CHARITABLE PROGRAM – E.G., AN INDIVIDUAL RECEIVES AN EDUCATIONAL SCHOLARSHIP OR AN INDIGENT PERSON RECEIVES A BLANKET OR FOOD – OTHERWISE THE CHARITY LOSES ITS 501(C)(3) STATUS] and so the notice has the same understanding

as the private foundation understanding. I was just saying that people have been saying it shouldn't be the same under the DAF rules, the argument being that it's just a different way of doing the same thing. My response is, it's not necessarily just a different way of doing the same thing. [ANY INCIDENTAL BENEFIT THAT THE SPONSORING CHARITY IS ENTITLED TO RECEIVE WHEN IT MAKES A GRANT IS AN ASSET OF THE SPONSORING CHARITY AND UNLESS THE SPONSORING CHARITY IS SOLICITING CONTRIBUTIONS AND OFFERING TO DISTRIBUTE THESE INCIDENTAL BENEFIT ITEMS TO NEW DONORS TO ENCOURAGE THEM TO MAKE NEW CONTRIBUTIONS TO THE SPONSORING CHARITY, *THERE IS NO BASIS* FOR ALLOWING PAST DONORS OR CURRENT DONOR ADVISORS OR ANY OTHER PRIVATE PERSON TO RECEIVE THESE ASSETS; THEY ARE THE PROPERTY OF THE SPONSORING CHARITY WHICH SHOULD EITHER REFUSE TO RECEIVE THEM, SELL THEM TO PRODUCE REVENUE TO BE USED FOR THE SPONSORING CHARITY'S CHARITABLE PURPOSES OR DISTRIBUTE THEM FOR A CHARITABLE USE -- FOR EXAMPLE, TO A PUBLIC LIBRARY – OR GRANT THEM TO ANOTHER 501(C)(3) – FOR EXAMPLE, FOR ANOTHER 501(C)(3) TO USE TO RAISE FUNDS, SUCH AS OFFERING THEM AS ITEMS TO BE BID ON AT THE 501(C)(3)'S FUNDRAISER AUCTION EVENT.]

Woods: If it's a later generation, although isn't the issue really it's not the donor's money in the DAF and you can't go to the event unless you pay both parts.

Ramey: That's a different issue, too.

Judson: A fundamental other issue which came up before and people appreciate comments. The different concept of what a DAF is and earlier people said some people think it's hybrid, some people do not, and that will impact. Regardless, we welcome comments of all kinds and other ways to solve what people view as underlying challenges without disrupting the rest of people's operating world.

A DAF program is a way for the sponsoring charity to encourage the public to participate in supporting the charities that operate to benefit society. For a community foundation or a sponsoring charity that has a particular focus (e.g., a religious based sponsoring charity), offering a DAF program is a way to involve the community served by the sponsoring charity, to make them aware of needs, to strengthen its relationship with the community that supports it and the relationship of its donors with the community served by the sponsoring charity. Such sponsoring charities should be classified as a public charities. If a sponsoring charity attracts support from and serves no particular community and simply administers a national DAF program, then perhaps such entities should be classified like a pooled common fund private foundation (170(b)(1)(F)(iii)) – contributions would continue to be deductible to the same extent as a contribution to a public charity, but the private foundation excise tax rules apply to the sponsoring charity. Regs should still be issued making clear that benefits to which a sponsoring charity is entitled by reason of a grant from one of its DAFs belong exclusively to the sponsoring charity and may not be re-distributed to any private person except as part of the sponsoring charity's own fundraising campaign as an incidental benefit to a person making a NEW contribution.