COUNCIL *on* FOUNDATIONS

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

Via Email: Notice.Comments@irscounsel.treas.gov

RE: Comments Regarding Notice 2017-73

To Whom It May Concern,

The Council on Foundations is pleased to submit comments in response to the above referenced Notice. Specifically, our comments relate to the three donor advised fund issues outlined in Notice 2017-73 in Sections Three, Four and Five. Additionally, the Council has included comments to address the questions outlined in Section Six of the Notice, also related to donor advised funds.

The Council on Foundations is a nonprofit leadership association of grant making foundations, corporations, and public charities qualified under Section 501(c)(3) of the Internal Revenue Code. Our members include over 700 philanthropic organizations and our mission is to provide the opportunity, leadership, and tools needed by these organizations to expand, enhance and sustain their ability to advance the common good.

These comments were developed by the Government Affairs and Legal Affairs staff at the Council on Foundations and reviewed and approved by the Council's President and CEO. Council staff have daily contact with our numerous members and these comments are informed by the issues and challenges our members express. We appreciate your consideration of these recommendations and welcome the opportunity to discuss these items with you further. If you have any questions, please feel free to contact Serena Jezior at (703) 879-0629 or Serena.Jezior@cof.org, or Suzanne Friday at (703) 879-0705 or Suzanne.Friday@cof.org.

Sincerely,

Serena Jezior
Associate Director, Public Policy

Suzanne Friday
Sr. Counsel and Vice President of Legal Affairs

Notice 2017-73, Section 3.
Certain Distributions from a DAF Providing a More Than Incidental Benefit to a Donor, Donor Advisor, or Related Person:

Since the Pension Protection Act was passed in 2006, the Council has advised its membership that distributions from donor advised funds (DAFs) should not be approved by the sponsoring organization, if the distribution resulted in the Donor/Advisor or a related party receiving tickets to an event, membership benefits, or other benefits of a more than incidental value, regardless of whether the Donor/Advisor offers to pay the non-charitable portion directly (bifurcation). Notwithstanding the provisions of IRC Section 170 that allow treatment of the charitable and non-charitable portions of a contribution separately, the Council has taken the conservative approach and advised its members that such distributions should not be made from DAFs.

However, for more than a decade, distributions have been made from DAFs for charitable contributions alongside a donor's payments for the full fair market value of tickets, memberships or other benefits received in exchange from a charity without question. Since the donor pays the full fair market value for any benefit received from the charity, it is difficult to imagine what additional benefit the donor receives from the DAF distribution. Therefore, because maximizing attendance at fundraising events is critical for many grantee charities (especially with the prospect of decreased charitable giving in light of tax reform), and because disallowing contributions from DAFs often reduces attendance, the Council believes that prohibiting all such distributions would be a mistake. If there are particular situations in which donors are deriving inappropriate benefits, it would be extremely helpful to have from Treasury additional guidance, and examples of when a DAF distribution would be permitted versus when it would result in too much benefit to a donor. For example, when the value of the tickets is only a small percentage of the requested contribution, or when food and beverage is provided complimentary at an event, the DAF distribution should be able to be made without incurring a penalty under Section 4967. "Safe harbor" guidance regarding what is considered a more-than-incidental benefit with respect to DAF distributions has long been sought by the field, and the Council is hopeful that this opportunity will result in such guidance.

The Council notes that, although it recommended a conservative approach to interpretation of the new Section 4967 to ensure that sponsoring organizations did not incur liability for distributions later determined to provide a more-than-incidental benefit to a Donor/Advisor, this is not the only reasonable interpretation of the law. If, after more than a decade of tacit agreement with a range of practices the IRS now wants to adopt a conservative position in regulations (such as that in the Notice), it should apply only prospectively, after the date regulations setting out the new standard are finalized.

Notice 2017-73, Section 4.
Certain Distributions From a DAF Permitted Without Regard to a Charitable Pledge Made by a Donor, Donor Advisor, or Related Person:

The Council is generally pleased with the recognition that it is often difficult for a sponsoring organization to differentiate between a charitable pledge and a mere expression of charitable intent and appreciates the approach that would leave this determination to the grantee charity rather than to the sponsoring organization. In addition, we appreciate the recognition of the significant difference between the relationship an independently-managed, sponsoring organization shares with its many DAF donors and the relationship between a private foundation and its substantial contributors, who are often managers of the private foundation as well. The Council is supportive of proposed regulations that would provide certainty to sponsoring organizations that DAF distributions will not result in a more than incidental benefit to the Donor/Advisor provided certain requirements are satisfied. The three "safe harbor" requirements outlined in Section 4 are not unreasonable; however, the Council requests that any proposed regulations confirm that the sponsoring organization does not have any affirmative obligation to determine whether the Donor/Advisor has received any other benefit as a result of the DAF distribution (requirement 2) or that the Donor/Advisor has not attempted to claim a second charitable contribution deduction as a result of the distribution (requirement 3). In the alternative, the proposed regulations should provide specific guidance regarding statements or information the sponsoring organization must receive from the Donor/Advisor and/or the grantee organization in order to satisfy the three safe harbor requirements.

Notice 2017-73, Section 5.
Preventing Attempts to Use a DAF to Avoid "Public Support" Limitations:

The Council is concerned that the proposals outlined in Section 5, intended to address potential abuses, are overbroad, administratively burdensome, and will serve to discourage financial support for many public charities. We understand that Treasury and IRS are concerned that donors may use DAFs as intermediaries to make substantial contributions of appreciated property to public charities that they control. However, rather than impose a broad rule that all contributions from DAF sponsoring organizations to public charities must be treated as indirect contributions from the Donor/Advisor, and thereby subject to the 2-percent limitation, the Council urges Treasury and IRS to narrowly tailor any new regulations to be imposed on DAF distributions to address the very particular circumstances that could be viewed as abusive. Specifically, Treasury regulations could clarify that a Donor/Advisor receives a more-than-incidental benefit in situations where the following conditions are met: the Donor/Advisor makes a contribution of appreciated property to a DAF, and the sponsoring organization—in turn—1) distributes the property to a public charity controlled by the donor or a related person, and 2) the public charity could not have met the public support test had the contribution been made by the donor directly.

When the Donor/Advisor or a related party controls the public charity grantee, there may be circumstances when a DAF distribution to such organization may result in a benefit to the Donor/Advisor or related party. But when there is no relationship, the likelihood of a benefit to the Donor/Advisor or related party is very small. A broad rule that would treat all DAF distributions

similarly and penalize all DAF distributions by imposing the 2-percent limitation would unfairly penalize the many grantee public charities—which would then incur additional administrative costs to collect information needed to properly calculate their public support. This would be even more difficult if donor information were not available, precluding the public charity grantee from counting the distributions as public support and potentially endangering their public charity status. Similarly, public charity grantees that have previously demonstrated a history of substantial public support should not be at risk for re-characterization as private foundations simply because of generous DAF distributions without any evidence that a Donor/Advisor is actually receiving any improper benefit if the donor is not related to the grantee. The Treasury proposal, which strongly discourages anonymous giving by placing more burden on organizations that receive such gifts, may have a disproportionate impact on the charities supported by donors from certain religious backgrounds, which prize anonymous giving.

Finally, the Council would call attention to the increased administrative burden such a rule would impose on sponsoring organizations with respect to the new reporting requirements and information to be provided to the grantee organization. Additional administrative expenses, for both sponsoring organizations and grantee public charities, result in less funding for charitable activities in communities across the country. Thus, broad, burdensome regulations should not be imposed on all organizations, when a more narrowly targeted approach is available.

Notice 2017-73, Section 6.
Request for Public Comments:

The Council has previously provided the Treasury Department with the following specific examples describing how private foundations legitimately use DAFs at sponsoring organizations in support of their exempt purposes.

<u>Examples from Community Foundations working with Private Foundations:</u>

1. A private family foundation is developing a program designed to support community efforts and charitable causes in all "company communities," or towns where the family had owned businesses years ago. To efficiently facilitate this program, the private foundation establishes two separate donor advised funds at a community foundation - each intended to focus its grantmaking activities in one of these company communities.
2. As is common at many community foundations, one of the community foundation's board members has other philanthropic interests including an active private foundation. While the board member is not interested in terminating the private foundation into a donor advised fund, he is interested in building the assets of, and providing support for, the operations and programs of the community foundation. The board member decides to establish a DAF with a grant from the private foundation to support the community foundation's grantmaking and administrative costs.
3. A private foundation with limited staff and research capabilities establishes a one-million-dollar DAF at the community foundation. The private foundation looks to the community foundation to help them to make "smarter grants" with greater impact. They've partnered with the community foundation in the most recent community grants round, helping to

make several grants possible in counties that previously didn't receive the same level of funds.

4. As an incentive to serve on a private foundation board, instead of paying compensation to its trustees, a private foundation may create a donor advised fund for each trustee to advise, designating the trustee as the fund advisor. This also ensures that a trustee does not receive impermissible benefits from fund distributions because the community foundation must approve all grant recommendations and conduct due diligence. Further, the funds are staying in the charitable sector rather than being paid to private individuals. We also occasionally see private foundation-established donor advised funds used to show appreciation for CEOs retiring from private foundations. While there is no private benefit to the individuals in any of these cases, the advisory privileges associated with a donor advised fund may feel like a meaningful "gift" that allows the trustee or retiring CEO to be active in philanthropy.

Recognizing the value of relationships between community foundations and private foundations, the Council on Foundations' combined membership asks the Treasury Department and the IRS to consider these examples of successful collaboration and avoid any regulations that would discourage private foundations from utilizing the resources at community foundations.