From: Marx, Nancy P. [mailto:nmarx@cl-law.com]
Sent: Thursday, March 22, 2018 5:43 PM
To: Notice Comments
Subject: RE: Notice 2017-73 -- Comments on Ruth Madrigal's remarks of February 23 to attendees of the annual meeting of the TEGE Joint Councils

Madrigal: Sure, not a problem. I will do my best Elinor impersonation today. So what Janine is talking about is this last piece in the notice about the public support calculation changes that are proposed to be made. It would indicate that if there is a distribution from a DAF to a public charity, then it would be considered an indirect contribution from a donor for purposes of that public charity's support test rather than necessarily 100% public support from the sponsoring organization. So the distribution would become 100% public support only if the sponsoring organization were to indicate that the distribution was not advised by a donor to a DAF. Also, the charity must treat all the anonymous contributions as being made by one person, and therefore subject to a 2% haircut on all of the anonymous DAF contributions. I think that's the bottom line, and I just want to give you a little bit of background to tell you what's up with this proposal.

… **The situation I think that is of concern** here is where you have a donor who has appreciated property. If he contributed that directly to a new organization, he would be a substantial contributor, the new organization would be a private foundation, and he would take a basis deduction for that appreciated property, and then he would also have all of the private foundation rules to deal with. There would be distribution requirements and self-dealing requirements, and all of the usual private foundation rules.

If that donor instead were to take that property and dump it into a donor advised fund and advise the distribution out to this newly-created charity **where he is also the board and the management**, then all of a sudden that distribution becomes 100% public support, he's sitting on a public charity, he has no private foundation rules to contend with, and he gets the full fair market value deduction.

My comment and suggestion for rule-making:

Note – the full fair market value deduction would also be available for a contribution of appreciated property (whether or not marketable securities) to a private operating foundation, so the concern should be solely whether an individual wants to turn a privately funded charitable activity into a public charity.

If the new entity is not holding itself as planning to conduct a program that is likely to attract public support, then the IRS should not be recognizing it as a public charity. Some combination of the activity and the solicitation plan needs to be sufficient to justify the classification. The more attractive the program activity, the less the solicitation plan needs to impress, but if the activity is unlikely by its nature to attract public support (for example, grant making), then you need to

see a solicitation plan that makes public support seem likely – usually a grant making entity formed by someone in the entertainment industry or politics who expects others to provide the funding.

If the concern is a donor who is on the Board and managing a newly-created charity, then why not have a rule that for 6 years following formation of the charity, no contributions from a DAF funded by a director or officer (or the spouse of a director or officer) of a new charity (or a 60-month terminating foundation) can be counted as "public support." The return preparer can secure this information easily enough from management as part of the information needed to prepare the return. The managers will know what DAFs they have funded and if they are not the advisors for the DAF, they can still be expected to know that a distribution was made to the new charity they manage from a DAF that they funded. You could set a threshold, such as, a manager-funded DAF is a DAF that the manager and/or the manager's spouse provided at least 50% of the funding for.

If a new charity can meet the public support test through year 6 (based on years 1- 5 or 2 – 6) without counting these DAF contributions as public support, but counting them as part of its total support, then you probably have a genuine publicly supported charity.

It is unlikely that any donor hoping to "game the system" would have the patience and ability to incubate a new entity for 6 years and to operate it a manner that would attract sufficient public support to enable it to qualify as publicly supported at the end of the 5 year grace period, all so the donor can thereafter convert it into a privately funded public charity by funding DAFs and recommending distributions from them. Therefore, starting with contributions received in year 7, I would allow all charities to treat all DAF contributions as 100% public support, whether or not a current manager funded the DAF.

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