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LEGAL PROCESSING DIVISION
PUBLICATION & REGULATIONS BRANCH

Pamela Norley
President
Fidelity Charitable

VIA ELECTRONIC MAIL AND REGULAR MAIL

March 2, 2018

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

Re: Comments in Response to Notice 2017-73, Request for Comments in Connection on Application of Excise Taxes with Respect to Donor Advised Funds in Certain Situations

Ladies and Gentlemen:

I am writing on behalf of the Fidelity Investments® Charitable Gift Fund ("Fidelity Charitable®") in response to Notice 2017-73 (the "Notice") on the "Application of Excise Taxes With Respect to Donor Advised Funds in Certain Situations." In that Notice, the Department of the Treasury (the "Treasury") and the Internal Revenue Service (the "IRS") stated that they are considering developing proposed regulations under Section 4967 of the Internal Revenue Code (the "Code"), and described approaches that Treasury and the IRS are considering to address certain issues regarding donor-advised funds ("DAFs") of sponsoring organizations, and requested comments on those approaches.

The first part of this letter provides an overview of Fidelity Charitable. The second part reviews the statutory structure adopted by Congress in the Pension Protection Act as they apply to sponsoring organizations and donor-advised funds. The third part addresses specific questions asked in Notice 2017-73.

FIDELITY CHARITABLE- AN OVERVIEW

Fidelity Charitable — an independent public charity governed by an independent Board of Trustees — was established in 1991 with the mission to further the American tradition of philanthropy by providing programs that make charitable giving accessible, simple and effective. Fidelity Charitable continues to advance philanthropy by helping donors realize their charitable objectives with an organized approach to giving, principally through the Giving Account, Fidelity Charitable's donor-advised fund program. Fidelity Charitable is one of the nation's largest public charities and has the largest donor-advised fund program in the United States with approximately 108,000 Giving Accounts.

In 2017, Fidelity Charitable donors recommended over 1 million grants (a 25 percent increase over 2016) – totaling $4.5 billion (a 27 percent increase over 2016) – to more than 127,000 nonprofit organizations. In 2017, Fidelity Charitable received contributions from nearly 70,000 donors, including more than 30,000 new donors. Fidelity Charitable's donors have actively recommended grants. A first-in, first-out analysis of contribution and grant dollars reveals that seventy-four percent of dollars contributed to Fidelity Charitable are granted out within five years. In addition, Giving Accounts are used by donors across the wealth spectrum to achieve their charitable goals; 57% percent of Giving Accounts have balances under $25,000.

Since its inception, Fidelity Charitable has helped donors support more than 255,000 charities with $30 billion in grants.

DONOR-ADVISED FUNDS AND SPONSORING ORGANIZATIONS UNDER THE PENSION PROTECTION ACT OF 2006

In the Pension Protection Act of 2006, Congress for the first time adopted statutory language defining donor-advised funds, clarifying how sponsoring organizations and donor-advised funds fit within the statutory structure of the Internal Revenue Code (the "Code"), and applying specific penalty provisions, including those under Section 4966, Section 4967 and Section 4958, to prevent abuses.

The Pension Protection Act clearly defined sponsoring organizations of donor-advised funds as public charities. Section 4966(d)(1), enacted as part of the Pension Protection Act, defines a "sponsoring organization" as any organization which is a charitable organization described in Section 170(c), is not a private foundation, and maintains donor-advised funds.

In connection with clearly situating sponsoring organizations of donor-advised funds as public charities, the Pension Protection Act adopted carefully-crafted penalty provisions to prevent abuses. Section 4966 imposes penalty taxes on both the sponsoring

organization and "fund management" (its officers, directors, trustees and certain other employees) on "taxable distributions" to individuals or otherwise for a non-exempt purpose. Section 4967 imposes penalty taxes on donors, donor advisors, related persons, and also on fund management for any distribution from a donor-advised fund that confers a more than incidental benefit on any donor, donor advisor, or related person as a result of such distribution. In addition, the Pension Protection Act amended Section 4958 to extend its penalty taxes to automatic "excess benefit transactions" - any grant, loan, compensation, or other similar payment from a donor-advised fund to a donor, donor advisor or related person.

In only one situation, the Pension Protection Act applied rules initially applied to private foundations to donor-advised funds or sponsoring organizations, applying the excess business holdings rules of Section 4943 to donor-advised funds.

In the Pension Protection Act, Congress adopted specific provisions applicable to donor-advised funds, focused precisely on donor-advised funds and specifically designed to prevent abuses. Guidance for donor-advised funds should be focused on— and limited to—the specific provisions adopted in the Pension Protection Act.

COMMENTS ON NOTICE 2017-73

Fidelity Charitable welcomes guidance for donor-advised funds, particularly with respect to provisions enacted as part of the Pension Protection Act. As a general comment, we believe the Notice should have focused on the statutory structure adopted in the Pension Protection Act, and should have consistently applied the focused penalty provisions adopted in this act to sponsoring organizations, donor-advised funds, and donors, donor advisors and related persons, rather than importing concepts borrowed from the specific rules focused on the special considerations arising in connection with private foundations. We submit that the focused provisions explicitly adopted in the Pension Protection Act are the proper starting point for any proposed regulations, and also the proper starting point for analysis of particular issues such as those addressed in the Notice.

1. Certain distributions from a DAF providing a more than incidental benefit to a donor, donor advisor or related person.

This question addressed two factual situations: a charitable event with a $1,000 ticket price, of which $100 is the non-deductible fair market value of goods or services received, and $900 represents a charitable contribution, and a membership fee which similarly consists of a non-deductible and deductible portions. In some respects, clarity on a single answer to be applied by all sponsoring organizations provides some benefit, rather than permitting confusion and different practices among different sponsoring organizations. Nevertheless, we believe that the proposed approach to this question is flawed.

The Notice properly posed the question in terms of whether there was a more than incidental benefit provided to the donor, the legal standard set up under the Pension Protection Act and Section 4958, Section 4966, and Section 4967. In our view, those provisions give the proper analytical framework, and the question should be addressed solely in terms of those provisions.

Unfortunately, the Notice adopted a different analytical approach, apparently based in large part on one commenter's analysis. That commenter argued that, in the $1,000 charity event example, an individual who paid the non-deductible $100 and recommended a grant of $900 from a donor-advised fund would receive a more than incidental benefit, based entirely on the argument that that individual would not have been able to "receive the benefits that the ticket provides" "but for" the $900 grant. We believe this analysis is wrong for at least four reasons.

First, this analysis does not apply the standards adopted under the Pension Protection Act in Section 4958, Section 4966, and Section 4967. The legislative history is clear that the applicable standard for donor-advised funds as to whether there is a "more than incidental benefit" under Section 4967 is "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." Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," JCX-38-06 at p.350 (August 3, 2006). Instead, the analysis in the Notice appears to draw on a 1990 private letter ruling that addressed a very different legal arrangement. In Private Letter Ruling 9021066, 1990 PLR LEXIS 543 (March 1, 1990), the Internal Revenue Service addressed such a "bifurcated" charitable event ticket where the deductible portion was paid by a private foundation. That private letter ruling analyzed the question under Section 4941, which addresses "self-dealing" between a private foundation and a disqualified person as defined in Section 4946. That is the wrong standard to apply in the context of a donor-advised fund. The self-dealing rules of Section 4941 impose a *per se* prohibition on enumerated

transactions. Put simply, Section 4941 standards simply do not apply in the context of donor-advised funds. The Pension Protection Act, as explained by the Joint Committee, adopted clear standards for measuring whether there is a "more than incidental benefit," and that alone is the proper test that should be applied with respect to donor-advised funds.

Second, once the analysis is properly placed (as posed in the question itself in the Notice) of whether there is "a more than incidental benefit," the Notice engages in sophistry in the creation of value. Having stated that the fair market value of the non-deductible portion was $100 and the deductible portion was $900, the Notice would somehow create an additional element of value – but without enumerating the value – under the "but for" test. There is no principled basis for this creation of additional value out of thin air. Once again, a proper analysis under the "more than incidental benefit" standard would question whether the $100 and $900 values were properly determined; having done so, there is no place for the invention of any additional so-called element of value.

Third, and from the standpoint of practicability and administrability, the approach adopted in the Notice adopts an approach that is likely to harm charities, donors and the tax system itself. From the standpoint of tax compliance, a well-run donor-advised fund program would ensure that only the properly deductible portion would granted by a donor-advised fund. Individuals writing unspecified checks, on the other hand, raise far more substantial compliance concerns about proper accounting and deductions.

Finally, it is important to note that there is no showing, nor even a reasonable assertion in the Notice, that there are any abuses that would be presented by the alternative rule that would permit such a "split" or "bifurcated" grant from a donor-advised fund. Quite to the contrary, we believe it is likely that abuses would in fact be reduced, and that charities and donors would be far better served by permitting such grants.

2. Certain distributions from a DAF permitted without regard to a charitable pledge made by a donor, donor advisor, or related person.

The Notice proposes that there would not be a "more than incidental benefit" where a distribution from a donor-advised fund is to a charity to which a donor or donor advisor has made a charitable pledge, whether or not enforceable under local law. The Notice would require the following three conditions be met: (1) "the sponsoring organization makes no reference to the existence of a charitable pledge when making the DAF distribution", (2) no donor/advisor receives any more than incidental benefit, and (3) the donor/advisor does not attempt to claim a charitable contribution deduction under Section 170 with respect to the DAF distribution.

We welcome the outcome reached with respect to this matter, which has been an area of confusion and difficulty for donors, donor-advised funds, and recipient charities alike. We note that the second and third conditions stated in the Notice merely restate existing requirements in connection with any grant from a donor-advised fund, and suggest that their iteration here confuses rather than clarifies the proper application of the rules.

More fundamentally, we find the first condition – that "the sponsoring organization makes no reference to the existence of a charitable pledge when making the DAF distribution" – only injects uncertainty and confusion. Operationally, of course, sponsoring organizations could ensure that the word "pledge" does not appear in any grant transmittal. Such formalism, however, appears only to add uncertainty. For example, the Notice does not address other terminology (*e.g.*, "commitment", "obligation", and "promise"), or perhaps even more highly-coded language that might indirectly refer to a statement of intention or obligation (*e.g.*, "the XYZ Society"). Finally, this condition does not address knowledge. For example, it is not at all clear what a sponsoring organization should do when, having refused to approve a grant recommendation that included the word "pledge," the donor recommends a grant to the same organization in the same amount without any reference to a "pledge."

As the Notice properly points out, "the determination of whether an individual's charitable pledge is legally binding is best left to the distributee charity, which has knowledge of the facts surrounding the pledge." We believe this statement is correct, and that the first condition stated in the Notice should be eliminated; in fact, explicit reference to a pledge could even assist the distributee charity in identifying and addressing the matter.

For these reasons, we suggest that three stated conditions be stricken, and that the rule simply state that the donor and distribute charity are responsible for determining whether a particular grant would constitute relief of indebtedness of the donor.

As an alternative, in keeping with the Notice's finding that "the determination of whether an individual's charitable pledge is legally binding is best left to the distributee charity," we would suggest that sponsoring organizations of donor-advised funds should be entitled to rely on a certification of a distributee charity; such certification could either state that pledges received from the charity's donors are never legally binding, or that the distribute charity will not accept a grant from the sponsoring organization that would satisfy a legally-binding pledge.

We note also that the Notice fails to address the remedial steps that should be taken if a distribute charity determines that a particular grant would constitute relief of a legally-enforceable pledge and thus potentially relief of indebtedness to the donor. One potential step, of course, would be for the distributee charity to decline the grant and return the funds to the sponsoring organization that made the grant. Another approach might be for the recipient charity to forgive any indebtedness of the individual donor. The Notice does not, however, address whether in that circumstance the recommending donor would recognize income from cancellation of indebtedness. We believe it is important for additional remedial steps to be outlined. In any event, in keeping with the Notice's finding that these determinations are best left to the recommending donor and the distributee charity, it is important that the guidance clearly state that there would be no consequences with respect to the sponsoring organization or the donor-advised fund.

3. Preventing attempts to use a DAF to avoid "public support" limitations.

The Notice asserts that there is a potential for abuse wherein donors recommend grants from a donor-advised fund in order to avoid having a direct contribution from that individual being treated as from a "substantial contributor" for purposes of determining the recipient charity's level of public support. In an effort to address this perceived abuse, the Notice proposes a complicated and unwieldy set of rules that would recharacterize grants received from sponsoring organizations of donor-advised funds as instead being attributable to an identifiable donor who funded a donor-advised fund, or if no such donor is identifiable, all grants from a sponsoring organization with respect to which the recommending donor is not identified would be treated as coming from one person.

We believe this proposed set of rules is unwarranted for a number of reasons.

First, we do not believe there has been any showing of abuse. As a practical matter, we believe the interests of the charitable sector would be better served by studying whether there is indeed a problem, the size and scope of any such problem, and other methods of addressing concerns. We believe the Notice is proposing a baroque system of rules without sufficient cause or analysis.

Second, it is critical to bear in mind that a sponsoring organization is in fact a public charity under the Code. The Notice cites no authority by which a sponsoring organization's status as a public charity can be disregarded, cites no authority by which grants received from a public charity must be reattributed to donors to the sponsoring organization of donor-advised funds, and cites no authority by which a series of look-through rules and presumptions can instead be applied. We note that many sponsoring organizations, as charitable grant-makers, conduct their own review of potential grant recipients, including the breadth of support for those organizations. That analysis is best left to the individual sponsoring organization, as a grant-making public charity.

Finally, the set of presumptions and rules described in the Notice are overly burdensome on the recipient charitable organization, and do not yield useful information.

We believe this issue would be better served by careful study to determine, in the first instance, whether there is a serious potential for abuse, and, if so, what processes could be put in place to address only those abuses.

3. Additional requests for comments.

The Notice also asks for comments on four additional topics. Two of the topics relate to additional questions relating to public support tests addressed in the Notice. As discussed above, we believe those issues should first be addressed in fact-finding and issue clarification rather than in rule-making.

Two of the topics relate to private foundations and donor-advised funds, on which we will make some general comments. We are of course aware that some individuals make contributions both to private foundations and to donor-advised funds. There are many reasons individuals may choose different methods of giving - in addition to direct contributions to charities - to fulfill their charitable objectives. We believe that donors should be free to adapt their giving patterns to fulfill their objectives in compliance with the law, and that the charitable sector as a whole is richer and best served by that flexibility and adaptability.

We are also of course aware that private foundations may make grants to a sponsoring organization of donor-advised funds. Sometimes a private foundation decides to "collapse" by transferring all of its assets to a sponsoring organization of donor-advised funds. Often such a decision is made based on cost and efficiency, and the entire charitable sector can benefit from such a decision. Other times, a private foundation may make one or more transfers to a sponsoring organization of donor-advised funds. Often, that decision relates to a portion of the private foundation's grant-making

activity and for the same reasons outlined above. Other times, such a transfer is intended to achieve a particular objective, such as funding a particular program. In our experience, these decisions are based on careful considerations of cost, efficiency and charitable purpose, and should in no way be a cause for concern.

The Notice also asks whether a transfer of funds by a private foundation to a donor-advised fund should be treated as a "qualifying distribution." This question is one that should be addressed entirely under the purposes of Section 4942. We note, however, that the purpose of Section 4942 relates to the extraordinary level of control in a private foundation and to prevent the excessive accumulation of assets within that private foundation. The definition of "qualifying distributions" simply points to "any amount . . . paid to accomplish one or more purposes described in section 170(c)(2)(B)", and does not further discriminate among those purposes or organizations. There is no requirement in Section 4942 that the qualifying distribution be spent on current programs; indeed, there is nothing that would prevent the qualifying distribution from being treated as endowment funds by a recipient charitable organization. We are once again concerned by the Notice subjecting sponsoring organizations of donor-advised funds to a different set of rules without any showing of statutory authority, nor any showing of any abuse. We believe the analysis of "qualifying distributions" should begin and end with the purposes of Section 4942 as initially enacted in the Tax Reform Act of 1969, Pub. L. 91-172.

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Fidelity Charitable is proud to have assisted nearly 180,000 donors, including donors from every State in the United States, to achieve their charitable-giving goals, and proud to have made grants of over $30 billion to over 255,000 grant recipient charitable organizations, including grant recipient charitable organizations in every State in the United States, to support their charitable activities. We urge Treasury and the IRS to focus their efforts on preventing abuses, and to support the good work that donor-advised funds have brought to American's charitable sector.

Sincerely yours,

Pamela Norley

With a copy to (via electronic mail):

Sunita Lough, Commissioner, Tax Exempt and Government Entities Division

Amber L. MacKenzie, Division Counsel/Associate Chief Counsel (TEGE), Office of Chief Counsel

Ward L. Thomas, Division Counsel/Associate Chief Counsel (TEGE), Office of Chief Counsel

David Kautter, Assistant Secretary for Tax Policy, Treasury

Thomas West, Tax Legislative Counsel, Treasury

Krishna Vallabhaneni, Deputy Tax Legislative Counsel, Treasury