GREATER KANSAS CITY
COMMUNITY FOUNDATION

MAR 14 2017

LEGAL PROCESSING DIVISION
PUBLICATION & REGULATIONS BRANCH

March 2, 2018

Notice.Comments@irscounsel.treas.gov

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

Elinor Ramey, Department of the Treasury, via email: Elinor.Ramey@treasury.gov

Re: Comments on Notice 2017-73

Ladies and Gentlemen:

Thank you for this opportunity to submit comments on Notice 2017-73. The Greater Kansas City Community Foundation is celebrating 40 years of empowering donors. Every year we work with a growing number of new donors who are using donor advised funds (DAFs) to support the charities they care about.

Last year was a record year. We experienced a 99% increase in the number of new DAFs that we opened for new donors. Half of those new DAFs were started with $50,000 or less. Additionally, our donors granted $400 million from their funds. Other community foundations around the country and national gift funds experienced similar DAF growth. This is a turning point for DAFs.

With the increased use of DAFs by donors at all levels of giving, and the huge volume of grants that we process, it is important to create bright-line rules that we can follow, that the IRS can audit and that donors can understand. As a policy matter, IRS regulations should increase the flow of dollars from DAFs, not restrict them. We recommend a clear Section 170 analysis for grants from DAFs: If a donor could make a donation to a Section 170(b)(1)(A) organization and it would be deductible, then the donor could also recommend the same grant from a DAF.

Bifurcated Grants

Section 3 of the Notice describes a situation that we deal with every single day with our donors. Based on Private Letter Ruling 9021066, we spend a significant amount of staff time working with donors and charities to determine what we can grant from DAFs related to charitable fundraising events. Donors simply don't understand why they cannot use their DAF to cover the tax-deductible portion of a ticket or table at a charity's event when they could pay for the ticket or table personally and take a charitable deduction for that same amount. Charities holding the fundraising events also do not understand this rule.

Dollars in DAFs are set aside for purely charitable purposes and we make sure they are used in that manner. Public charities that administer DAFs exercise due diligence to ensure grants do not provide more than an incidental benefit to donors and fund advisors. The Notice's proposed rule for bifurcated grants is based on a private letter ruling for a private foundation. By design, private foundations do not have the oversight of an independent public charity. The Joint Committee on Taxation's Technical Explanation of the Pension Protection Act of 2006 acknowledges this on page 335: "*Because private foundations receive support from, and typically are controlled by, a small number of supporters, private foundations are subject to a number of anti-abuse rules and excise taxes not applicable to public charities.*" Therefore, we believe a clear, bright-line Section 170 rule is a more appropriate rule to apply to DAFs administered by public charities.

If there is a portion of a ticket or table that would be deductible to the donor had they paid for the ticket or table personally, then the DAF should be able to grant that deductible portion to the charity holding the event. This is a rule that can be easily followed by DAF sponsoring organizations and donors without any unnecessary judgment calls.

This position is consistent with the legislative history, as reflected on page 350 of the Joint Committee on Taxation's Technical Explanation of the Pension Protection Act of 2006, which states, "*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.*"

If the IRS is willing to allow donors to pay pledges from a DAF (discussed in more detail below), why does the IRS want to penalize a donor and DAF sponsor for paying the tax-deductible portion of a ticket or table at a fundraising event? In our experience, donors typically request grants of less than $5,000 related to charity events. From a cost perspective, the administrative burden on DAF sponsoring organizations to adhere to the proposed rule and the burden on the IRS to enforce the rule is not likely to generate enough revenue from excise taxes to make the effort worth it. From a policy perspective, a Section 170 analysis would increase the flow of dollars from DAFs to charities without private benefit. Donors could use their DAFs to cover the tax-deductible portion of a ticket or table as long as the donor personally pays for the non-deductible portion. The rule is clear, easy to follow, and easy to audit.

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Pledges

We like where the IRS is going in Section 4 of the Notice concerning pledges. We agree with the second and third requirements (which are true of all DAF grants): that the donor/advisor cannot receive, directly or indirectly, any benefit that is more than incidental as a result of the DAF grant and that the donor/advisor cannot claim a charitable contribution deduction with respect to the DAF grant. However, we would like to see the IRS go one step further by deleting the first requirement and declaring that all pledges can be paid from DAFs, regardless of whether the pledge is referenced in the grant. We do not understand why any mention of the existence of a pledge by the sponsoring organization should trigger a 125% penalty on a donor, with a corresponding 10% penalty on the fund manager who mentioned the pledge in the grant. This requirement relegates pledges to a "don't ask, don't tell" status.

We encourage the IRS not to get hung up on the use of the word "pledge" or whether a pledge is "referenced" in the grant. There is too much unnecessary confusion around what constitutes a "reference" to a pledge and how much knowledge a sponsoring organization can have about the pledge. Rather, we would like to see the IRS enact a bright-line rule that is auditable and easy to administer. We address pledge questions every day with our donors. To encourage the flow of dollars through DAFs and reduce administrative burden, we are again in favor of a bright-line Section 170 rule: to the extent a donor's personal pledge to a charity would be deductible, they should also be able to recommend that grant from their DAF.

Public Support Treatment for Grants from DAFs

While the proposal to treat DAF grants as coming from one donor would most directly impact grantees of DAFs, we do have some concerns with Section 5 of the Notice.

If the sponsoring organization of a DAF is a public charity, then all grants from their DAFs should be treated as coming from a public charity. Otherwise, the IRS is ignoring the DAF sponsoring organization's variance power and ownership of the DAF. Likewise, if a DAF is making a grant to a public charity and the sponsoring organization has confirmed their public charity status through IRS Exempt Organizations Select Check, then the sponsoring organization should not be expected to inquire further about how the charity is meeting the public support test.

The proposal would cause significant and undue administrative burden on grantee charities and DAF sponsoring organizations. As the popularity of DAFs is increasing, millions of grant checks are going out of DAFs every year to charities. Often grant checks identify a fund name, but do not state the fund type. For each recipient charity to have to verify whether a grant came from a DAF or another type of fund, and for each sponsoring organization to have to respond to those inquiries, is not manageable or practical.

The proposal would be unfair to charities who receive multiple DAF grants from anonymous funds that are created by unrelated donors. The proposal would also be unfair to charities who receive DAF grants from DAFs that are funded by multiple donors. Memorial funds are a good

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example of DAFs that often have donations from a wide variety of donors. A charity should not be penalized for purposes of the public support test just because they receive anonymous grants or one grant from a DAF instead of receiving multiple memorial contributions directly.

For all of the administrative burden this proposed rule would cause, what is the end result? If a charity would not otherwise pass the public support test because the DAF grants were treated as coming from individual donors subject to the 2% limitation, the charity would likely become a private operating foundation (assuming they are an actively operating charity and not a grantmaking charity). From a tax standpoint, there is a small variation from a public charity to a private operating foundation.

We understand the IRS is concerned about charities and donors using DAFs to avoid the 2% public support limitation. We encourage the IRS to consider other ways to identify those abusive situations rather than categorizing all DAF grants as coming from individual donors. One idea would be to ask on Form 990 if a charity receives a majority of their donations from DAF grants, or if they are receiving the majority of their support or otherwise controlled by one donor (or family of donors). Then the IRS could develop regulations focused on those narrow situations that can lead to abuse.

Private Foundation Distributions to DAFs

Among other items that we've already addressed in these comments, Section 6 of the Notice requests comments about how private foundations are using DAFs. The private foundations we work with are very active grantmakers. We do not believe they are using DAFs to meet their 5% payout requirement. They use DAFs as grantmaking tools.

Sometimes private foundations pool resources with other private foundations in a DAF to jointly support a project or area of interest. Others use DAFs if they need support from a community foundation's grantmaking staff on an issue. Some family foundations make grants to DAFs advised by younger generations to keep them engaged in philanthropy and ready for board succession. And sometimes, if the administrative costs and burdens of a private foundation become too much, a private foundation will terminate and make a qualifying distribution of all its assets to a DAF so that it can continue to make grants with the support and infrastructure of a community foundation. We do not believe the use of DAFs by private foundations should be an area of concern for the IRS. We have seen nothing but good come of it.

Thank you for your thoughtful consideration of these comments.

Sincerely,

Deborah L. Wilkerson

Deborah L. Wilkerson
President & CEO

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