National Philanthropic Trust

Your partner in giving

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Via E-mail [Notice.Comments@irscounsel.treas.gov] and First Class U.S. Mail

The Honorable David J. Kautter
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable David J. Kautter
Acting Commissioner, Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: Notice 2017-73

Dear Mr. Kautter and Mr. Paul:

I am pleased to submit comments in response to IRS Notice 2017-73 (the "Notice") on behalf of National Philanthropic Trust ("NPT"), the largest national independent charitable sponsor of donor-advised funds ("DAFs").

NPT is a public charity within the meaning of Sections 501(c)(3) and 509(a)(1) of the Internal Revenue Code of 1986, as amended (the "Code"), dedicated to providing philanthropic expertise to donors, foundations and financial institutions, enabling them to realize their philanthropic aspirations.

NPT was founded in 1996. Since that time, we have raised more than $10 billion in charitable contributions and currently manage $6.2 billion in charitable assets. We have made more than 200,000 grants totaling in excess of $5 billion to charities all over the world. We rank among the 25 largest grantmaking institutions in the United States.

The Notice requests comments regarding the issues addressed therein as well as other related matters. This letter will address and provide comments on the principal issues the Notice raises.

(1) DAFs are not private foundations.

The Notice is extremely helpful to NPT, as a DAF sponsor, because it attempts to provide clarity in areas where clarity was previously lacking. Specifically, the Notice proposes clear guidelines around what constitutes a more than incidental benefit under Section 4967 of the Code as a result of a DAF distribution. However, the Notice misses the mark by applying private foundation rules to DAFs that we believe are solely applicable to private foundations.

DAFs are fundamentally different from private foundations. As the Joint Committee on Taxation explicitly noted in its Technical Explanation of H.R. 4, The "Pension Protection Act of 2006" (the "Technical Explanation"), private foundations are subject to a number of anti-abuse rules and excise taxes not applicable to public charities. This is "[b]ecause private foundations receive support from, and typically are controlled by, a small number of supporters."

The Pension Protection Act of 2006 (the "PPA") defined a DAF in Section 4966(d) of the Code as a fund or account (i) which is separately identified by reference to contributions of a donor or donors, (ii) which is owned and controlled by a sponsoring organization, and (iii) with respect to which a donor (or any person appointed or designated by such donor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor. Section 4966(d)(1) of the Code defines a sponsoring organization as an organization described in Section 170(c) of the Code that is not a private foundation and that maintains one or more DAFs.

Congress could have extended the private foundation rules to DAFs in the PPA, but it chose not to apply those rules. Instead, Congress, in enacting the PPA, specifically made the decision to distinguish DAFs from private foundations in the following ways:

- Added Sections 4966 (defining DAFs and imposing a tax on taxable distributions from DAFs) and 4967 (imposing a tax on prohibited benefits from DAF distributions);
- Applied Section 4958 (tax on excess benefit transactions) to DAFs; and
- Extended only one specific private foundation rule (Section 4943 – tax on excess business holdings) to DAFs.

Moreover, the Technical Explanation defines a "more than incidental benefit," as it relates to DAFs, by reference to the Section 170 standard and not to private foundation standards. Specifically, the Technical Explanation provides that, under Section 4967, "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." This standard is very different from the private foundation self-dealing rules under Section 4941 of the Code, which generally prohibit all direct or indirect acts of self-dealing.

DAFs are not private foundations and should not be treated like private foundations. Although donors or their designees often retain advisory privileges with respect to the distribution and/or investment of amounts held in DAFs, the sponsoring organization at all times retains discretion and control over such amounts.

(2) Bifurcated Distributions.

The Notice proposed that the relief of a Donor/Advisor's obligation to pay the full price of a ticket to a charity-sponsored event or a membership fee should be considered a direct benefit to the Donor/Advisor that is more than incidental under Section 4967 of the Code. We disagree with this conclusion.

The Notice's conclusion on this issue aligns with rulings previously issued by the IRS regarding proposed bifurcation of costs to attend certain charity-sponsored events, where the tax deductible and nondeductible portions of the tickets were considered "inextricably linked." These prior rulings relate to private foundations and were determined with reference to the Section 4941 self-dealing rules, which are applicable to private foundations but do not apply to DAFs.

As noted above, the Technical Explanation provides that, under Section 4967, "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." Applying this standard, the payment by a DAF of the tax deductible portion of a ticket to a charity-sponsored event or a membership fee should not constitute a more than incidental benefit to the Donor/Advisor under Section 4967 of the Code. If the Donor/Advisor paid for the entire ticket or membership fee out of pocket, he or she would be entitled to a charitable contribution deduction under Section 170 of the Code only for the tax deductible portion of the ticket. The Donor/Advisor would not receive any benefit in connection with the payment of the tax deductible portion of a ticket or membership fee from a DAF that would reduce or eliminate a charitable contribution deduction if received as part of the contribution to the sponsoring organization.

(3) Donor/Advisor Pledges.

The Notice proposed that distributions from a DAF to a charity will not be considered to result in a more than incidental benefit to a Donor/Advisor under Section 4967 merely because the Donor/Advisor has made a charitable pledge to the same charity, provided that (i) the sponsoring organization makes no reference to the existence of any individual's pledge when making the DAF distribution, (ii) no Donor/Advisor receives, directly or indirectly, any other benefit that is more than incidental on account of the DAF distribution, and (iii) a Donor/Advisor does not attempt to claim a charitable contribution deduction under Section 170(a) with respect to the DAF distribution.

We agree with the Treasury Department and the IRS that distributions from a DAF should not be considered to result in a more than incidental benefit to a Donor/Advisor under Section 4967 merely because the Donor/Advisor has made a charitable pledge to the same charity (in contrast to the treatment of a private foundation grant in fulfillment of a disqualified person's pledge under Section 4941) for the reasons noted above with respect to bifurcated payments. The Donor/Advisor would not receive any benefit in connection with the fulfillment of a pledge by a DAF that would reduce or eliminate a charitable contribution deduction if received as part of the contribution to the sponsoring organization.

Moreover, we agree that the Donor/Advisor must not receive, directly or indirectly, any other benefit that is more than incidental on account of the DAF distribution, and must not attempt to claim a charitable contribution deduction under Section 170(a) with respect to the DAF distribution. However, we disagree with the conclusion that to avoid treatment as a more than incidental benefit, the sponsoring organization must make no reference to the existence of any pledge when making the DAF distribution.

The proposed rule amounts to a "don't ask, don't tell" policy, which would be difficult to administer and fraught with potential pitfalls. Under such a rule, it is unclear what would be the consequence of a DAF sponsor's actual knowledge of the existence of a pledge or even of the suspicion of the existence of a pledge. It is also unclear what amounts to a "reference" -- would the inclusion of a Donor/Advisor's account number with the grantee charity constitute such a reference?

Distributions from a DAF in fulfillment of a Donor/Advisor's pledge should not be considered to result in a more than incidental benefit to a Donor/Advisor under Section 4967. The requirement that the DAF sponsor not reference the existence of any pledge is unnecessary to support this conclusion.

(4) Public Support Limitations.

The Notice articulates the concern of the Treasury Department and IRS that DAFs could be used to circumvent the private foundation rules and excise taxes imposed by the Code. The Treasury Department and IRS are proposing changes to the existing public support regulations under Treas. Reg. Sections 1.170A-9(f) and 1.509(a)-3 that would prevent an organization that would otherwise be treated as a private foundation based on contributions received from one or more large donors from qualifying as a publicly supported charity solely as a result of the donors making their contributions through a DAF.

Under the proposed new rules, a donee organization, for purposes of determining the amount of its public support, would be required to treat: (i) a sponsoring organization's distribution from a DAF as coming from

the donor (or donors) that funded the DAF rather than from the sponsoring organization; (ii) all anonymous contributions received (including a DAF distribution for which the sponsoring organization fails to identify the donor that funded the DAF) as being made by one person; and (iii) distributions from a sponsoring organization as public support without limitation only if the sponsoring organization specifies that the distribution is not from a DAF or states that no donor or donor advisor advised the distribution.

We agree that the use of DAFs to circumvent the public support rules is a potential area of abuse. However, the proposed rules articulated in the Notice are overly broad and reach far beyond what would be necessary to prevent any such abuse.

NPT, like most DAF sponsoring organizations, has procedures in place to prevent such an abusive scenario. Specifically, in such circumstances, we look at:

- The Donor/Advisor's relationship to the donee organization;
- The composition of the board of the donee organization;
- The list of donors to the donee organization; and
- Whether the donee organization has made attempts to fundraise.

Any rule designed to prevent this type of abusive scenario should be narrowly tailored -- for example, where a single donor or family controls the board of the donee organization and is its principal supporter, and where the organization makes no attempts to fundraise (e.g., has no website and no “donate now” link).

(5) Transfers from Private Foundations.

The Notice seeks comment regarding (i) how private foundations use DAFs in support of their purposes, and (ii) whether, consistent with Section 4942 and its purposes, a transfer of funds by a private foundation to a DAF should be treated as a “qualifying distribution” only if the DAF sponsoring organization agrees to distribute the funds for Section 170(c)(2)(B) purposes (or to transfer the funds to its general fund) within a certain timeframe.

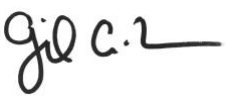
As to the first part, in NPT’s experience, private foundations use DAFs in support of their purposes in a number of effective and permissible ways. Specifically, private foundations have used DAFs at NPT to fund collaborative funding projects (i.e., projects funded by multiple foundations), to make anonymous grants in support of their charitable purposes, and to fund charitable projects that may be outside the clear scope of their missions. We have also had several foundations conclude that a DAF would be a more efficient vehicle for carrying out the foundation's mission. In each such case, the foundation board made the decision to terminate the foundation and distribute its assets to a DAF, which will be used to carry out the foundation's charitable mission.

We understand that the Treasury Department and IRS are concerned about the use of transfers to DAFs by private foundations to meet their annual minimum distribution requirements. We believe that any rule regarding the treatment of private foundation transfers to DAFs should be tailored and should focus on the specific scenarios of concern. There are many legitimate uses of DAFs by private foundations, which should not require distribution of the funds transferred to DAFs within a specified period of time.

* * * * *

Thank you for the opportunity to provide comments on this area of importance to donor-advised fund sponsors and the charitable community.

Sincerely,



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