THE NEW YORK
COMMUNITY TRUST

909 Third Avenue, New York, NY 10022
T: 212-686-0010   F: 212-532-8528
www.nycommunitytrust.org

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Notice.Comments@irscounsel.treas.gov

Amber L. MacKenzie, Esq.
Ward L. Thomas, Esq.
Tax Exempt and Government Entities Division
Office of Associate Chief Counsel

Re: Notice 2017-73

Dear Ms. MacKenzie and Mr. Thomas:

The New York Community Trust submits these comments in response to Notice 2017-73.

**Introduction**

For more than a century, community foundations have been building permanent charitable resources to meet the current needs of their communities and the unforeseen needs of the future. And for more than 90 years, The New York Community Trust, including its not-for-profit corporate affiliate Community Funds, Inc. (together, "The Trust"), through the generosity of donors past and present, has supported nonprofit organizations in the New York metropolitan area that work to ensure that our community is a vital and healthy place to live and work—for all residents. We started in 1924 and our mission was to distribute to nonprofit organizations the income from charitable trusts set up by donors in their wills. The Trust's founders were persons of vision who understood the power of an institution that could employ the combined charitable passions of individuals to meet a broad variety of community needs. They also understood that contemporary donors could not anticipate the compelling issues that would confront their successors—and they were committed to ensuring that adequate resources would be available for future needs.

In those early days, our donors set up unrestricted and field-of-interest funds through bequests, trusting tomorrow's leaders to spend it wisely. Today, The Trust has approximately $2.8 billion in assets; $1 billion of that total is held in more than 1,200 donor-advised funds, which range in size from $5,000 to $165 million. Those funds routinely pay out more than 10% of their assets to charity annually. The balance of our assets rest in permanent unrestricted, field-of-interest, or designated funds.

Our first donor-advised fund ("DAF") dates to 1931, before there was even a name for it—and long before there were any specific laws or regulations. During her lifetime, this first "donor advisor" made suggestions to The Trust as to charitable distributions from the fund. When she died, the assets remaining in the advised fund became part of The Trust's competitive grantmaking program—a program that relies on a professional staff to assess community needs, investigate nonprofits, vet their projects and finances, review proposals and recommend grants to our distinguished volunteer board. Today, the fund she created has more than $4 million in assets and supports projects to help keep low-income elders in their homes, help children with disabilities get the educations they deserve, reduce environmental health hazards, and much more.

It was our hope, and indeed, our expectation, that in consideration for the privilege of making grant recommendations from DAFs, donors would leave money in the fund for future generations. And in fact they did.

DAFs are not a tool to avoid taxes; they are a long-standing approach developed by community foundations to enhance and encourage donors to invest in the immediate and future needs of communities. They are one of many ways that permanent charitable institutions are able to consolidate grants from different funds to support community programs and to build their assets for the future health and well-being of their community.

We have limited our responses below to those questions or parts of questions that we believe are most important to the continuing ability of The Trust and other community foundations to support their communities, now and in the future. The discussion references the relevant sections of Notice 2017-73.

**Section 3. Certain Distributions From a DAF Providing a More Than Incidental Benefit to a Donor, Donor Advisor, or Related Person**

Does a distribution from a DAF to a charity that enables a donor, donor advisor, or related person ("Donor/Advisor") to attend or participate in an event (or receive a membership) result in such person receiving a more than incidental benefit under IRC Section 4967 if the distribution does not exceed the portion of the ticket cost that would be deductible under IRC Section 170 if paid directly by the Donor/Advisor?

The Notice indicates that Treasury and the IRS believe that a distribution from a DAF should not be analyzed as a direct contribution by the Donor/Advisor, and that the donor who wishes to receive goods or services in exchange for a contribution should make the contribution without the involvement of the DAF. The Notice states that proposed regulations would, if finalized, provide that under IRS Section 4967 the subsidy of a Donor/Advisor's attendance at an event confers a "more than incidental benefit."

This view is consistent with the long-held position of the IRS; it ruled privately in PLR 9021066 that bifurcation of the cost of tickets to benefits and similar events between a private foundation and a substantial contributor and disqualified person constituted self-

dealing because a person could not attend the event by paying only the noncharitable portion of the ticket.

In explaining the concept of an "incidental benefit," the *Joint Committee on Taxation Technical Explanation of H.R. 4, "The Pension Protection Act of 2006"* (August 3, 2006, JCX-38-06) states that a Donor/Advisor receives more than incidental benefit if, as a result of a distribution from the DAF, he or she receives a benefit that would have reduced (or eliminated) a charitable contribution deduction if the person had made the contribution directly. It is not at all clear that this means that if the Donor/Advisor paid the noncharitable part of the ticket, with no deduction, the value of the bifurcated payment of the charitable portion by the DAF is a more than incidental benefit. Had the donor paid the whole, he or she would have had a deduction for the charitable portion.

Because the donor would be unable to attend but for the payment of the charitable portion, in this case, by the donor-advised fund, it may be impractical to separate the two payments—the payment of the noncharitable portion of the ticket (or membership) cost paid by the donor, and the payment of the charitable portion by the DAF. However, the quid pro quo rules in place under IRC Section 170 and IRS guidance thereunder recognize the dual nature of payments for events. Careful consideration should be given to whether the benefit to the donor advisor who has paid the charitable portion of, for example, an event ticket, is in fact "more than incidental." The stakes are high if the donor or DAF manager misunderstands the rules—Section 4967 imposes a 125% tax on the Donor/Advisor who requested the distribution that resulted in the receipt of a more than incidental benefit, and a 10% tax on the fund manager who authorized the distribution, knowing it would provide such benefit.

If the Treasury Department and the IRS reconsider their view, and conclude that such bifurcated payments do not provide more than incidental benefit to the Donor/Advisor, it is requested that regulations clearly address the DAF sponsor's responsibilities in connection with any such bifurcated payments. Must it determine the amount of the charitable portion of the payment? Must it ascertain whether the donor has in fact paid the noncharitable portion, and not merely been "comped" by the charity that might prefer to increase its attendance numbers?

**Section 4. Certain Distributions From a DAF Permitted Without Regard to a Charitable Pledge Made by a Donor, Donor Advisor, or Related Person.**

We applaud the proposed regulation that would allow distributions from DAFs to be applied to fulfill a Donor/Advisor's charitable pledge. There is complexity in determining whether a Donor/Advisor made a legally binding pledge, which may differ under the laws of various states. The penalties under IRC 4967 make the issue a trap for the unwary.

However, we are of the view that the proposed regulations do not go far enough in providing that there is not a more than incidental benefit to a Donor/Advisor where the Donor/Advisor has made a charitable pledge *only* if the sponsoring organization makes no

reference to the existence of the individuals pledge when making the DAF distribution. This "don't ask, don't tell" rule is unnecessarily complicated. What if the Donor/Advisor sends the DAF sponsor a request, specifically noting it is payment of a pledge? The sponsor will be in the unenviable position of telling the Donor/Advisor that it (the sponsor) cannot communicate with the grantee about the pledge, and the Donor/Advisor is faced with uncertainty about how the recipient will treat the distribution.

Moreover, the Notice suggests such a payment would provide more than incidental benefit if the Donor/Advisor attempts to claim a charitable contribution deduction (perhaps innocently, because the grantee mistakenly sends him or her an acknowledgment). We agree the donor should be presumed to know that a DAF distribution is not deductible, and may be subject to penalty; however the regulations should protect the sponsor charity manager who approved the grant from penalty under IRC Section 4967 with respect to the grant because he or she could not have known that the Donor/Advisor would claim a deduction for the DAF distribution.

We urge Treasury and the IRS to allow the DAF sponsor, in its discretion, to reflect that a grant is to be applied to the payment of a pledge. This will increase the transparency of such payments and give donors certainty. We further suggest that if a grant letter or written communication to a grantee states that a grant is to be applied toward a pledge, the DAF sponsor also should be required to affirmatively state that the distribution is not deductible to the Donor/Advisor, and that any acknowledgement from the grantee to the Donor/Advisor should indicate the grant from the DAF is not deductible.

**Section 5. Preventing Attempts to Use a DAF to Avoid "Public Support" Limitations**

We are troubled by the possibility that the public charity that owns a DAF might be disregarded for the purpose of measuring public support. However, we understand that where the grant comes from a DAF, there is the potential for avoidance of the 2% public support limitation where a Donor/Advisor hides behind the public charity status of the DAF sponsor.

Because a grantee organization has to count separate individual contributions in reporting contributions for the public support test, we do not believe it an unreasonable burden to require it to track DAF contributions according to the Donor/Advisor. However, we believe the regulations should take the position that it is the *advisor* who recommended the grant who should be counted for this purpose, not the original donor. The advisor who requested the grant is responsible for the choice of grantee, not the original donor. For example, it is not uncommon for a DAF to be funded by a parent, possibly through a bequest, and a child serves as advisor. It also is not uncommon for DAFs to have multiple donors. The typical grant check identifies only the advisor who recommended the grant. In those cases, the grantee charity would not know the identity of the donor, and as proposed by Treasury and the IRS, would be required to treat all such contributions as "anonymous contributions" that would be aggregated as made by a single person. Treating the advisor as the individual to be counted for purposes of the public support test would simplify this requirement.

In drafting rules, we urge the Treasury Department and the IRS to consider appropriate rules where the grantee would qualify as a private operating foundation.

**Section 6. Request for Other Public Comments**

The Treasury Department and the IRS further requested comments with respect to:

1. How private foundations use DAFs in support of their purposes;
2. Where, consistent with IRC 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 sponsor agrees to distribute the fund for charitable purpose (or transfer the assets to a non-DAF) within a certain timeframe;
3. Any additional considerations relating to DAFs with multiple unrelated donors under the proposed changes described in Section 5 relating to the treatment of DAF grants for purposes of the recipient charity's public support test calculation;
4. Methods to streamline required recordkeeping under the proposed changes of Section 5.

1/2. Community foundations like The New York Community Trust use DAFs as a way of increasing resources for the community's needs, anticipating that some portion will remain on hand when there are no advisors remaining to the fund. These unspent charitable resources stay in their named funds and increase the amounts available to meet the community's needs through the community foundation's competitive grantmaking.

We oppose any payout requirement imposed fund-by-fund, as this ignores the component treatment of funds within the community foundation. In addition, it runs counter to the goal of building community endowment.

There should not be a presumption that private foundations that make grants to DAFs do so to avoid their payout requirements. It is our experience that private foundations work with DAFs in many ways that are consistent with treating distributions to DAFs as qualifying distributions, and there should be no required timeframe for regranting.

The first and most obvious example is the terminating private foundation. Treas. Reg. Section 1.507-(2)(a)(7) makes it clear that a terminating distribution to a donor advised fund qualifies as long as the governing body of the public charity or DAF sponsor has the ultimate authority and control over the assets. Other common examples include:

- Splitting off part of a private foundation to one or more DAFs as part of a restructuring, such as a divorce, or siblings or trustees who no longer wish to work together. Typically, these will exceed the minimum payout, but the full amount should be a qualifying distribution;
- Facilitating grantmaking for a purpose outside the private foundation's core mission;

- Allowing individual trustees to make grants in lieu of compensation;
- Joining with other funders on an issue of common interest;
- Furthering programmatic purposes, such as where a grantee cannot yet fully utilize the grant (for example, the project is not fully up and running, construction has been delayed, or government approvals have not been finalized). Use of a DAF allows the grant to be paid out over time to further these programmatic purposes;
- Supporting a DAF established by a person unrelated to the private foundation, such as a memorial fund.

3. As previously stated, we believe the regulations should take the position that it is the advisor who recommended the grant who should be counted for the purpose described in Section 5, not the donor(s) who contributed to the fund. The typical grant check from a DAF identifies only the advisor who recommended the grant. In these cases, the grantee charity would not know the identity of the donor, and would have to aggregate all such contributions into "anonymous contributions" that would be treated as made by a single person.

Thank you for your consideration of our comments. We would be pleased to discuss them further with you.

Respectfully submitted,

Jane L. Wilton
General Counsel