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To: Notice Comments
Subject: Notice 2017-73 -- Additional comments

1. On the treatment of DAF contributions as public support. If these contributions are going to be subject to the 2% limitation rule for 509(a)(1)s and excluded 100% if the contributions from the DAF make it a substantial contributor, then you are going to have to decide how to aggregate DAFs sponsored by different charities and since DAFs can have multiple donors, you are going to have to decide how to allocate the grants made from these various DAFs and decide whether to look through entities that also can fund DAFs to the owners of those entities, or if funding comes from a private foundation, to inquire as to the source(s) of the PF's funding, and then decide whether the publicly supported charity must aggregate the grants or some portion of the grants with contributions received directly from these individuals and their spouses to determine whether the 2% limitation was exceeded or whether there is a substantial contributor whose contributions must be excluded 100%. You will also need to consider whether to apply the same to the grant advisor – and if the grant advisor is an employee, agent, accountant, attorney or investment advisor, ask whether he/she is acting on behalf of someone else to make recommendations from the account. Rather than make the public support tests even more complicated, consider addressing the concerns that make you question whether a Sponsoring Charity is operating as an independent publicly supported charity and then adopt rules for the administration of the DAFs that address these concerns – rather than regulations that make the DAFs seem even less like independent public charities that both control (own) the assets in the DAF and have discretion over the grants made from these funds.
2. Note that many organizations that are classified as publicly supported under 509(a)(1) are using the 509(a)(2) public support test on their 990 and vice versa, and many 509(a)(2)s show no contributions excluded on their 990 Schedule A when you KNOW that at least some of their directors and officers must have made a contribution and under 509(a)(2), their contributions must be excluded 100%.
3. So, if you are going to look at how to treat DAF contributions for purposes of the public support test, I would suggest that you start with re-evaluating the public support tests to ensure that the publicly supported charities know the rules, know their own classification and start complying with them. Right now, the charities with no legal advice and an ill-informed return preparer are the best served because they go along reporting everything willy-nilly as public support while those that spend the time and resources to try to comply with the law, especially, the very new, find it almost impossible to raise sufficient funds and satisfy the applicable test. It takes a fair amount of initial support if you want to take off running and make an impact that will attract broad public support, but if a strong supporter – who has an interest in seeing that his/her funding is not squandered – takes an inside position, then his/her support is less likely to qualify for exclusion as an unusual grant. And, ask yourselves why, if the IRS would like to see a broad independent board managing an operating charity, a 509(a)(2) must exclude 100% of the donations received from directors and officers from the numerator of its public support fraction. Why not apply a 2% limitation rule like a 509(a)(1) rather than exclude contributions from directors, officers and substantial contributors 100%. You are only encouraging 509(a)(2)s to keep their supporters off the board and out of management.
4. I represent a lot of private foundations. I have a massive client handout on just the federal law requirements and considerations for grant making. It is so complicated, especially since 2006 (supporting organizations and affiliated entities under group exemption letters) that I was very

grateful that I could counsel those making smaller grants to contribute their annual grants budget to a sponsoring charity and recommend grants from a DAF. The sponsoring charity conducts the due diligence and since the sponsoring charities makes so many grants for so many DAFs, it has the staff and resources and has often already conducted the extra due diligence required for grants to supporting organizations and affiliated organizations under a group exemption letter, making it more cost-efficient for the foundation to make grant recommendations and let the sponsoring charity exercise discretion and control over the use of the DAF funds. The result is more money for charity and less money on attorneys and/or staffing a foundation – and greater compliance with the excise tax rules. I encourage foundations following this practice to report on the 990-PF the amount redistributed by the DAF so that the IRS can see that the foundation is not using a DAF to avoid complying with the 5% distribution requirement – the 990-PF could be revised to add lines reporting the amount of the grant to the DAF treated as a qualifying distribution and the amount distributed from the DAF that year or within 2 ½ months after the end of the foundation's tax year to document that qualifying distributions are not being parked in a DAF. This would put the onus on the foundation rather than the sponsoring charity to comply with the foundation's own excise tax requirements. I would amend the regulations to make clear that a foundation may elect not to treat a charitable distribution or a program-related loan or investment as a qualifying distribution and to treat it merely as a charitable distribution / use of funds (page 1, 990-PF, column (a), but not column (d)). If the foundation elects to treat it as such, and the grant is to a DAF, it must show that the amount of the grant to the DAF was redistributed, and if it elects to treat a program-related loan/investment as a qualifying distribution, it will be subject to the recapture rule when the funds are returned; otherwise, not. This will make it easier for foundations to make a PRI without having to make a commitment to continue making PRIs in future in order to satisfy the redistribution rule when program related loan or investment funds are received back.

5. Do not adopt rules that would discourage a foundation from terminating by distributing its remaining assets to a DAF.
6. Do not discourage foundations from using a DAF to operate part or all of their grant making program in a cost-efficient manner (without the need for staff, attorneys, for-profit foundation management companies to ensure legal compliance, conduct due diligence, and handle the check writing and record keeping).
7. Make DAFs operate as true publicly supported grant making charities. Prohibit the use of a DAF to satisfy any one's pledge (other than the sponsoring charity's own pledge); prohibit the awarding of any benefit of any kind to anyone other than the sponsoring charity itself, and require it to refuse any such benefit (tickets, admission, discounts, ski suits, etc.). Prohibit public charities from awarding such benefits to anyone who has not personally contributed the amount required to receive the benefit – and who will then receive a substantiation letter confirming to what extent that contribution is tax deductible. If an individual wants credit for a gift or want to pay his/her pledge, he/she will need to make the gift personally.
8. Allow sponsoring charities to publish their own annual donor recognition reports listing their named DAFs.
9. Allow the sponsoring charity to request that the grantee charity provide soft credit recognition listing the Sponsoring Charity's name, the total received from the Sponsoring Charity (or placing the listing in the appropriate support category for the Sponsoring Charity's total grants) and listing under the Sponsoring Charity's name all donors/donor advisors who recommended grants and did not request anonymity). Consider allowing the Sponsoring Charity, for grant recommendations from a single DAF in excess of some threshold amount

$50,000/$100,000/$250,000, to request that the grantee charity provide separate soft credit recognition in the applicable support category listing the Sponsoring Charity's name and the recognition name requested by the grant advisor.

10. Consider allowing the sponsoring charity to negotiate for naming opportunities for their own donors or persons their own donors wish to have honored – such as, in connection with a sponsoring charity's grant to establish a named endowed professorship or to support construction of a named facility. As long as the public charities are prohibited from awarding any benefits to any person other than the Sponsoring Charity or from applying a Sponsoring Charity's grant in satisfaction of any other person's pledge, allowing the grantee to know the identity of the individual to be honored should not present a legal issue.