



NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 PH 518.463.3200 www.nysba.org

TAX SECTION

2018-2019 Executive Committee

KAREN GILBREATH SOWELL

Chair
Ernst & Young LLP
1101 New York Ave. N.W.
Washington, DC 20005
202/327-8747

DEBORAH L. PAUL

First Vice-Chair
212/403-1300

ANDREW H. BRAITERMAN

Second Vice-Chair
212/837-6315

GORDON E. WARNKE

Secretary
212/997-0500

COMMITTEE CHAIRS:

Bankruptcy and Operating Losses

Stuart J. Goldring
David W. Mayo

Compliance, Practice & Procedure

Elliot Pisem
Bryan C. Skarlatos

Consolidated Returns

William Alexander
Richard Nugent

Corporations

Michael T. Mollerus
Linda Z. Swartz

Cross-Border Capital Markets

David M. Schizer
Andrew R. Walker

Cross-Border M&A

Yaron Z. Reich
Ansgar A. Simon

Employee Benefits

Robert C. Fleder
Andrea K. Wahlquist

Estates and Trusts

Alan S. Halperin
Joseph Septimus

Financial Instruments

Lucy W. Farr
Jeffrey Maddrey

"Inbound" U.S. Activities of Foreign

Taxpayers

Peter J. Connors
Peter F. G. Schuur

Individuals

Megan L. Brackney
Steven A. Dean

Investment Funds

John C. Hart
Amanda H. Nussbaum

Multistate Taxation

Arthur R. Rosen
Jack Trachtenberg

New York City Taxes

Sherry S. Kraus
Irwin M. Slomka

New York State Taxes

Paul R. Comeau
Joshua E. Gewolb

"Outbound" Foreign Activities of

U.S. Taxpayers

Andrew P. Solomon
Philip R. Wagman

Partnerships

Phillip J. Gall
Eric B. Sloan

Pass-Through Entities

James R. Brown
Edward E. Gonzalez

Real Property

Robert Cassanos
Marcy Geller

Reorganizations

Neil J. Barr
Peter A. Furci

Securitized and Structured

Finance

Daniel M. Dunn
John T. Lutz

Spin Offs

Lawrence M. Garrett
Joshua M. Holmes

Tax Exempt Entities

Stuart Rosow
Richard R. Upton

Treaties and Intergovernmental

Agreements

Lee E. Allison
David R. Hardy

MEMBERS-AT-LARGE OF EXECUTIVE COMMITTEE:

Daniel Z. Altman
William A. Curran
Tijana J. Dvornic
Pamela L. Endreny
Jason R. Factor

Kathleen L. Ferrell
Elizabeth T. Kessenides
Shane J. Kiggen
Stuart E. Leblang
William L. McRae

Kara L. Mungovan
Joel Scharfstein
Stephen E. Shay
Michael B. Shulman
Eric Solomon

Jonathan R. Talansky
Eric Wang
Sara B. Zablotny

Report No. 1390
February 28, 2018

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: *Report No. 1390 on Notice 2017-73 – Donor-Advised Funds*

Dear Messrs. Kautter and Paul:

I am pleased to submit Report No. 1390 in response to the request for comments contained in Notice 2017-73 with respect to certain issues relating to donor-advised funds ("DAFs"). The Report generally supports the proposals made in the Notice, but also makes certain recommendations to augment the rules proposed. Our recommendations follow from our view expressed in a prior report that DAFs and private foundations should be subject to consistent rules in situations that present similar issues.

In particular, the Report supports the Notice's position that a donor-advisor or related person receives more than an incidental benefit from a DAF distribution to an exempt organization if, as a result of the benefit received, the donation would not be fully deductible, if made by the donor

FORMER CHAIRS OF SECTION:

Peter L. Faber
Alfred D. Youngwood
Gordon D. Henderson
David Sachs
J. Roger Mentz
Willard B. Taylor
Richard J. Hiegel

Herbert L. Camp
William L. Burke
Arthur A. Feder
James M. Peaslee
Peter C. Canellos
Michael L. Schler
Carolyn Joy Lee

Richard L. Reinhold
Steven C. Todrys
Harold R. Handier
Robert H. Scarborough
Robert A. Jacobs
Samuel J. Dimon
Andrew N. Berg

Lewis R. Steinberg
David P. Hariton
Kimberly S. Blanchard
Patrick C. Gallagher
David S. Miller
Erika W. Nijenhuis
Peter H. Blessing

Jodi J. Schwartz
Andrew W. Needham
Diana L. Wollman
David H. Schnabel
David R. Sicular
Stephen B. Land
Michael S. Farber

–advisor directly. The Report also endorses the Notice’s suggested rules and approach (i) limiting the extent to which private foundations may treat distributions from a DAF as public support and, (ii) limiting the treatment of contributions to DAFs by private foundations as qualifying distributions only if the DAF agrees to further distribute the funds to another exempt organization.

The Report differs with the position in the Notice with respect to the use of distributions from a DAF to satisfy a legally binding pledge of the donor-advisor. Our view is that such use of the DAF distribution to relieve the donor-advisor of a legally binding obligation should be treated no differently than the use of private foundation funds to satisfy the legally binding obligation of a disqualified person. Under existing regulations, such use of private foundations funds is an act of self-dealing subject to penalty. We do not see a basis for adopting a different substantive rule for DAFs. Nevertheless, to address issues relating to the difficulty of the DAF in determining whether the distribution is being used to satisfy a pledge, the Report suggests a donor-advisor should be required to represent to the DAF that the distribution is not being used to satisfy a pledge and that, armed with that representation, the DAF would be protected from penalties. Finally, while we believe that private foundations and DAFs should be subject to the same rule in this context, the Report suggests that a review of the private foundation rule may be appropriate, especially in situations in which the ultimate benefit received by the donor-advisor or disqualified person is merely incidental.

Respectfully submitted,



Karen G. Sowell
Chair

Enclosure

Cc:

Thomas C. West
Tax Legislative Counsel
Department of the Treasury

Shelley de Alth Leonard
Deputy Tax Legislative Counsel
Department of the Treasury

Elinor Ramey
Attorney-Advisor
Department of the Treasury

Victoria A. Judson
Associate Chief Counsel (TEGE)
Internal Revenue Service

Janine Cook
Deputy Associate Chief Counsel (TEGE)
Internal Revenue Service

Amber L. MacKenzie
Assistant Branch Chief (TEGE)
Internal Revenue Service

Ward L. Thomas
Tax Law Specialist (TEGE)
Internal Revenue Service

