New York State Bar Association

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June 6, 2007

The Honorable Eric Solomon
Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, DC. 20220

The Honorable Kevin Brown
Acting Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Report Responding to Notice 2007-21 Concerning Donor-Advised Funds and Supporting Organizations

Dear Assistant Secretary Solomon and Acting Commissioner Brown:

I am pleased to submit the New York State Bar Association Tax Section Report No. 1129 responding to questions raised by Notice 2007-21 concerning the tax treatment of donor-advised funds ("DAFs") and supporting organizations ("SOs"). Notice 2007-21 invited public comments in connection with the study being conducted, pursuant to the Pension Protection Act of 2006 (the "PPA"), by the Department of the Treasury and the Internal Revenue Service on the organization and operations of DAFs and SOs.

The Report reviews the history of these organizations, recommends legislative changes and, unless and until legislation is enacted, proposes regulations designed to clarify their tax treatment and discourage potential abuse of their tax-exempt status. Specifically, the Report generally recommends that legislation be enacted to extend to DAFs and certain SOs the minimum distribution and other requirements, restrictions and penalties imposed by the Internal Revenue Code (the "Code") on private foundations. We believe that DAFs, as well as Type III SOs that are not functionally integrated with their supported organizations, exhibit many of the characteristics of private foundations. These entities afford opportunities for abuse of their tax-exempt status that are similar to the concerns that led to the enactment of the private foundation provisions in the Tax Reform Act of 1969.

We are concerned about the rapid growth of DAF assets over the last two decades and the expansion of DAF sponsorship to entities formed by financial institutions. Increasingly, it appears that DAFs are considered more as tax-planning vehicles than as charitable resources. We believe that the benefits of tax deductions realized by donors and the cost to the fisc should be balanced by commensurate resources going to charitable purposes.

DAF donors enjoy the generous deduction allowances granted for gifts to public charities without any requirement that some portion of the gift actually be distributed for charitable purposes. The only DAF constraint that goes beyond the restrictions applicable to private foundations limits donor control over distribution and investment decisions. While private foundation donors can exercise full discretion and control over these decisions within certain regulatory constraints, under new Code Section 4966 a DAF donor may retain only "advisory privileges" and must cede legal control to the sponsoring organization. Notwithstanding formalistic DAF compliance with this requirement, many arrangements appear to give DAF donors de facto control over investment and distribution decisions. Because DAFs are not separate legal entities but rather internal accounts of their sponsoring organizations, DAFs are virtually invisible to tax authorities and nonprofit regulators. While the DAF provisions in the PPA recognize DAFs as statutory entities for the first time, they do not address these concerns.

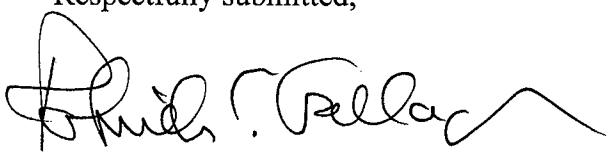
We believe the private foundation rules provide an effective regime for curbing potential abuses and ensuring that tax-benefited assets serve charitable purposes. In recommending that these rules be extended to DAFs, the Report recognizes that existing arrangements may require a transitional period to adapt to such a new regime if adopted. It also recognizes that certain traditional DAF sponsors such as broad-based community foundations may not present the risks posed by more recent DAF arrangements. Therefore, the Report suggests that these traditional sponsor arrangements be evaluated and that, to the extent they exhibit features that adequately address potential abuses, consideration be given to exempting them from the private foundation regime.

Although the Report focuses largely on DAFs, we believe that Type III SOs that are not functionally integrated with their sponsors present similar issues and should be subject to similar rules.

Recognizing that our legislative suggestions either might not be accepted or might not be enacted soon, the Report also recommends the promulgation of new regulations for DAFs and SOs in the interim. These are intended to clarify their treatment, provide greater certainty about the allowability of deductions, and discourage potential abuse. Specifically, given the difficulties of applying a facts and circumstances tests to determine the permitted scope of donor "advisory privileges" and other donor rights under the statute, we recommend that regulations prescribe an objective test for DAFs, SOs and their sponsoring and supported organizations to determine whether or not contributions are complete. This could take the form of a regulatory safe harbor that imposes a minimum payout standard, prohibits donor retention of options or other rights with respect to donated assets, requires specified oversight and control by sponsoring organizations, and/or includes other limitations modeled after the private foundation rules. Regulations that provide clear, objective standards should help the government, as well as donors, sponsors, supported organizations and their advisors, ascertain the deductibility of donations and the qualifying status of DAFs and SOs.

We appreciate your consideration of our recommendations. If you have any questions or comments regarding this Report, please contact us and we will be glad to discuss them or provide any other assistance that you might find helpful.

Respectfully submitted,



Patrick C. Gallagher
Chair

Enclosure

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