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By electronic submission to Federal eRulemaking Portal:

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The Honorable Lily Batchelder
Assistant Secretary (Tax Policy)
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, D.C. 20220

The Honorable Daniel Werfel
Commissioner
Internal Revenue Service
1111 Constitution Avenue NW
Washington, D.C. 20224

Mr. William Paul
Acting Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Avenue NW
Washington, D.C. 20224

Re: Notice of Proposed Rulemaking [REG 142338-07] on Taxes on Taxable Distributions From Donor Advised Funds Under Section 4966; 88 Fed. Reg. 77922

The Philanthropy Roundtable appreciates the opportunity to comment on the Department of Treasury’s (“Treasury”) and the Internal Revenue Service’s (“IRS”) Notice of Proposed Rulemaking on the Taxes and Taxable Distributions from Donor Advised Funds under Section 4966, 88 Fed. Reg. 77922 (Nov. 14, 2023) (the “Proposed Regulations”). We also thank the Treasury and the IRS for the comment period extension, as the Philanthropy Roundtable and many others in the charitable sector requested. *See* 88 Fed. Reg. 1042 (Jan. 9, 2024).

The Philanthropy Roundtable is America’s leading network of charitable donors working to foster excellence in philanthropy, protect philanthropic freedom, assist donors in achieving their philanthropic intent, and help donors advance shared values of liberty, opportunity, and personal responsibility. Our members include individual philanthropists, family foundations, and community foundations located throughout the country who support a broad range of charitable causes.

The Philanthropy Roundtable supports Treasury and the IRS in their efforts to clarify important definitions to the philanthropic community, more specifically community foundations, family foundations, and individual donors. Our paramount goal is to encourage a robust, thoughtful giving community, and we highly value the role of all vehicles that make giving possible, including donor-advised funds.

Donor Advised Funds (“DAFs”) allow individuals to channel their charitable giving with flexibility and impact. In this way, DAFs act as charitable savings accounts, fueling a surge in charitable giving, and encouraging philanthropic participation from donors who might not otherwise have the means to engage in strategic long-term or impactful giving.

When the COVID-19 pandemic unleashed unprecedented needs in 2020, DAFs proved their agility and responsiveness. These “rainy-day-funds” for philanthropy enabled Americans to answer the call swiftly and generously, highlighting their crucial role in navigating times of crisis. These charitable giving vehicles are a versatile tool for compassionate donors to support diverse causes and respond adeptly to changing societal needs.

With the value that DAFs offer as a robust giving vehicle used to support the most vulnerable in our communities, the Roundtable urges the Treasury and the IRS to consider changes to specific areas of the proposed rule. While we appreciate the Treasury and the IRS’s goal of clearly and effectively implementing the rules outlined in 2006 Pension Protection Act, Pub. L. 109-208 (“PPA”), there are three major areas that warrant further changes before a final rule takes effect.

More Time is Needed for Implementation

The top priority for the Roundtable is to request a later effective date for the Proposed Regulations. Regardless of the shape of the final rule, the size and scope of the Treasury and the IRS’s undertaking is too large for sponsoring organizations, donors and other stakeholders to implement on a short timeline. Depending on the timing of the final rule, affected entities may be faced with retroactive requirements that are virtually impossible to meet. The result would be increased costs for stakeholders, less giving in a time of uncertain rules and less resources available for meeting charitable missions.

The Roundtable recommends an effective date of taxable years ending at least two years after the date of publication of the final rules in the *Federal Register*. This will ensure that stakeholders have sufficient time to fully comply with the rules, without impeding the crucial support for charitable work underway.

Treatment of Investment Advisors Is Contrary to Congressional Intent

We urge the Department to reconsider its proposed expanded definition of “Donor Advisor” that proposes including a donor’s “Investment Advisor” in the definition. *See* Prop. Treas. Reg. § 53.4966-1(h)(3). This definition is outside of the Department’s authority as the law is written. In section 4958(c)(2) as enacted by the PPA, Congress already provided special rules for donor-advisors and related parties, which are stricter than the general excess benefit transaction rules. Section 4958(c)(1) also subjects investment advisors to the general excess benefit rule. Clearly, Congress did not intend personal investment advisors to be subject to the enhanced rules that apply to donor-advisors and related persons (under which virtually any payment is an excess benefit transaction subject to penalty), or they would have explicitly done so as part of the PPA.

Applying Section 4966 of the PPA to investment advisor fees undercuts Congress' clear intent for this section, focused on grants and similar payments. Instead, Section 4958 explicitly addresses such fees in section 4958(c)(1) and (f)(8), which generally requires such fees to be arm's length or be subject to penalty. Under the proposed regulations, such fees would *ipso facto* be subject to penalty.

Including personal investment advisors in the definition of donor advisors raises concerns about potentially deviating from established tax policy, which has long favored public charities over private foundations. The proposed change could have unintended consequences for charitable giving patterns by nudging high net worth donors toward private foundations, where advisor and family member compensation structures are less restricted and which may or may not be the right giving vehicle for the specific client.

Further, with the goal of encouraging charitable giving, it would be inadvisable for the Treasury and the IRS to chill giving by discouraging investment advisors to recommend using a DAF as a giving tool when warranted by a client's situation. The thoughtful inclusion of DAFs into wealth management strategies is a positive benefit for causes and communities throughout the world. Care should be taken to avoid discouraging this.

Caution is Needed in Broad Definition of Distributions

The proposed expansion of the definition of "taxable distribution" subject to penalty under Prop. Treas. Reg. § 53.4966-5 beyond grants and investments to encompass potentially any fee-for-service transaction with non-charities raises significant concerns. This could inadvertently penalize routine and necessary expenses like legal counsel, accounting, or philanthropic advising, even if deemed reasonable and related to the DAFs operation. Such broad application of penalty taxes raises questions about how DAF sponsors can fulfill their fiduciary duty to act in the best interest of donors. It could readily discourage essential service procurement, hindering efficient oversight and management of DAFs.

If the Treasury's and the IRS's aim is to prevent grant funds from being used for non-charitable purposes or benefiting disqualified individuals, the proposed rule's scope and language could benefit from significant clarification. The proposed rule's broad interpretation would hinder legitimate charitable activities within authorized scopes. The example included in the proposed rule, where a grantee charity's activity within its charitable scope (*e.g.*, missionary work, individual grants, supporting foreign organizations) triggers a taxable distribution for the DAF solely based on donor recommendation, raises concerns about the rule's broadness and potential unintended consequences.

Future Rulemaking on DAFs Should Foster Giving

As Treasury and the IRS move forward with additional rulemaking related to DAFs, we caution against taking sweeping action on Notice 2017-73 and implementing changes that could have a transformational impact on the use of DAFs. That includes proposals which place additional restrictions or distribution requirements on DAF accounts, or which make it more difficult for our nation's charities to count DAF contributions toward the public support test.

DAFs have become a pivotal force for positive change, thanks to generous individuals leveraging them to make a monumental impact across the nation. While overall charitable giving declined in 2022, DAF donors defied the trend, pushing their charitable grants out of DAFs to a record high of over \$52 billion. This trend extends far beyond 2022—DAF grants have steadily increased over the past five years, more than doubling in volume providing vital support to communities in need.

But the value of DAFs extends beyond impressive payout numbers. These vehicles also play a poignant role in sustaining legacies and quickly directing charitable funds to where they're needed most. Take the American Indian College Fund, which serves to increase access to college education for American Indians. In the aftermath of the COVID-19 pandemic, donors used DAFs to support the organization at unprecedented rates, with gifts from DAFs almost 7-times higher than in prior years. Another example is the Akron-Canton Regional Food Bank. Community foundations used DAFs to generously donate unrestricted gifts allowing the food bank to get to work and put the money where it was needed most.

The unintended consequences of these proposed changes will ripple through the complex ecosystem of philanthropy, leaving a disparate and disproportionate burden on the shoulders of those who rely on the generosity of DAF donors. Organizations addressing urgent needs like food insecurity, homelessness, and healthcare access often rely on flexible funding from DAFs. Reduced contributions or limitations on grantmaking could mean fewer meals served, fewer beds available, and delayed or denied medical care for some society's most vulnerable individuals.

The Philanthropy Roundtable again thanks the Treasury and the IRS for undertaking the rulemaking under the PPA. We appreciate the opportunity to comment and respectfully urge the Treasury and the IRS to consider changes to the proposed rules.

Sincerely,

Christie Herrera

President & CEO
Philanthropy Roundtable