THE NEW YORK COMMUNITY TRUST
909 Third Avenue, 22nd Floor
New York, NY 10022
T: (212) 686-0010 | F: (212) 532-8528
nycommunitytrust.org

February 14, 2024

CC:PA:01:PR (REG–142338-07)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: IRS and REG–142338-07
Comments in Response to Notice of Proposed Rulemaking, Request for Comments in Connection with Taxes on Taxable Distributions from Donor Advised Funds under Section 4966 and Request for Public Hearing

To Whom It May Concern:

The New York Community Trust ("The Trust") is one of the oldest and largest community foundations in the United States. We have the distinction of being the organization where the first-ever donor-advised fund ("DAF") was established in the 1930s. During the more than ninety years since, we have had a front-row seat to the evolution and growth of the DAF as a giving vehicle, stretching back long before the enactment of the Pension Protection Act (the "PPA") in 2006 and continuing since then.

We submit these comments in response to the above-referenced Notice of Rulemaking (the "Notice") and the proposed regulations (the "Proposed Regulations") under Section 4966 of the Internal Revenue Code of 1986, as amended (the "Code"). We are also requesting a public hearing on the Proposed Regulations.

We are concerned that certain provisions in the Proposed Regulations would be difficult to administer, impose burdens on DAF sponsoring organizations that would fall disproportionately on The Trust and other community foundations, and needlessly discourage the type of philanthropy and volunteer engagement that a community foundation is able to foster. What follows is, first, a high-level summary of our perspective on the Proposed Regulations and then a more detailed analysis of specific provisions.

Summary of Comments

The Trust's first donor-advised fund was established in 1931, long before there was even a name for the concept. During the donor's lifetime, this first-ever "donor advisor" made grant suggestions. When she died, the assets on hand at her death remained in the named fund as part of The Trust's permanent endowment, supporting our competitive grantmaking program, through

which our professional staff assess community needs, review proposals, investigate nonprofits' projects and finances, and recommend grants to our volunteer board.

For the past century, The Trust has administered both permanent and currently expendable funds and has offered a range of types of funds, including those that support a particular purpose or purposes ("field-of-interest" funds), those that support specified organizations ("designated" funds), scholarship funds, and donor-advised funds. Our donor-advised funds themselves take multiple forms, including memorial funds to honor a deceased loved one, funds received as the final grant from a terminating private foundation, and more "garden variety" donor-advised funds established by individuals to carry out their philanthropy. Our donor advisors have access to the comprehensive philanthropic expertise of our professional staff, who are available to help our donor advisors learn more about the causes and organizations they care about and ways that they can achieve their charitable goals in well-informed, effective, and, in many cases, innovative ways.

In the 1990s and early 2000s, as our own DAF program largely hewed to its origins, we witnessed the growth and evolution of the DAF. The essence of a DAF from a legal standpoint, however, has remained the same and was preserved and codified in the PPA. What has always been clear, both before and since the PPA, is that the DAF sponsoring organization retains control and responsibility over the assets in a DAF – both the investment management of those funds and the administration of the funds, including grantmaking from the DAF.

After all, the DAF – like all other fund types held by a community foundation – remains a component part of the assets of the community foundation. *See* Treas. Reg. § 1.170A-9(f)(11) and 12 (setting forth the "component part" concept and allowing certain aggregations of trusts and funds to be treated as a "single entity" and, therefore, qualify on an aggregate basis as a public charity if the specified standards are met, including the existence of a common governing instrument and a common governing body). Like all fund types within a community foundation, a DAF is separately identified and tracked, and just as it is the responsibility of the community foundation to ensure that the assets in its other "component" funds are prudently managed under state law and that grantmaking is appropriately administered in furtherance of charitable purposes, so does the community foundation have this responsibility with respect to its DAFs.

What we read in the Proposed Regulations is a suspicion that the responsibility and control described above are not there *in substance* and that donors who establish a fund at a sponsoring organization are "calling the shots," controlling the investment management and the grants from funds they establish through both the direct exercise of powers they do not legally have and through a nebulous kind of indirect exercise of this power. Moreover, from certain rules in the Proposed Regulations, we infer a concern on the part of Treasury that donors are sometimes doing this in ways intended to benefit themselves personally.

We do not see attempts on the part of our donors to abuse or attempt to abuse DAFs or other funds they establish. Instead, we see people from all walks of life and levels of means using these funds as an efficient way to carry out meaningful philanthropy, supporting the causes and, where appropriate, the specific organizations they care about in an efficient, low-cost, and better-informed manner.

Even if, for the sake of argument, we were to assume that some abuse does exist at the margins in the large arena DAFs occupy, it is not for lack of sufficient clarity about the law but rather due to lack of full compliance with that law. And whatever marginal impact the Proposed Regulations may have on the rare abuses, they will have an enormous, and harmful, impact on community foundations like The Trust by making our work as a DAF sponsoring organization more complicated and expensive. The reason for this is twofold: First, community foundations have fund types other than DAFs, and under these Proposed Regulations, funds that are not DAFs are subject to the ongoing risk of becoming DAFs by reason of amorphous rules that would be hard, if not impossible, to administer. Second, anything that increases administrative burdens would disadvantage DAF sponsoring organizations that lack the resources to expand their compliance capacity without increasing fees.

In addition, certain provisions in the Proposed Regulations will constrain donor engagement and the volunteer service that community foundations like The Trust currently draw upon in administering funds that are not DAFs. This will have a harmful effect on the administration of certain types of non-DAF funds (including fellowships, prizes, and awards) that are labor-intensive to administer but powerful philanthropic tools in our communities.

Below we point to specific provisions in the Proposed Regulations that we consider problematic and offer our recommended alternatives.

<u>Detailed Comments</u>

A. <u>Advisory Committees</u>

There are two types of advisory committees at a community foundation such as The Trust. The first is a DAF advisory committee, namely, a committee of advisors who are appointed or designated *by the donor* and who have advisory privileges over the DAF within the meaning of the PPA (*See* Code Section 4966(d)(2)(A)(iii).) A DAF advisory committee may act as a committee, or individual advisors may exercise their advisory privileges independently.

The second type of advisory committee arises with respect to funds that are *not* DAFs, and it is a committee that is appointed by the community foundation to assist the community foundation in grantmaking from the fund. Funds that might have an advisory committee of this type include scholarship funds, fellowship funds, collaborative funds, and award and prize funds – funds where The Trust benefits from the input of volunteers and holds the power to appoint suitable volunteers to the advisory committees. Funds of this type support innumerable worthy activities, including literary prizes, awards for artists, and fellowships in medicine or public service. The advisory committees we appoint for such funds act as a body; no member of the committee has advisory privileges that the individual may exercise unilaterally.

The Proposed Regulations muddy this distinction and create situations where the second type of committee is regulated as if it were the first type of committee. We can understand Treasury's desire to clarify the scope of "advisory committees" that are not DAF advisory committees. And given the importance of volunteer committees to the structure of fund

administration at community foundations, we appreciate the effort to define multiple ways in which a fund or account may make distributions based on the recommendation of an "advisory committee" without the fund or account being classified as a DAF. However, as explained in greater detail below, the standards created in the Proposed Regulations (in the definition of "donor-recommended advisory committee member" and the definition of "advisory privileges") are confusing, will be difficult to administer as a practical matter, will add new compliance costs, and will disincentivize worthy philanthropy and volunteer engagement.

We therefore urge Treasury to revise the Proposed Regulations to adopt a single concept — what we refer to in this letter as a "qualified sponsoring organization advisory committee" — that would be a category separate and apart from scholarship selection committees delineated under Code Section 4966(d)(2)(B)(ii)(I) and Proposed Treas. Reg. § 53.4966-4) and would preserve the flexibility of community foundations to involve donors and related persons in advisory committees of funds that are not regulated as DAFs. And we urge Treasury to adopt this concept employing objective standards, rather than factually uncertain determinations of whether a committee member is appointed based on the donor's "recommendation" or "by reason of the donor's status as a donor." Finally, we urge Treasury to adopt a definition of "control" throughout the Proposed Regulations that is based on objective governance standards, as Treasury has done in the analogous context of supporting organizations. Below we explain in greater detail our concerns with the Proposed Regulations and the concept we propose as an alternative.

1. §53.4966-1(h)(4): *Donor-recommended advisory committee member*; *§53.4966-3(c)(1)(i): Advisory privileges; §53.4966-3(c)(1)(iii): Donor, donor-advisor, or related person appointed to an advisory committee*.

   (a) *Proposed Regulations' Standards for Advisory Committees.*

Under the Proposed Regulations, "facts and circumstances" are used to determine whether a donor or donor-advisor has, or reasonably expects to have, advisory privileges "by reason of the donor's status as a donor," in which case the corresponding fund or account will be a DAF. In the case of advisory committees appointed by the sponsoring organization, Proposed Treas. Reg. §53.4966-3(c)(1)(iii) would *deem* such an appointment to result in advisory privileges "by reason of the donor's status as a donor" and would thereby cause a fund to be a DAF unless "(1) the appointment is based on objective criteria related to the expertise of the appointee in the particular field of interest or purpose of the fund or account; (2) the committee consists of three or more individuals, not more than one-third of whom are related persons with respect to any member of the committee; and (3) the appointee is not a significant contributor to the fund or account, taking into account contributions by related persons with respect to the appointee, at the time of appointment." If such privileges are found to exist under this rule and the other DAF tests are met, the fund would be a DAF.

The Proposed Regulations further provide that, where a person is "recommended" by a donor or donor-advisor and "appointed" by the sponsoring organization to serve on a committee, such person is a donor-advisor – and the fund or account is therefore a DAF – unless "(1) the recommendation is based on objective criteria related to the expertise of the member in the

particular field of interest or purpose of the fund or account; (2) the committee consists of three or more individuals, and a majority of the committee is not recommended by the donor or donor-advisor; and (3) the recommended person is not a related person with respect to the recommending donor or donor-advisor." Proposed Treas. Reg. §53.4966-1(h)(4).

The cited provisions are similar but different, as follows: first, each one applies an "objective criteria" standard, but the first one requires a determination of whether the *sponsoring organization* applied "objective criteria" in making an appointment, and the second one requires a determination of whether the *donor* applied "objective criteria" in making a recommendation for appointment. Second, each one has a relationship standard, but in the first case it pertains to how the committee members relate to one another, whereas in the second it pertains to how they relate to the donor (i.e., whether they were "recommended" by him or her"). And finally, each one has a *per se* exclusion from the committee, but in one case the exclusion is for anyone who is a significant contributor and in the other case it is for anyone "related" to the recommended donor or advisor. Furthermore, the underlying standard for each category is dependent on a question that is so fact-specific (whether the appointment arises "by reason of the donor's status as a donor" or whether it arises as the result of a donor's "recommendation") as to invite uneven application of the standard and inadvertent non-compliance.

Attempting to communicate these "similar but different" rules internally and to our donors and ensuring that the rules are properly applied to a multitude of funds will be administratively burdensome and, as a result, will require resources that The Trust would otherwise be able to apply to our actual charitable work. If some DAF sponsoring organizations can absorb these costs without increasing their fees, e.g., by relying on services donated by an affiliated entity or by making minor refinements to digital tools they already have, it disadvantages those DAF sponsoring organizations without that ability and whose fees may be forced upward relative to others in the field.

We also note that these "objective criteria" standards are wholly an invention of the Proposed Regulations. This standard was not considered necessary by Treasury in the analogous context of supporting organizations, where a governance-based "disqualified person control" standard suffices to ensure that supporting organizations are not improperly controlled by their disqualified persons under Code Section 509(a)(3)(C). The fact that the control standard in the Proposed Regulations is more elaborate and subjective than in the supporting organization context is particularly striking when one considers that the advisory committee appointed by a community foundation or other sponsoring organization is *merely advisory*. Unlike the case where donors and related persons serve on the governing board of a supporting organization and therefore act as top-level organizational fiduciaries, community foundation donors have a much more attenuated role: they are mere advisors, and they merely advise with respect to individual funds that are still controlled by the community foundation and, ultimately, its board. Given that sponsor-appointed advisory committees therefore operate at two levels of remove in terms of their decision-making, the governance-based standard that is used in the supporting organization context should suffice to achieve Treasury's objectives in this context.

While administrability is a serious concern, we are also concerned that the regime set forth in the Proposed Regulations seems to be premised on the exclusion of donors and those

who are related to them from participation on community foundation-appointed advisory committees (outside the limited contexts covered in under Proposed Treas. Reg. §53.4966-4). For example, a "significant" contributor to an award fund would not be able to participate on an advisory committee appointed by The Trust that selects the award recipients because otherwise, such a fund would be a DAF and could not make grants to individuals; by contrast, a significant contributor could participate on an advisory committee appointed by The Trust that selects scholarship recipients in conformity with Proposed Treas. Reg. §53.4966-4(b). The same discrepancy is present if a donor recommends a family member to serve as a minority voice on an award selection committee, as opposed to a scholarship selection committee – the first is impermissible, whereas the second is permissible.

We do not understand the reasons for excluding donors and their related parties so categorically. In our experience, donors and those associated with them often possess valuable expertise or experience about the charitable purpose or objective of a fund. We believe that as a sector, we should be looking for reasons to *include* them, not to exclude them, from the philanthropy they care about – so long as they do not control grantmaking from the fund and so long as standard conflict of interest protocols are followed. A retired cancer surgeon who establishes a fund that awards prizes for outstanding accomplishments in cancer research is likely to have a valid and meaningful role to play as a participant on an advisory committee. Similarly, foundations that come together at a community foundation to work collaboratively on some of our community's most intractable problems bring their valuable expertise in addition to their resources.

Indeed, it has been our experience that some of the most determined and effective philanthropy in the country is made possible by individuals with commitment and vision around an issue that they have dealt with for many years, sometimes exclusively in their role as donors and not always because they have degrees or other indicia of "expertise." And it has been our experience that the reasons a donor might wish to be part of an advisory committee are overwhelmingly charitable – reflective of the spirit of volunteerism that we as a community foundation aspire to encourage. In other words, donor involvement helps promote engagement around some of our community's most difficult problems, which is at the core of what community foundations strive to do.

(b) *Proposed Alternative Concept of a "Qualified Sponsoring Organization Advisory Committee."*

We believe it is possible for the Proposed Regulations to implement Code Section 4966 without creating complex and cumbersome rules that will discourage some donors from giving to charity and impede the ability of community foundations to call on the expertise and experience available to them. We also believe that, in the rare cases where any member of an advisory committee has a conflict of interest, those can be readily regulated through existing practices of disclosure and recusal (as is our current practice).

We therefore respectfully request that Treasury replace the confusing, subjective, and unwieldy standards described above with a single concept of "qualified sponsoring organization advisory committee" (or some similar term) for all sponsor-appointed advisory committees

(other than those otherwise covered under Proposed Treas. Reg. §53.4966-4) that allows for minority representation from the donor and/or related persons.

We note that Congress specifically granted Treasury the authority to exempt additional funds from the definition of a DAF "if such fund or account is advised by a committee not directly or indirectly controlled by the donor or any person appointed or designated by the donor for the purpose of advising with respect to distributions from such fund (and any related parties)" Code Section 4966(d)(2)(C), and we submit that the definition outlined below is consistent with the scope of that authority.

Specifically, we propose that Treasury modify the Proposed Regulations to incorporate the following concept: that a fund or account will not be a DAF (and that advisory powers held by reason of serving on a committee will not be "advisory privileges" for DAF purposes) if:

> (1) the fund or account is established for a specified charitable purpose, objective, or field of interest (other than making grants to individuals for travel, study, or similar purposes or providing relief from one or more qualified disasters); and
>
> (2) the sole suggestions or recommendations provided with respect to the fund or account are provided by a "qualified sponsoring organization advisory committee" with the attributes described below that is empowered to advise solely with respect to distributions (i.e., not with respect to investments).

For these purposes, a "qualified sponsoring organization advisory committee" would be a committee:

> (a) with three or more members,
>
> (b) appointed by the sponsoring organization based on its reasonable determination that a majority of the members of the committee possess expertise or relevant experience with respect to the charitable purpose, objective, or field of interest of the fund or funds with respect to which the committee provides advice, and
>
> (c) that is not controlled, directly or indirectly, by one or more donors to the fund or their related parties.

Insofar as a qualified sponsoring organization advisory committee is empowered to exercise its authority with respect to prizes or awards to individuals, we believe it would be appropriate to provide specific prohibitions on recipients similar to those in Proposed Treas. Reg. §53.4966-4(c)(5) and 53.5966-4(d)(5), respectively, for scholarships awarded by Code Section 501(c)(4) organizations and funds for disaster relief (e.g., no prizes or awards to members of the committee or their related persons).

We strongly recommend that existing definitions of direct and indirect control, such as already exist in the context of supporting organizations, be used in interpreting what constitutes control. The legislative history of Code Section 4966 supports this approach, as the Joint Committee on Taxation concluded that "membership alone" on a board or committee "does not establish direct or indirect control." Rather, the Joint Committee's report indicates by way of an example that the donor and individuals controlled by the donor must hold a *majority* of seats for control to exist. (*See* Joint Committee on Taxation, Technical Explanation of H.R. 4, The "Pension Protection Act of 2006" (Aug. 3, 2006), at 345.) If a concept along the lines we

propose were adopted, conforming changes would be needed throughout the Proposed Regulations, including through the development of suitable examples.

This approach respects the legitimate role of The Trust and other charities that serve as thoughtful stewards of charitable funds. We also believe it would establish a clear and administrable system for enabling community foundations and other DAF sponsoring organizations to deploy volunteer expertise and experience in useful ways. We further believe that a unified and simple rule for qualified sponsoring organization advisory committees would encourage philanthropy by clarifying precisely how to create a fund for a specified charitable purpose or objective that can benefit from the passion, expertise, and/or experience that the donor or a related person is able to bring to the table.

For example, if The Trust, under current law as we understand it, were to convene a collaborative fund around the migrant crisis in New York City, the participants would be a combination of members of the community, persons in relevant government positions, and funders (predominantly private foundations, but possibly individual donors as well). If our proposed concept were adopted in lieu of what is now in the Proposed Regulations, the fund would not be a donor-advised fund, so long as the criteria for a qualified sponsoring organization advisory committee are met, including that the representatives of the funders remain a minority of the total committee membership. This is particularly significant because a collaborative fund of this type might well recommend cash assistance to migrant families who are struggling in New York City, which would not be possible if the fund were a DAF.

(c) *Exercising the discretionary authority to exempt a fund that benefits a single identified charitable purpose.*

In the preamble to the Proposed Regulations, Treasury requested comments specifically on whether other funds should be exempted from the definition of DAF using the authority under Code Section 4966(d)(2)(C). In addition to providing that the Secretary may exempt a fund from the definition of DAF that is advised by a committee not controlled by the donor or related parties, Section 4966(d)(2)(c) also provides that the Secretary may exempt a fund or account if it "benefits a single identified charitable purpose."

If Treasury chooses to adopt our recommended concept of a qualified sponsoring organization advisory committee, we do not think it is necessary for Treasury to develop an exception for a fund or account benefiting a single identified charitable purpose since the concept would allow for a committee structure that most collaborative funds could comfortably fall within. However, if Treasury does not adopt the concept, we urge Treasury to develop regulations that exempt funds benefitting a single identified charitable purpose from the definition of DAF so that collaborative funds do not risk being swept into the definition of a DAF.

We emphasize the importance of preserving collaborative funds because they are a core part of the work we do as a community foundation. For almost 50 years, The Trust has been an innovator in philanthropic collaboration, partnering with hundreds of participating funders to recommend grants to pursue common goals in areas of broad public interest. So far, The Trust

has been home to nearly 40 collaborative funds, distributing hundreds of millions of dollars. The collaborations develop around common interests but operate in many ways, with some having addressed short-term issues and living a brief life, and others having focused on more complex goals over the long term.

The Trust's earliest collaborative funds began in 1977 in response to New York City's fiscal crisis, where a series of meetings The Trust convened with corporate leaders who wanted to keep vital City programs alive led to the creation of the Corporate Special Projects Fund, which supported projects benefiting the City and improving quality of life. A second collaboration, the Neighborhood Revitalization Fund, began in 1978 to support community development initiatives. Perhaps our most widely known collaborative fund was the September 11th Fund, which pooled $534 million from individuals living in all 50 states and from 150 countries to respond to the tragic events of that day. Today, we are hosting four collaborative funds in New York City – New York City Workforce Development Fund, GoVoteNYC, Fund for New Citizens, and New York State Census Equity Fund – and still more are hosted by our Long Island and Westchester County divisions.

A collaborative fund at a community foundation stands distinctly apart from the classic DAF in that the community foundation appoints and manages the committee, and collaborative funds as a class pose an extremely low risk of the type of abuse that Treasury is evidently concerned about since they are among the most public and publicized funds we offer and tend to involve many different unrelated parties. Under whatever statutory rubric Treasury concludes would be appropriate, we urge it to ensure that this important category of funds not be swept into the definition of a DAF.

2. <u>§53.4966-4(b)(2)((iii): *indirect control of scholarship and fellowship committees*</u>.

At The Trust, it has not been difficult to parse what it means to appoint and control a committee that advises us with respect to funds that make grants to individuals "for travel, study, or similar purposes" (i.e. scholarship or fellowship funds). The Proposed Regulations, however, introduce the following definition of "indirect control" of committees providing advice with respect to scholarship and fellowship funds that will complicate our task enormously when we appoint such committees:

> Whether a committee is *indirectly controlled* [emphasis in original] by a combination of donor(s), donor-advisor(s), or related persons is determined by the facts and circumstances, including the nature of any relationships among the members of the selection committee and with any donor, donor--advisor, or related person. For example, a committee is *indirectly controlled* [emphasis in original] by a combination of donor(s), donor -advisor(s), or related persons if a majority of the selection committee is currently engaged by the donor-donor-advisor, or any related person in any employment or fiduciary capacity, whether as an employee or independent contractor, or <u>recommended by a donor or donor-advisor and appointed to the selection committee based on other than objective criteria regarding the person's expertise, or a combination thereof</u> [underscoring added].

This example detailing what constitutes "indirect control" reaches far beyond the types of relationships that could reasonably give rise to indirect control when it sweeps in a donor's recommendation for reasons *other* than objective criteria. It is a leap in logic to conclude that an individual recommended because the donor believes they have good judgment or because they have served on other scholarship committees is somehow "controlled" by the donor.

As described above, in the related context of "disqualified person control" under Code Section 509(a)(3)(C) applicable to supporting organizations, there is no such "objective criteria" standard. Rather, there is simply a generalized facts and circumstances analysis without categorical pronouncements. *See* Treas. Reg. §1.509(a)-4(j)(1); Rev. Rul. 80-207, 1980-2 C.B. 193; IRS Supporting Organizations Guidesheet Explanation, Type I and II, March 13, 2008. *See also* Proposed Treas. Reg. §53.4966-1(c)(2) (drawing heavily on the supporting organization definition of "indirect control" for purposes of the definition of "disqualified supporting organization"). Even in the highly scrutinized area of Type III supporting organizations, Treasury has not gone so far as to impose an "objective criteria" rule as part of the "indirect control" analysis. For the reasons outlined earlier, we believe the Proposed Regulations need not take the matter any farther than the "indirect control" rules applicable to supporting organizations.

We respectfully request that the underscored language in the explanation of "indirect control" be struck.

B. Advisory Privileges – Facts and Circumstances
§53.4966-3(c)(2)(iv): *Facts sufficient to find advisory privileges.*

The Proposed Regulations include among the facts and circumstances sufficient to find advisory privileges the fact that "[t]he sponsoring organization generally solicits advice from a donor or donor-advisor regarding the distribution or investment of amounts held in a fund or account." This provision is too broad to be administrable. If the donor who establishes an environmental field-of-interest fund is an issue expert in the environmental area and staff meet with her on a regular basis to discuss developments in the field, it should be clear that this activity does not convert the fund into a DAF. What makes community foundations distinctive is that our donors are necessarily part of the community we serve, and they are sometimes issue experts in their own right. A DAF is established through a fund agreement that has characteristics that distinguish it from our other fund types; if a donor does not set up a DAF, it is not a DAF.

We respectfully request that Proposed Treas. Reg. §53.4966-3(c)(2)(iv) be struck in its entirety.

C. Single-Identified Organization Exception
§53.4966-4(a)(4)(i)(A); §53.4966-4(a)(6)(iii): *Special rules*; *example 3.*

The Proposed Regulations provide that a fund or account will not be treated as making distributions only to a single identified organization if "[a] donor, donor-advisor, or related person has or reasonably expects to have the ability to advise regarding some or all of the distributions from the single identified organization to other individuals or entities." Example 3

states that if one of the advisors of the DAF is on the board of the single-identified organization that is the sole grantee of the DAF, the fund will not qualify for the single identified organization exception because the advisor "has the ability to advise on some or all of the distributions" from the grantee.

This example fundamentally misunderstands the way grantmaking works and the corporate presence of a nonprofit's board. This is another place where we detect a suspicion on the part of Treasury that donors are "calling the shots," notwithstanding the corporate structure and processes within which grantmaking occurs. An individual board member cannot themselves direct grants from the organization on whose board they serve, as the board acts as a collective. Imputing to donors a seemingly boundless capacity for controlling the organizations they support both misunderstands donor motivations and behavior and disregards the very real corporate structures and processes that are necessarily involved.

We respectfully request that the referenced Example 3 be struck.

D. Distributions from a DAF
§53.4966-1(e)

The Proposed Regulations define "distribution" broadly as "any grant, payment, disbursement, or transfer, whether in cash or in kind, from a donor advised fund" with a narrow exclusion for "investments and reasonable investment or grant-related fees." We are concerned that the narrowness of the exclusion calls into question the perfectly appropriate process of allocating fund-specific expenses to the relevant fund. For example, if an issue expert is engaged to advise on the relative merits of multiple potential grantees from a DAF, not all of whom will necessarily receive grants, we believe it is appropriate to allocate those costs to that particular DAF. Is that a "grant-related fee"? The answer to that question is unclear to us, but we do not see any reason why appropriate expenses related to a DAF should not be chargeable to that DAF.

We recommend expanding the exception language to state, subject to the exception for deemed distributions, that "fees or expenses reasonably incurred in connection with the administration of a particular donor advised fund, including investment and grant-making, by a particular donor advised fund are not considered distributions."

E. Personal Investment Advisors
§53.4966-1(h)(3)

Much ink has been spilled already on the provision in the Proposed Regulations that transforms a donor's personal investment advisor into a "donor-advisor" with respect to a donor's DAF if the investment advisor provides investment advice with respect to both the donor's personal assets and the assets in the DAF in certain circumstances. This rule appears to be designed to prevent a donor from reaping impermissible benefits from the dual advisor relationship, e.g., reduced fees on the management of their personal assets, and to prevent conflicts of interest and disincentives for depleting the fund through distributions. We do not see a basis in the PPA to create such a rule and believe existing law and other provisions in the Proposed Regulations already guard against that type of impermissible benefit.

The central reason that the investment advisor that may be managing a DAF's assets may not be a donor-advisor by virtue of that relationship is that investment advisors/managers are *recommended*, not *designated*, by the DAF donor. And investment advisors do not have advisory *privileges*; rather they manage the assets of the DAF pursuant to a contractual agreement with the sponsoring organization. In fact, the status of the investment advisor is more akin to the grantee favored by the DAF donor than it is to a DAF advisor, since the donor may not decree that the sponsoring organization make a grant to the grantee any more than it may compel a sponsoring organization to hire a particular investment advisor. The sponsoring organization is the party responsible for the management of the assets and, as such, is the party that performs due diligence on the advisor, contractually engages the advisor, monitors the performance of the advisor, and exercises authority over what to pay the advisor and when to discharge the advisor or change its mandate – all in compliance with state law. This distinction is clearly recognized on the face of Code Section 4958(f), where "donor advisors" are defined as a category separate and apart from "investment advisors". *Cf.* Code Sections 4958(f)(7) and 4958(f)(8).

If the purpose of this new rule is to regulate a conflict of interest in which a donor might benefit personally from a fee discount on the management of their personal assets, this provision is also not necessary because the Proposed Regulations already provide that a "deemed distribution" from a DAF includes "any use of donor advised fund assets that results in a more than incidental benefit . . . to a donor, donor-advisor, or related person" (Proposed Treas. Reg. §53.4966-1(e)(2)). If the payment of an investment fee to an investment advisor from a DAF results in a more than incidental benefit to the DAF donor, which could be the case if the DAF donor receives a discount on the management of the donor's personal assets, that fee would be a "deemed distribution." In addition, state law conflict-of-interest principles provide a roadmap for DAF sponsoring organizations to prohibit donors from benefiting from co-investment.

It is worth noting that co-investment by a charitable organization and its investment committee members has long been a matter of conflicts management in the nonprofit world, and it is much more consequential when an individual with fiduciary responsibility over the management of the charity's assets (i.e., as a board member with actual legal authority) is conflicted as a result of the individual's own personal relationship with the manager. Here, of course, the donor has no such status with respect to the charity, as the charity is controlled by its own independent governing board.

We respectfully request that Proposed Treas. Reg. §53.4966-1(h)(3) be struck in its entirety.

Conclusion

We are concerned that if the Proposed Regulations are adopted, they will make DAFs more expensive and unwieldy for community foundations to administer, thereby deterring donors from establishing DAFs at community foundations. This would have devastating consequences for the sector. We are also concerned that the Proposed Regulations will add substantial and vague new compliance obligations (which will add to our costs), create new and needless risks of non-compliance, and limit the ability of community foundations to work with donors in ways

that promote volunteerism, community engagement, and innovation. We urge Treasury to study our comments and those from the sector at large in a way that will support the good work that community foundations do, through their DAF programs and otherwise.

Finally, given the complexity and importance of the task at hand, we respectfully urge Treasury to consider not issuing final Regulations until it has first issued (and obtained further comment on) *revised* Proposed Regulations. The entire philanthropic sector would benefit from a process in which proposed rules can be thoroughly debated (and vetted against practical reality) before they become law.

We remain available to answer questions or provide input on the Proposed Regulations.

Sincerely,

Amy Freitag
President

Carrie Trowbridge
General Counsel & Secretary