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January 10, 2024
Submitted Electronically IRS and REG-142338-07

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

**RE: COMMENTS OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL ("ACTEC") ON PROPOSED REGULATIONS UNDER CODE SECTION 4966**

Treasury Notice 88 Fed. Reg. 77922 (November 14, 2023) requested comments on proposed regulations (the "Proposed Regulations") that would amend existing Treasury Regulations issued under section 4966 of the Code.[1] The Proposed Regulations relate to excise taxes on taxable distributions made by a sponsoring organization from a donor advised fund (DAF), and on the agreement of certain fund managers to the making of such distributions.[2] ACTEC appreciates the opportunity to comment on the Proposed Regulations, the text and structure of which reflect careful work on the part of the U.S. Department of the Treasury and the Internal Revenue Service (together, "Treasury").

ACTEC is a nonprofit association of lawyers and law professors. Its more than 2,400 members are called "Fellows" and practice throughout the United States, Canada, and other foreign countries, with extensive experience in the preparation of wills and trusts, estate planning, and administration of trusts and estates of decedents, minors, and incompetents. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar association activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of transfer tax and charitable planning. These

[1] Unless otherwise stated, references in these Comments to "section(s)" or to "Code" are to the Internal Revenue Code of 1986, as amended. References in these Comments to "§" are to relevant sections of the Treasury regulations promulgated under the Code.

[2] 88 Fed. Reg. 77922 (November 14, 2023), Taxes on Taxable Distributions from Donor Advised Funds under Section 4966.

comments were prepared by members of ACTEC's Charitable Planning and Exempt Organizations committee who, collectively, have extensive experience representing both donors and charities, including community foundations. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

ACTEC's comments regarding the Proposed Regulations are set forth in the attached memorandum. If you or your staff would like to discuss the contents of this memorandum with the ACTEC Fellows who created it, please contact Reynolds T. Cafferata, who chaired the working group that prepared this memorandum (213-892-7700, reynolds@rhcclaw.com), William I. Sanderson, Chair of ACTEC's Washington Affairs Committee (202-875-1743, wsanderson@mcguirewoods.com), or Deborah McKinnon, ACTEC Executive Director (202-684-8460, domckinnon@actec.org).

Respectfully submitted,

Kurt A. Sommer, President of ACTEC
ACTEC President 2023-2024

**Comments of the American College of Trust and Estate Counsel ("ACTEC") on Proposed Regulations under Code Section 4966**

Treasury Notice 88 Fed. Reg. 77922 (November 14, 2023) requested comments on proposed regulations (the "Proposed Regulations") that would amend existing Treasury Regulations issued under section 4966 of the Code.[1] The Proposed Regulations relate to excise taxes on taxable distributions made by a sponsoring organization from a donor advised fund (DAF), and on the agreement of certain fund managers to the making of such distributions.[2] ACTEC appreciates the opportunity to comment on the Proposed Regulations, the text and structure of which reflect careful work on the part of the U.S. Department of the Treasury and the Internal Revenue Service ("Service") (together, "Treasury").

## BACKGROUND

Many charitable organizations (including community foundations) sponsor "donor advised funds" or "DAFs" which are accounts established by the sponsoring organization to which donors may irrevocably contribute and thereafter provide nonbinding advice or recommendations to the sponsoring charitable organization regarding distributions from the account to further qualified charitable recipients and/or regarding the investment of assets in the account. Sections 1231-1235 of the Pension Protection Act of 2006, P.L. 109-280 (2006) ("PPA") enacted a number of amendments to the Code regarding DAFs, including section 1231(a) of the PPA which added section 4966 of the Code imposing excise taxes on taxable distributions made by sponsoring organizations from a DAF, and on the agreement of certain fund managers to the making of such distributions. The Proposed Regulations are intended to provide guidance to such sponsoring charitable organizations, donors, donor-advisors, related persons, and certain fund managers on certain actions and advice that will be characterized as taxable distributions subject to such excise taxes under section 4966.

## EXECUTIVE SUMMARY OF ACTEC'S RECOMMENDATIONS

ACTEC's comments address the following aspects of the Proposed Regulations and are briefly summarized below:

1. Overview: Donor advised funds further the general public policy embodied in the Code and existing regulations that donations to charitable organizations for charitable purposes should be encouraged. Consistent with general public policy encouraging charitable donations, to increase compliance, and for efficiency of administration of the tax laws, ACTEC suggests that Treasury consider ways to modify these Proposed Regulations in a manner analogous to and consistent with the large body of current regulations and legal guidance governing charitable giving that encourages philanthropy while protecting against abusive behavior and inappropriate benefits to donors.

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[2] 87 Fed. Reg. 55934 (September 13, 2022), Resolution of Federal Tax Controversies by the Independent Office of Appeals.

2. Proposed §53.4966-1(e)(1): Including "any… payment" and "any…disbursement" (emphasis added) from a DAF in the definition of "distribution" will lead to confusion and hamper the ability of DAFs to engage in active charitable work or hire third-party service providers in furtherance of the sponsoring organization's charitable mission. ACTEC recommends that the regulations clarify that payments for services provided to a DAF or to a sponsoring organization and allocable to a DAF are not "distributions" for purposes of section 4966 to the extent that the payments represent fair payment for services provided and also are not treated as a prohibited benefit under section 4967 or an excess benefit under section 4958.

3. Proposed §53.4966-1(g), §53.4966-3 (specifically §53.4966-3(b)), and §53.4966-4: ACTEC suggests that, consistent with apparent legislative intent, Treasury clarify that a fund will not be treated as "separately identified" with respect to a donor or donors merely because it maintains the sorts of records required by standard bookkeeping and accounting practices. Rather, for the fund to be treated as "separately identified," ACTEC believes that a sponsoring organization's internal records must manifest some ongoing significance to the fact that funds have derived from a particular donor or group of donors (e.g., that advice is sought or received from the donor or group). In addition, ACTEC suggests that the regulations provide bright-line tests for determining that a fund is not "separately identified," drawing from analogous tax law principles to exclude situations in which donors' individual contributions are so diffuse as to be insubstantial.

4. Proposed §53.4966-3(c): ACTEC suggests that engagement of professional investment advisors by the sponsoring organization of a DAF generally does not constitute the sort of "advisory privileges" contemplated in section 4966(d)(2)(A)(iii) of the Code. In the interest of ensuring that a few large financial institutions are not effectively favored over smaller community-related DAF sponsoring organizations, ACTEC submits in any event that the "personal investment advisor" exception be expanded to include situations in which a personal investment advisor is made available as an option to substantially all of a sponsoring organization's DAF funds (whether or not it actually provides services to any other funds).

5. Proposed §53.4966-3(c)(iii): The standards set forth in the Proposed Regulations used to determine when committee members will be treated as "donor advisors" are considerably more stringent than analogous tax law rules regarding "control." ACTEC suggests that a definition of "control" in this area should be similar to the definition applicable to supporting organizations. Conforming with this analogous definition of "control" will be more efficient, while addressing the policy concerns noted in the Preamble.

6. Proposed §53.4966-4: The Proposed Regulations contain a number of new and intricate rules relating to the exception of a "single identified organization" from the proposed regulatory definition of a donor advised fund. ACTEC suggests that more closely aligning the Proposed Regulations with analogous tax law rules governing supporting organizations could address Treasury's policy concerns while allowing more flexibility in the ways in which a single-entity fund can support its designated charity.

7. Proposed §53.4966-5: ACTEC is concerned that the "anti-abuse" rule in the Proposed

Regulations could have the unintended consequences of (1) imposing penalties on sponsoring organizations which neither knew nor had reason to know about the ultimate use of DAF funds by grantees, and (2) chilling the flow of DAF funds to general operating or other non-DAF funds at sponsoring organizations. ACTEC suggests conforming this anti-abuse rule to commonly understood tax law rules regarding "earmarking," while requiring, in certain circumstances, independent determinations by public charities.

8. Proposed §53.4966-6: Given commonly accepted practices by many DAF sponsors, any retroactive application of the Proposed Regulations could penalize organizations that don't modify the administration of their programs before they know what final rules will apply to the administration of their programs. Accordingly, ACTEC suggests that the Proposed Regulations should be prospective after the date the final regulations are published for at least one full taxable period for each DAF sponsor.

## DISCUSSION

### Overview

Long before the PPA was enacted, and since, donor advised funds have been an important charitable giving tool for many sponsoring charitable organizations, their donors, advisors, and recipients of DAF support, as well as the financial institutions, legal, accounting and investment community which assist DAF participants in creating and administering DAFs. These funds further the general public policy embodied in the Code and existing regulations that donations to charitable organizations for charitable purposes should be encouraged. Consistent with that general public policy encouraging charitable donations, these Proposed Regulations governing taxable distributions from DAFs should as much as possible build on, and be consistent with and analogous to, the large body of existing law governing charitable giving.

In many respects, the Proposed Regulations provide clear and understandable new definitional rules and examples meant to guide DAF participants in complying with these rules in a way that is consistent with both the statutory text of the PPA and commonly understood charitable giving rules and principles. At the same time, ACTEC is concerned that several of the proposed provisions appear to be inconsistent with such commonly understood rules and principles, and therefore may in fact hamper understanding by DAF participants as to what may constitute a DAF or a taxable distribution subject to excise tax, and therefore could undermine the efficient administration of the tax laws. The more these regulations can align with existing principles and rules regarding charitable giving, the easier it will be for donors, advisors, sponsoring organizations, and charities benefitting from DAFs to comply with the Proposed Regulations, and the simpler and more efficient it will be for the Service to administer and enforce them.

### Proposed §53.4966-1(e)(1): Distribution – In general.

Proposed §53.4966-1(e)(1) provides that "[t]he term *distribution* means any grant, payment, disbursement, or transfer, whether in cash or in kind, from a donor advised fund." This proposed regulation also states that investments and reasonable investment or grant-related fees are not considered distributions unless otherwise provided in paragraph (e)(2), but does not include any

exception for payments made for goods or services appropriate to carrying out the charitable purposes of the fund. DAFs are permitted to engage in direct charitable activities, which may involve payments to service providers that are not in the nature of investment-related payments. For example, a DAF may hire a vendor to produce educational materials for schools. Even where the vendor is a third party and payments constitute fair value for services performed, this broad definition of "distribution" arguably treats such payments as taxable distributions unless expenditure responsibility procedures are followed. In addition, if a donor gives a building to a DAF, and the DAF needs to sell the building, the payment of brokerage and real estate closing fees could be treated as taxable distributions under this broad definition, unless they are considered "investment services." Furthermore, many DAF sponsors hire attorneys, accountants, and other service providers to provide services with respect to their DAF programs and assess these costs against the DAFs. These payments also could be considered taxable distributions without further clarification.

Requiring expenditure responsibility for third-party service contracts to avoid treatment of payments as "distributions" would be inconsistent with the analogous rules regarding when expenditure responsibility is required in the private foundation context. For consistency with those rules, and for clarity for charities and for the Service in administering these rules, ACTEC recommends that Treasury revise this proposed regulation to clarify that a payment for services will not be treated as a "distribution" under section 4966 so long as that payment both represents fair value for the services performed and will not be treated as a prohibited benefit under section 4967 of the Code or an excess benefit under section 4958 of the Code.

**Proposed §53.4966-1(g) Donor advised fund generally; §53.4966-3 Definition of donor advised fund (specifically §53.4966-3(b) Separate identification by reference to contributions of a donor or donors); and §53.4966-4 Exceptions to the definition of donor advised fund**:

*Tracking of Contributions and Standard Accounting and Recordkeeping Practices*

One element of the definition of whether a fund is a "donor-advised fund" is whether that fund is "separately identified by reference to contributions of a donor or donors." Section 4966(d)(2)(a)(i). Prop. Reg. § 53.4966-3(b)(1) provides that a fund is "separately identified" if the sponsoring organization "maintains a formal record of contributions to the fund or account relating to a donor or donors" or, if there is no formal record, based on certain facts and circumstances. The Preamble to the Proposed Regulations notes that a formal record exists whenever the sponsoring organization "tracks" contributions of donors to the fund.

It is unclear from the Proposed Regulations whether mere maintenance of information traditionally required by auditing and accounting requirements constitutes such a "formal record of contributions" or whether something more is required. Proper accounting requires that every charity track every contribution to every fund. Donors to field of interest funds or other multi-donor funds receive acknowledgement letters with respect to their gifts to those funds, copies of which are generally maintained by charities. Auditors regularly review whether a charity is operating in a manner consistent with donor restrictions, which generally requires those charities to keep records of each donor to each fund in case the auditors need to review that information. Without further clarity, this broad "formal record of contributions" test would mean, in practice, that every fund of every charity that is maintaining accounting records consistent with standard practices is "separately identified" with respect to one or more donors for purposes of section 4966, because the information as to who contributed to what fund is available in its formal records.

ACTEC recommends that Treasury clarify that, for a fund to be "separately identified" with respect to a donor or donors, a sponsoring organization must maintain a formal record of contributions

beyond those consistent with standard bookkeeping and accounting practices. Because advisory privileges are the key element of a donor-advised fund, ACTEC recommends that a fund not be treated as "separately identified" (and therefore not a donor-advised fund) unless it maintains a formal record of contributions that is connected in some way to provision of donor privileges with respect to distributions or investments, perhaps by reference to some of the facts and circumstances outlined in Prop. Reg. § 53.4966-3(b)(2). This standard would be consistent with both the statutory language of section 4966 and common practices for charities that manage both DAF and non-DAF funds.

*Facts and Circumstances*

ACTEC notes that the circumstances described in Prop. Reg. § 53.4966-3(b)(2)(i) and (v) are unclear and may be overly inclusive. Prop. Reg. § 53.4966-3(b)(2)(i) includes, as a fact or circumstance relevant in determining that a fund is "separately identified" by reference to contributions of a donor or donor, whether "the fund or account balance reflects items such as contributions, dividends, interest, distributions, administrative expenses, and gains and losses (realized or unrealized)." Prop. Reg. § 53.4966-3(b)(2)(v) includes as a fact or circumstance whether "one or more donors or donor-advisors regularly receive a fund or account statement from the sponsoring organization."

With respect to certain field of interest or other funds, charities often provide impact and financial reports to the general public, as well as to committees and others in the community interested in the work of a particular fund (many of whom are likely to be contributors to the fund). This practice fosters transparency and community accountability and encourages charitable giving overall. These reports may include some or all of this information. Where such reports are made available to the general public, and are delivered to donors and others who are part of a broad public disclosure, the fact that donors or advisors have received such reports does not, itself, indicate any particular special treatment of those donors. Treating broad, public dissemination of such reports as a potential indicator that a fund is "separately identified" with respect to donors could discourage charities from providing such public disclosures. Accordingly, ACTEC suggests that Treasury clarify that financial statements provided to the public broadly (even if it includes such information), as opposed to financial statements provided only to, or specifically customized for, one or more donors, will not be treated as a fact or circumstance indicating that a fund is "separately identified" with respect to those donors.[1]

*Multiple-Donor Funds*

Multiple-donor funds may be DAFs if they meet the criteria of section 4966(d)(2). However, ACTEC is concerned that the Proposed Regulations and the breath of the related examples essentially treat all funds as "separately identified by reference to contributions of a donor or donors" regardless of the number of donors and the amounts donated by each. For example, Example 10 of Prop. Reg. § 53.4966-3(e) would treat as "separately identified" by reference to donors a memorial fund that receives many contributions from unrelated individuals if the charity maintains a formal record of each contribution. ACTEC is concerned that such a broad interpretation is inconsistent with the history and purposes of the PPA. The Joint Committee on Taxation's Report on the PPA[2] notes that the "separately identified" definitional prong is not met "unless the fund or account refers to contributions of a donor or donors, such as by naming the fund after a donor, or by treating a fund on the books of the sponsoring organization as attributable to funds contributed by a specific donor or donors." This discussion

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[1] Such a rule would be analogous to the rules regarding lobbying communications, whereby nonpartisan reports made available by private foundations to the general public (and not just to legislators) are generally not treated as direct lobbying communications. See Treas. Reg. § 53.4945-2(d)(1)(iv).

[2] See the Joint Committee on Taxation's Technical Explanation of H.R. 4, The "Pension Protection Act of 2006," As Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006, JCX-38-06, pp. 342-345.

suggests that more is required than mere maintenance of internal records consistent with standard accounting and bookkeeping practices – otherwise, all funds would be "separately identified." The Joint Committee clearly indicated that funds analogous to general operating funds are in most cases not intended to be treated as "separately identified."[3] The Joint Committee Report provides as an example a fund established by a sponsoring organization dedicated to the relief of poverty within a specific community, which fund attracts contributions from several donors but does not separately identify or refer to contributions of a donor or donors, and notes that such a fund is not a donor-advised fund even if a donor has advisory privileges with respect to the fund. This poverty relief fund is not a DAF not because the charity has been sloppy with, or is intentional deleting or obscuring, information about who has donated to the fund and in what amount, but rather because, after such contributions have been made, the fund has subsequently become "pooled anonymously." In other words, it is not the formal bookkeeping records that make the fund "separately identified," but rather whether those records of individual donors have any ongoing significance in terms of tracking whether a fund has any continuing relationship with any particular donors (such as attributing the entire fund to a donor, or tracking the ongoing percentage of a fund, including earnings, losses, distributions, etc., as attributable to a particular donor or group of donors).

ACTEC suggests Treasury clarify that for a multi-donor fund to be treated as "separately identified," there must be some manifestation in the documentation of the fund that indicates that the sponsoring organization is applying ongoing significance to the fact that a specific donor or group of donors is connected with the fund, beyond maintenance of standard accounting and recordkeeping practices.[4]

As a "bright-line" rule, and consistent with analogous rules regarding substantiality and regarding donor influence on public charities, ACTEC further suggests that a fund not be treated as "separately identified" with respect to a donor or donors if either (1) that fund would satisfy the public support test if it were an independent charity, or (2) no individual donor has contributed a significant amount (perhaps more than 5 percent[5]) of the aggregate initial contributions to the fund. Such "bright-line" thresholds would be consistent with analogous tax law and with the purpose of the Pension Protection Act, in that an individual donor's influence with respect to their donated funds would in those circumstances be so diffused as to be insubstantial. A fund that meets the public support test of 170(b)(1)(A)(vi) should not be treated less favorably than a separate organization would be.

**Proposed §53.4966-3(c): Advisory Privileges:**

As discussed in the Preamble to the Proposed Regulations, it is appropriate and consistent

[3] Id. at p. 342 ("Although a sponsoring organization's general fund is a "fund or account," such fund will not, as a general matter, be treated as a donor advised fund because the general funds of an organization typically are not separately identified by reference to contributions of a specific donor or donors; rather contributions are pooled anonymously within the general fund.")

[4] For this reason, ACTEC is concerned that Example 7 of Prop. Reg. § 53.4966-3(e) is inconsistent with Congressional intent as reflected in the Joint Committee Report. Example 7 involves a fund for relief of poverty to which over 100 citizens of the local city have contributed. Because the charity "maintains a formal record of donors" and amounts contributed, Example 7 would treat this fund as "separately identified" with respect to those donors. However, because all charities must (as discussed above) maintain a formal record of all donors, this example would essentially render all funds "separately identified," contrary to the Joint Committee Report's discussion.

[5] A 5 percent threshold would be consistent with the analogous tax law concept that a transfer subject to a condition or power that might prevent the charity from freely and effectively using the donated property is not eligible for an income tax, gift tax, or estate tax deduction unless the possibility that a charity may be divested of the property is "so remote as to be negligible." Treas. Reg. § 1.170A-1(e); Rev. Rul. 70-452 (defining "so remote as to be negligible" as "greater than 5 percent" in the context of the "probability of exhaustion test" for charitable remainder annuity trusts).

with the intent of the PPA to seek to limit any potential systemic conflict between investment advisors who may be incentivized to keep funds under management versus the public policy goal of facilitating greater charitable distributions from DAFs. However, ACTEC is concerned that the Proposed Regulations regarding donor-advisors, in particular those addressing Personal Investment Advisors, may favor larger DAF sponsors and may disadvantage smaller charitable organizations. ACTEC is further concerned that the Proposed Regulations will raise compliance costs and thereby reducing overall funds available to meet charitable needs.

Personal Investment Advisor (PIA)

Prop. Reg. § 53.4966-1(h)(3) addresses the ability of a donor or donor-advisor to designate or recommend an investment advisor with respect to a DAF. Specifically, this proposed regulation provides that an investment advisor who invests both personal assets of a donor to the DAF and assets of the DAF will be treated as a deemed donor-advisor while serving in that dual capacity, regardless of whether the donor played any role in recommending the advisor, unless the investment advisor provides services to the sponsoring organization as a whole (rather than to the DAF). If the investment advisor is treated as a donor-advisor under these rules, then under section 4958(c)(2) of the Code, any compensation paid to the investment advisor is deemed to be a *per se* excess benefit (regardless of whether the compensation is fair) subject to excise tax.

ACTEC suggests a recommendation to hire a professional investment manager is distinct from the sorts of designations of "advisory privileges" intended by section 4966(d)(2)(A)(iii) of the Code, except where the investment manager is an individual or is a 35-percent controlled entity as defined in section 4958(f)(3) of the Code.

The Preamble to the Proposed Regulations expresses concern regarding potential conflicts of interest, incentives of investment advisors to keep assets under management rather than making distributions, and possible fee arrangements benefiting donors personally. ACTEC fellows participating in preparation of these comments are not aware of commonplace situations among DAFs, including both DAFs affiliated with large, national financial institutions and those sponsored by local community foundations, that would support such concerns. Such a restriction would not in fact address these policy concerns, but could have the unintended consequence of shifting contributions from DAFs to private foundations. The proposed limits for DAFs do not affect private foundations[6] which would create an incentive for charitable giving to be done through private foundations that lack independent boards rather than DAFs whose sponsors generally are governed by independent boards.

ACTEC also is concerned that a restrictive interpretation of when a professional investment advisor is treated as a "donor-advisor" may favor large financial institutions affiliated with DAF sponsors, who under these Proposed Regulations would now be more inclined to force all DAFs to remain invested with their affiliated financial institutions, rather than allowing donors to participate in the decision regarding which investment advisor the DAF sponsor will engage with respect to a particular fund.

[6] Donors to a private foundation are permitted to engage their personal investment advisors to invest private foundation assets, so long as they avoid personal fee reductions or other benefits that might violate the self-dealing rules of section 4941.

Positive benefits can arise from dual investment advisory/investment management arrangements, and more flexible Proposed Regulations could address the concerns that were identified in the preamble while allowing for more customized options for investment of DAF funds.

- Community foundations and other sponsoring organizations serve donors with a very wide range of charitable priorities and beliefs. Not only do donors design their grant recommendations in line with their priorities, but many also insist that their investments be aligned with their priorities and beliefs. With help from their trusted investment advisors, they recommend investments in companies that advance their causes (similar to "mission-related investments" discussed in IRS Notice 2015-62) and recommend against investments in industries that violate their personal or religious beliefs (e.g., tobacco, liquor, carbon-polluting industries, companies aligned with certain political orientations, etc.).

- It would be unmanageable for a community foundation or other sponsoring organization to tailor investments in each DAF to each donor's personal criteria. Instead, the most efficient way to align philanthropic and investment objectives in this manner is to permit the investment company that manages the personal assets of the donor to manage or advise with respect to the assets in the DAF. Any such arrangement would of course remain subject to the prohibited benefit rules of section 4967, which would preclude reduced fees on a donor's personal assets or other financial benefits to the donor related to the advisor's service to the sponsoring organization .

**Proposed §53.4966-3(c)(iii): Donor, Donor-Advisor, or Related Person Appointed to an Advisory Committee; Examples Relating to Multiple Donor Funds or Accounts.**

The Proposed Regulations provide that appointment of a donor, donor-advisor, or related person to an advisory committee will not be treated as resulting in advisory privileges (thereby rendering the fund a DAF if the fund is also "separately identified" with respect to one or more donors) where (1) committee members are appointed based on objective criteria related to the experience of the appointee in the field of interest or purpose of the fund, (2) no more than one-third of the committee members are related persons with respect to any member of the committee, and (3) no committee member so appointed is a significant contributor to the fund. These (and similar) exceptions for treatment of committee members as "donor-advisors" are established under the authority granted to the Secretary of the Treasury under section 4966(d)(2)(C) of the Code to exempt a fund from DAF treatment "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."

In the interest of consistent application of tax law, ACTEC suggests the Proposed Regulations define "control" for this purpose in a manner consistent with existing tax principles, rather than creating new standards that may be difficult to implement. Further, ACTEC is concerned that the proposed rule would reduce charitable giving by preventing committee members from making significant contributions to funds with respect to committees on which they serve. An alternative approach could be the rules for supporting organizations that define control as effective ability to either force or veto a

material decision.[7] The existing statutory exception for scholarship funds in section 4966(d)(2)(B)(ii) is consistent with this widely understood meaning of "control," and, for ease of administration, could be expanded more broadly to committee service generally, not just in the context of scholarship funds or disaster relief funds.

With respect to Example 7 of Prop. Reg. § 53.4966-3(e), ACTEC notes that this example involves a situation in which no committee member is related to any other, and in which no committee member may serve more than two three-year terms. ACTEC suggesting revising this example (or adding an example) to hew more closely to the Proposed Regulations; this example involves criteria that are considerably beyond what even the Proposed Regulations seem to require to exclude committee members as "donor-advisors."

**Proposed §53.4966-4: Single Identified Organization Exception to the Definition of Donor Advised Fund**

Section 4966(d)(2)(B)(i) provides that a fund that makes distributions only to a single identified organization or governmental entity is not a "donor-advised fund." However, the Proposed Regulations do not address the situation in which the "single identified organization" is the sponsoring organization itself (as opposed to a separate grantee organization). For example, many universities establish donor-advised funds, some of which may only be used to support that university, and not to make grants to other charities. ACTEC requests clarification that a fund that may support only the sponsoring organization will not be treated as a donor-advised fund subject to these rules.

In addition, ACTEC requests clarification that a fund may be treated as supporting only a "single identified organization" where that fund makes direct expenditures for benefit of the supported organization, rather than or in addition to making distributions to the supported organization. A common reason for forming a single entity fund is to allow the supported entity to benefit from an expenditure without having the expenditure reflected on the finances and subject to the purchasing processes of the identified charity. This concept is recognized in the supporting organization regulations with respect to governmental entities. Similar concerns apply with respect to many charities where there are good reasons for not having a particular expense reflected on the books of the supported charity. A single entity fund is analogous to a supporting organization under section 509(a)(3) of the Code and should reflect the same flexibility as a such supporting organizations have to make direct expenditures for the benefit of the identified charity without being subject to DAF treatment. Without clarity in this regard, donors and supported organizations may be more likely to set up separate supporting organizations, increasing costs and IRS administrative burdens. To ensure that the identified charity is attentive to the single entity fund, the sponsoring organization could be required to provide notification to the identified charity so the identified charity would be aware of the fund and thus have a significant voice in how the fund is managed.

Furthermore, ACTEC suggests that a unified conglomeration of 501(c)(3) entities, such as a hospital group or group of entities connected with a higher education institution, should be treated as a "single identified organization" for this purpose where they are subject to common control. It is a common structure in the health care area for several independently incorporated hospitals to be managed under the umbrella of a parent 501(c)(3) organization. Such a hospital or educational system

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[7] See for example Treas. Reg. Section 1.509(a)-4(j)(1).

should have the flexibility to request that distributions be made to one commonly controlled entity or another within the group without subjecting the fund to DAF treatment.

**Proposed §53.4966-5: Taxable Distributions**

ACTEC requests that Treasury clarify the application of the "anti-abuse" rule of Prop. Reg. § 53.4966-5. Under that proposed rule, a series of otherwise separate distributions would be treated as a single distribution subject to section 4966 if either the donor or the sponsoring organization "arranges" for the ultimate use of the funds. With respect to grants from a DAF to a public charity, this rule would appear to subject a sponsoring organization to an excise tax under section 4966 where a donor "arranges" with the recipient charity for use of the funds that would, if made from the DAF directly, constitute a taxable expenditure under section 4966, even where the sponsoring organization does not know or have reason to know of such separate "arrangement." Similarly, this rule would appear to prohibit grants from DAFs to non-DAF funds at sponsoring organizations, or even as general operating support, where the sponsoring organization subsequently uses those funds in a way that the DAF could not, as the sponsoring organization is always "arranging" for use of its own funds.

ACTEC understands the concern about pre-arranged plans to circumvent the DAF rules. However, this anti-abuse rule goes considerably further than analogous rules in other areas of tax law. For example, contributions by way of fiscal sponsors, "Friends of" organizations, or other intermediaries are commonly collapsed where funds are "earmarked" for the ultimate recipients, but are generally not collapsed where the intermediary charity makes an independent determination as to the ultimate disposition of the funds.[8] ACTEC suggests incorporation of these well-known and commonly understood tax principles, rather than the creation of a new rule, would aid in compliance and reduce administrative burdens. Otherwise, sponsoring organizations will be penalized for activities outside their knowledge or control. In addition, the existing Proposed Regulations could discourage the flow of assets from DAFs to non-DAF funds at community foundations and other DAF sponsors, and would require sponsoring organizations to ensure that funds transferred from DAFs to general operating funds or to non-DAF funds continue to be subject to DAF limitations so long as they are under the control of the sponsoring organization, regardless of whether the donor continues to have advisory privileges with respect to those transferred funds. This resulting requirement to maintain ongoing tracking of funds contributed from DAFs to general operating or non-DAF funds could make compliance particularly difficult for smaller sponsoring organizations, such as many community foundations.

**Proposed §53.4966-6: Effective Date**

ACTEC suggests the effective date of the Proposed Regulations should be prospective from some reasonable time after the date on which the final regulations are published. The effective date of the tax year in which the final regulations are adopted forces community foundations to terminate any activity immediately that might potentially be prohibited under the proposed regulations before the final requirements are known. This would include the currently widespread arrangements involving investment advisors, as well as many fiscal sponsorship arrangements that would be impacted by the proposed rules. ACTEC is concerned the compliance burden may fall more heavily on independent community foundations as compared to DAFs sponsored by major financial institutions which have far

[8] See, for example, Treas. Reg. § 53.4941(d)-1(b)(2), providing that "indirect self-dealing" in the context of section 4941 of the Code does not include transactions that do not involve "earmarking" of individual recipients, but where instead selection of individuals is made by the public charity "completely independently" of the private foundation.

more resources to comply with the Proposed Regulations, and to whether any penalties that would be imposed based on retroactive application of the final regulations.

ACTEC suggests all sponsoring charitable organizations, regardless of size, are afforded at least one full tax year after the Proposed regulations become final to adjust their practices to comply with any new rules.

ACTEC further requests that Treasury, as it has done in certain past situations, clarify that donors, donor-advisors and sponsoring organizations will not be penalized for acting pursuant to a good-faith, reasonable interpretation of the statutory rules prior to the effective date of any final regulations.[9]

[9] See for example IRS Notice 2019-9, regarding the section 4960 tax on excess executive compensation, and Prop. Reg. § 1.413-2, in each case providing that taxpayers may, until final regulations are published, rely on a good faith, reasonable interpretation of the statutory provisions, which may (but need not necessarily) involve compliance with proposed regulations.