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GULF COAST COMMUNITY FOUNDATION

March 5, 2018

By e-mail (notice.comments@irscounsel.treas.gov)

Internal Revenue Service
CC:PA:LPD:PR (Notice 2017-73)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2017-73

Ladies and Gentlemen:

On December 4, 2017, the Internal Revenue Service ("IRS") released Notice 2017-73, 2017-51 I.R.B. 562, Request for Comments on Application of Excise Taxes with Respect to Donor Advised Funds in Certain Situations (the "Notice"). The Notice described guidance the IRS and the Treasury Department are considering with respect to donor advised funds. Donor advised funds are collectively referred to herein as "DAFs" and a donor advised fund is individually referred to herein as a "DAF."

Among other things, the Notice states the IRS and the Treasury Department are considering proposed regulations under section 4967 of the Internal Revenue Code of 1986, as amended ("Code"). If finalized, such proposed regulations would provide that certain distributions from a DAF that pay for the purchase of tickets that enable a donor, donor advisor, or related person under Code section 4958(f)(7) to attend or participate in a charity-sponsored event would result in a "more than incidental benefit" to such person under Code section 4967. Under Code section 4967(a)(1), this would result in the imposition of a penalty tax on such person equal to 125 percent (125%) of such benefit.

In the Notice, the IRS and the Treasury Department requested comments regarding the issues addressed in the Notice and suggestions for future guidance with respect to DAFs. Gulf Coast Community Foundation ("Foundation") provides the following comments in response to such request.

The Foundation is a community foundation located in Sarasota County, Florida. The Foundation is tax-exempt under Code section 501(a) as an organization described in Code section 501(c)(3) and is classified as a public charity described in Code section 170(b)(1)(A)(vi).

The Foundation is dedicated to serving the needs of the Sarasota County region. In furtherance of such purpose, among its other activities, the Foundation is the "philanthropic home" of more than 790 families, individuals, organizations, and businesses that have established various charitable funds to support a myriad of public charities and programs and services conducted by such public charities and other entities. The charitable funds of the Foundation include DAFs. In addition, the Foundation furthers its purpose of serving the needs of the Sarasota County region by educating donors, donor advisors, and their professional advisors regarding various philanthropic issues, including DAFs and how DAFs can be used to support various charitable causes.

DAFs are critically important to furthering the purposes of the Foundation and philanthropy in the Sarasota County region. As of the end of our previous fiscal year, June 30, 2017, the Foundation itself held more than $71.3 in DAF assets and distributed more than $25.8 million from DAFs in support of numerous public charities and the programs and services conducted by them.

In addition to the foregoing, the Foundation wishes to underscore for the IRS and the Treasury Department that charity-sponsored events are a common and critical fundraising method in the Sarasota County region and elsewhere. As noted above, if finalized, the proposed regulations would provide that distributions from a DAF that pay for the purchase of tickets that enable a donor, donor advisor, or related person under Code section 4958(f)(7) to attend or participate in a charity-sponsored event would result in a "more than incidental benefit" to such person under Code section 4967 and subject such person to a penalty tax. If finalized, the proposed regulations would significantly affect how philanthropy is conducted in the Sarasota County region and elsewhere and irreparably harm numerous public charities that seek to further their fundraising efforts through receiving DAF distributions in connection with charity-sponsored events.

Section 3 of the Notice summarizes the current position of the Treasury Department and the IRS concerning a distribution from a DAF that enables a donor, donor advisor, or related party (hereafter, a "Fund Advisor") to attend or participate in an event and whether such distribution results in the Fund Advisor receiving a "more than incidental benefit" under Code section 4967. According to the Notice, the Treasury Department and the IRS currently agree that the relief of a Fund Advisor's obligation to pay the full price of a ticket to a charity-sponsored event can be considered a direct benefit to the Fund Advisor that is "more than incidental" for purposes of Code section 4967.

The situation summarized in the preceding paragraph is commonly called "bifurcation." Bifurcation refers to a situation where an amount contributed in connection with a charitable fundraising event is split between the amount of the charitable contribution and the amount of

the contribution that results in something of value (such as a dinner or admission ticket) being provided to the donor.

Charitable organizations like the Foundation have been seeking guidance on bifurcation with respect to DAF distributions since the enactment of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) ("PPA"), more than a decade ago. The Foundation encourages the Treasury Department and the IRS to provide appropriate guidance on bifurcation that is consistent with the legislative intent of the PPA because the interpretation of several terms contained in the PPA has caused confusion. As a result, donors and charities have been taking inconsistent positions with respect to bifurcation and an appropriate administrative resolution of the issue will provide consistency and understanding in the charitable community.

The Foundation notes the Notice does not provide any technical references or citations for the conclusion that the "relief of a Donor/Advisor's obligation to pay the full price of a ticket to a charity-sponsored event can be considered a direct benefit to the Donor/Advisor that is more than incidental." The language appears to track the conclusions reached by the IRS in Rev. Rul. 77-160, 1977-1 C.B. 351, and Private Letter Ruling 9021066 (March 1, 1990). Both Rev. Rul. 77-160 and Private Letter Ruling 9021066 discuss instances where payment by a private foundation constituted an act of self-dealing under Code section 4941 with respect to a payment involving a "disqualified person." Rev. Rul. 77-160 concluded the payment of church membership dues "relieved [the disqualified person] of the obligation...to make such payment," thereby conferring "a benefit that is not incidental or tenuous, but is direct and economic in nature." Private Letter Ruling 9021066 discussed a payment representing the charitable contribution portions of a fund-raising event made by private foundation on behalf of a disqualified person under Code section 4941. Private Letter Ruling 9021066 concluded such payment would result in a "direct economic benefit to [the disqualified person] since it would relive [the disqualified person] of the obligation to pay these portions of the fund-raising events" and such benefit was determined not to be incidental or tenuous.

In considering the foregoing in connection with Section 3 of the Notice, it is important to note that both Rev. Rul. 77-160 and Private Letter Ruling 9021066 interpret "incidental or tenuous benefit" from the use by a *private foundation* of its income or assets in connection with acts of self-dealing as defined in Treasury Regulations section 53.4941(d)-2(f)(2). As set out more fully below, the Foundation maintains that, unless supported by statute or applicable legislative history, the private foundation rules should not be arbitrarily incorporated into DAF administration, including with respect to bifurcation and its application to Code section 4967.

The Foundation construes the Notice to reflect concerns that the Treasury Department and the IRS have when a Fund Advisor recommends a distribution from a DAF that involves bifurcation. The Foundation agrees that a definitive conclusion as to the tax treatment with respect to bifurcation will provide clarity to charities that sponsor fundraising events, Fund Advisors who

wish to contribute to such events, charities like the Foundation serving as sponsoring organizations that maintain and control DAFs, and the IRS, which is tasked with enforcing the law.

The Foundation, however, notes language at page 7 of the Notice that is concerning. Specifically, the Notice states:

> The Treasury Department and the IRS do not currently agree that, for purposes of § 4967, a distribution made by a sponsoring organization from a DAF to a charity upon advice of a Donor/Advisor should be analyzed the same as a hypothetical, direct contribution by the Donor/Advisor to the charity.

As a sponsoring organization for many DAFs, the Foundation is concerned the Treasury and IRS appear to be considering the adoption of a uniform definition of "more than incidental benefit" for purposes of Code section 4967 that is either (i) based on the premise that a DAF should be treated the same as a private foundation in all cases or (ii) that abandons a Code section 170 standard for considering Code section 4967 that is supported by the legislative history of the PPA.

The legislative history to the PPA is instructive in considering how Code section 4967 should be interpreted. Such legislative history contains an unambiguous reference that the term "more than incidental benefit" should be defined by reference to the rules governing charitable contribution deductions under Code section 170. Indeed, the Technical Explanation of the PPA provides that:

> [I]n general...there is a more than incidental benefit if, as a result of a distribution from a donor advised fund, a donor, donor advisor, or related person with respect to such fund receives a benefit that would have reduced (or eliminated) a charitable contribution deduction if the benefit was received as part of the contribution to the sponsoring organization.

*See* Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," (JCX-38-06), August 3, 2006 (hereafter, the "JCT Explanation"), at p. 350.

The concept that the amount of a charitable contribution claimed under Code section 170 must be reduced or eliminated if the donor receives a benefit in exchange for a contribution is well established in the law and readily understood by donors and charities. For example, in *U.S. v. American Bar Endowment*, 58 AFTR 2d 86-5190, 477 U.S. 105, 106 S. Ct. 2426 (1986), the Supreme Court noted that:

> [A] taxpayer may sometimes receive only a nominal benefit in return for his contribution. Where the size of the payment is clearly out of proportion to the benefit received, it would not serve the purposes of §170 to deny a deduction altogether. A taxpayer may therefore claim a deduction for the difference

> between a payment to a charitable organization and the market value of the benefit received in return, on the theory that the payment has the "dual character" of a purchase and a contribution.

*Id*. at 58 AFTR 2d 86-5195.

The IRS has issued numerous rulings applying Code section 170 to situations involving fundraising activities intended to solicit payments intended to be in part a gift, and, in part, the purchase of admission to or other participation in an event. For example, in Rev. Rul. 67-246, 1967-2 C.B. 104, the IRS concluded the price of a ticket to a charity ball was deductible under Code section 170 to extent it exceeds the fair market value of admission. Similarly, in Rev. Rul. 68-432, 1968-2 C.B. 104, the IRS noted the possibility that payment to a charitable organization may have a "dual character."

At the crux of the Notice with respect to Code section 4967 is the question of whether Code section 170 should be the standard for determining where there is "more than incidental benefit" for purposes of such section or whether Code section 4941 and its "self-dealing standard" should apply. The Foundation notes that while Rev. Rul. 77-160 and its progeny provide that payments by a private foundation of a disqualified person's obligations in order to maintain or receive benefits or relieve a disqualified person of a legal obligation is an act of self-dealing under Code section 4941, it is equally clear the disqualified person would be entitled to a charitable contribution under Code section 170, if such disqualified person had made the contribution directly to the charity involved. Moreover, the Foundation suggests the legislative history of Code section 4947 permits a sponsoring organization of a DAF to make the same type of distribution *provided the governing body* of the sponsoring organization authorizes such a distribution. This conclusion is consistent with the concerns underlying many of the provisions of the PPA that donors not be allowed to maintain control over assets contributed to DAFs or be able to use such assets for personal gain and that such control be fully vested in DAF sponsoring organizations like the Foundation.

The Foundation further notes that in enacting the PPA, Congress was fully capable of incorporating private foundation rules to DAFs. Indeed, Congress did so when it determined DAFs should, in some circumstances, be treated in a manner similar to private foundations and therefore subjected DAFs to the same or similar restrictive rules as apply to private foundations. A review of the JCT Explanation notes instances where specific reference is made to the private foundation rules applying to DAFs. For example, the JCT Explanation notes that the excess business holding rules of Code section 4943 apply to DAFs. Further, in the discussion of "taxable distributions" by DAFs, reference is made in the JCT Explanation to the expenditure responsibility rules that apply by Treasury Regulation to private foundation grants. Finally, the JCT Explanation notes specifically that a manager of a sponsoring organization should be "defined in a manner similar to the term 'foundation manager' under section 4945." Therefore,

if Congress wished to incorporate private foundation rules to define the term "more than incidental benefit" for purposes of Code section 4967, it could have done so as it did with the term "manager of the sponsoring organization." Importantly for purposes of the Notice, it did not do so and neither the Treasury Department nor the IRS should incorporate private foundation rules into Code section 4967 without authority to do so.

In summary, the Foundation believes tax policy and the legislative history of Code section 4967 clearly indicate that the issue of bifurcation with respect to DAFs should not be addressed through arbitrary application of the private foundation rules. To the contrary, guidance from the Treasury Department and the IRS with respect to Code section 4967 should reaffirm that the Code section 170 standard applies in determining whether a Fund Advisor has received a "more than incidental benefit" when there is bifurcation.

As noted more fully above, guidance to the contrary would significantly affect how philanthropy is conducted in the Sarasota County region and elsewhere and irreparably harm numerous public charities that seek to further their fundraising efforts through receiving DAF distributions that include bifurcation situations.

If you have any questions regarding these comments, please direct them to Wendy Deming at 941.486.4611 or via email to wdeming@gulfcoastcf.org.

Very truly yours,

Dr. Mark S. Pritchett
President | CEO