Council on Foundations

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# Proposed Donor Advised Fund Regulations

In November 2023, the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) released proposed regulations on donor advised funds (DAFs). The proposal defines or clarifies key terms including donor and donor-advisor. The most concerning provisions relate to the definition of a DAF, treating a personal investment advisor as a donor-advisor, and the proposed applicability date. The Council on Foundations submitted public comments cosigned by more than 140 foundations.The Council on Foundations submitted public comments cosigned by more than 140 foundations.

## Summary of the Proposed Rule

In the Pension Protection Act of 2006, a DAF is defined as a fund or account that is:

1. Separately identified by reference to contributions of a donor or donors;
2. Owned and controlled by a sponsoring organization; and
3. At least one donor or donor-advisor has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund or account by reason of the donor's status as a donor.

The proposed regulations clarify that a fund is considered separately identified if the sponsoring organization maintains a formal record of contributions by donor(s). If a formal record is not maintained, facts and circumstances may establish the fund is a DAF. These can include:

- At least one donor receives an account or fund statement.
- Account balance reflects contributions, dividends, distributions, expenses, gains, and losses.
- A fund is named after a donor or related person.
- The sponsoring organization generally solicits advice before making a distribution.

They also included several exceptions to the definition of a DAF. These exceptions include funds that only make distributions to a single governmental entity or public charity (except disqualified supporting organizations); multi-donor funds or accounts if no donor or donor-advisor has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of funds in the account; and certain scholarship and disaster relief funds.

The rules' effect date of taxable years ending after the date of the final rule would create an unreasonably short transition period and could result in a retroactive effect.

### Definition of a Donor-Advisor

A donor-advisor is defined as a person who establishes the fund or account and advises as to distributions or investments, or a person appointed or designated by the donor to have advisory privileges.

Among those who could be classified as donor-advisors are investment advisors who manage the investment or provide investment advice on both the assets maintained in a DAF as well as the personal assets of a donor. As a result, personal investment advisors could not receive compensation from the DAF. The proposed regulation allows an exception to this provision for an investment advisor who is providing services to the sponsoring organization as a whole.

## Council on Foundations Public Comments

In our comments to Treasury and the IRS, we highlighted the philanthropic sector's use of DAFs to serve communities across the U.S.—and the potential negative impact of some provisions in the draft rules.

**Importance of DAFs as a giving tool**
DAFs are an essential giving tool, explicitly supported by Congress, that democratizes giving by enabling donors of all financial means to expand their giving capacity over time.

**Separate Identification by Reference to Contributions of a Donor or Donors:**
The criteria for Separate Identification could greatly expand the types of funds considered a DAF, such as field of interest funds, collaborative funds, giving circles, and fiscal sponsorships.

- We encouraged Treasury and the IRS to provide a narrower criterion for separately identified to allow for additional exceptions to funds considered DAFs that include these funds. In these cases, no specific donor is tied to the account, no donor recommends the investment of the funds, and no donor or donor-advisor has control over the recommendations of distributions.

**Personal investment advisor provisions**:
The treatment of a personal investment advisor as donor-advisor could create uncertainty and significant administrative burdens for sponsoring organizations.

- We urged Treasury and the IRS to remove this provision or at least work with the sector to identify the scope of the issue and develop reasonable safeguards that prevent conflicts or abuse while maintaining flexibility for sponsoring organizations.

**Proposed applicability date:**
The proposed applicability date would create an unreasonably short timeline for sponsoring organizations to adjust and could make the new rules retroactive, causing additional disruption.

- We proposed the final rules come into effect two tax years after the tax year of publication in the Federal Register.