

recent developments
affecting charitable gift planning

prepared for CCPG bimonthly meeting 11/12/24

Russell A. Willis III, J.D., LL.M.
<http://www.plannedgiftdesign.com>



agenda

a brief history

- the 2006 legislation
- Notice 2006-109
- Notice 2017-73
- the four pending regulatory projects

the proposed regs under section 4966

- a DAF by any other name
- whether the investment advisor?
- "knowing" participation by fund manager

what comes next



the eight hundred pound gorilla



the 2006 legislation

"to improve accountability" of DAFs

- reporting requirement
- excise taxes

definition, sec. 4966(d) (2)

- DAF is "fund or account"
 - owned and controlled by sponsoring org
 - 170(c) org other than private foundation
- separately identified by reference to contributions of donor(s), over which
- donor or designee has "or reasonably expects to have" advisory privileges re
 - distributions or
 - investments



proposed regs under section 4966

REG-142338-07, FR Doc. 2023-24982, filed 11/13/23
published 11/14/23 at 88 FR 77922

comment period extended to 02/15/24
183 substantive comments submitted

public hearing 05/06/24 live, 34 witnesses
second day telephonic, 8 witnesses
transcript posted to TaxNotes, doc 2024-13585

incl testimony from Andrea Sáenz,
Chicago Community Foundation



does not include fund or account

- that distributes only to single identified org or govt entity or
- w/r/t which donor advises only as to grants for travel, study, etc. if
 - as member of committee appointed by sponsor,
 - no combination of donors, advisors, or related persons "directly or indirectly" controls the committee, and
 - grants awarded on objective, nondiscriminatory basis under procedure approved in advance by sponsor's board
- Treasury may create further, similar exceptions
 - see Notice 2006-109, below



section 4966

taxable distributions

- to individual
- for nonexempt purpose
- to other entity unless expenditure responsibility exercised
- cross ref section 4945(h)

exceptions

- 170(b)(1)(A) public charity other than
 - nonfunctionally integrated Type 3 supporting org
 - Type 1 or Type 2 or functionally integrated Type 3 "directly or indirectly" controlled by donor or advisor or related persons
 - other "inappropriate" org as per Treasury regs
- the fund sponsor itself
- another DAF



section 4958

excess benefit transactions

- new provisions re DAFs
- sub (c), any transaction w/ disqualified person is *per se* an excess benefit
- "grant, loan, compensation, similar payment"
- ref (f)(7), advisor, family, controlled entity
- ref (f)(8), nonemployee investment advisor

the excise tax

- 25 pct on disqualified person
- joint and several
- ten pct on org manager who "knowingly" participates
- joint and several
- subject to 10k cap



section 4967

prohibited benefits

- distribution resulting in "more than incidental benefit" to disqualified person
- cross ref section 4958(f)(7)
- holder of advisory privileges
- "member of family"
 - incl ancestors, spouse, third generation descendants and their spouses,
 - and also siblings and their spouses
- 35 pct controlled entity

but no tax if instead imposed under section 4958, excess benefit

- hold that thought



other provisions

section 4943, excess business holdings

- amended to include DAFs

section 170(f), disallowance of deduction

- amended to require
- fund sponsor not be nonfunctionally integrated Type 3 supporting org
- CWA expressly state fund sponsor has "exclusive legal control" over contributed assets

section 6033, reporting requirement

- amended to require fund sponsor to report
- total number of DAFs
- aggregate value
- aggregate contributions, distributions



the excise taxes

under section 4966, taxable distribution

- 20 pct on fund sponsor
- five pct on fund manager who "knowingly" approves
- joint and several
- subject to 10k cap

under section 4967, prohibited benefit

- 125 pct on advisor, recipient
- joint and several
- ten pct on fund manager who "knowingly" approves
- joint and several
- no cap

no mechanism for correction

- compare private foundation excise taxes



Notice 2006-109

re section 4966, distributions to supporting org

- safe harbor for determining Type 1 or 2 status
- written reps of grantee re control
- review governing docs
- ditto functionally integrated Type 3 status
- also written reps of supported orgs re functional integration, "but for" test, etc.
- alternative in either case
- "reasoned" written opinion of counsel of either grantor or grantee



Notice 2006-109 cont'd

whether disqualified person controls supported org

- existing reg section 53.4942(a)-3(a)(3) applies
- if disqualified persons may, by aggregating votes or positions of authority, require supported org to make or prevent it from making expenditure
- regardless of method by which control is exercised or exercisable

funds or accounts excepted from definition

- employer-sponsored disaster relief assistance funds

transitional rule for educational grant funds

- commitments made on or before August 17, 2006



four pending reg projects

since 2006 enactment,

- priority guidance plan has included generic entry for single reg project
- "regarding excise taxes on donor advised funds and fund management"

fiscal 2022-23 plan finally broke it out into four separate projects

- regs under section 4966
- regs under section 4967
- regs under section 4958
- "guidance" regarding public support computation w/r/t distributions from DAFs



Notice 2017-73

re section 4967 "more than incidental benefit"

- distribution from DAF enabling disqualified person to participate in charity event
- IRS says payment of even the otherwise deductible amount is improper
- distribution from DAF in satisfaction of pledge
- noting difficulty in determining whether pledge is legally enforceable, IRS says okay if
 - fund sponsor does not mention pledge
 - no disqualified person receives any other prohibited benefit, and
 - no one claims another or further income tax deduction, even if mistaken acknowledgment



proposed regs under 4966

definition of DAF

- "separately identified"
- incl facts and circumstances
- defn "donor" would not exclude
 - private foundations or disqualified supporting orgs
- advisory privileges
 - again, facts and circumstances
 - regardless whether actually exercised
 - incl choices among investment vehicles
 - incl service on advisory committee
 - comments requested on when restrictions on gift should trigger DAF status



Notice 2017-73 cont'd

re using DAF to avoid public support limitations

- no immediate informal guidance, but
- "anticipate proposing" regs that would require donee org
 - to treat distributions from DAF as from donor
 - to treat anonymous DAF distributions as from a single source
 - to treat distributions from fund sponsor as public support only if sponsor specifies not from DAF and no donor advised



further detail

defn "donor-advisor"

- incl investment advisor who also advises donor individually, unless "properly viewed" as advising fund sponsor "as a whole"
- incl recommended appointee to advisory committee unless "based on objective criteria related to expertise" in field of interest

advisory committee, multiple donors

- "objective criteria related to expertise"
- three or more individuals, not more than a third of whom are "related" w/r/t any others
- appointee not "significant contributor"
- comments requested on how to structure exception that would not allow "circumvention"



exceptions from defn

single identified org

- other than private foundation, disqualified supporting org, foreign org, non-charitable entity
- not to administer DAFs or to make grants
- exception does not apply if disqualified person can advise as to identified org's use of funds
- rejects suggestion to except distributions to third parties to support identified org's activities

scholarship fund

- "indirect control" determined w/ ref to facts and circumstances, incl "relationships among members"
- comments requested on evading requirements of 4945(g) exception



exceptions

- investments, "reasonable" investment and grant-related fees excepted
 - "reasonableness" facts and circumstances
 - comments requested on how to distinguish investments from distributions
- distributions to 170(b)(1)(A) orgs
 - equivalency determinations for foreign orgs
 - ref Rev. Proc. 2017-53
 - disqualified supporting orgs
 - comments requested on disqualifying other supporting orgs as "inappropriate"



exceptions, cont'd

- scholarship fund established by (c)(4) org
 - "broad-based" membership
 - donors may control selection committee
 - but related persons may not receive awards
- disaster relief
 - ref Notice 2006-109
 - exception extended to non-employer based
 - but not for "emergency hardship"
 - requirements similar to (c)(4) scholarship fund



exceptions, cont'd

- nonexempt org, exempt purpose
 - not incl activity
 - prohibited under 501(c)(3) or
 - which would cause loss of exemption if substantial
 - expenditure responsibility per reg section 53.4945-5(b)



defn taxable distribution

- "distribution" includes "any grant, payment, disbursement, or transfer"
 - expressly rejecting suggestion limited to "gratuitous" transfer
- "deemed" distribution
 - "use of assets" resulting in "more than incidental benefit" to disqualified person
 - ex: expense charged solely to particular fund
 - may also implicate section 4967
- step transaction analysis
 - "series of distributions through intermediaries"



the excise tax itself

- 20 pct on fund sponsor
 - ref existing reg section 53.4958-1
- five pct on fund manager who "knowingly agrees" to make taxable distribution
 - joint and several, capped at 10k
 - defn "manager"
 - officer, director, trustee, or anyone with similar authority or responsibility
 - need not be "final or decisive"
 - incl failure to act
 - constructive versus actual knowledge
 - comments requested on reliance on professional advice



open issues

a DAF by any other name

- field of interest or similar funds vulnerable
 - advisory committee structure
 - "significant" contributors

whither the investment advisor?

- status as "advisor," thus disqualified person
 - per se excess benefit under section 4958
 - prohibited benefit under section 4967
- under what circumstances "properly viewed" as advising fund sponsor?



other pending regulatory projects



open issues

"knowing" participation by fund manager

- statutory language
 - "knowing that it is a taxable distribution"
 - compare section 4945(a)(2) re "taxable expenditures" by private foundation
- proposed reg says
 - "is in fact aware" or
 - "has knowledge of facts sufficient to determine"
 - and "negligently fails to make reasonable attempts to ascertain"
 - compare existing reg section 53.4945-1(a)(2)
 - "is aware that such expenditure may violate"



fractions rule

REG-136978-12 published 11/23/16, 81 Fed.Reg. 84518

- re acquisition indebtedness generating UBTI
 - exception at section 514(c)(9) for real property does not apply if held through partnership
 - unless
 - all partners are exempt orgs, or
 - allocations qualify per section 168(h)(6), or
 - each allocation has substantial economic effect and satisfies "fractions rule"



up next

proposed regs under

- section 4967, prohibited benefits
 - problematic terms
 - "distribution," "directly or indirectly"
- section 4958, excess benefit transactions
 - note overlap, possibly a combined project

(subregulatory?) "guidance" re

- public support computation w/r/t distributions from DAFs
- see comments in Notice 2017-73



fractions rule

- per section 514(c)(9)(E)(i)(I),
 - partnership allocations must not result in exempt org partner having share of "overall partnership income" in any year greater than its share of "overall partnership loss" in year in which its share of loss is smallest
- per reg. section 1.514(c)-2(b)(2)(i),
 - partnership must satisfy rule both on prospective basis and on actual basis for each taxable year



fractions rule

- proposed regs relax rules on various carve-outs, to accommodate common non-abusive practices
 - preferred returns and guaranteed payments
 - partner-specific expenditures, management fees
 - "unlikely" losses or deductions
 - chargebacks of prior disproportionate allocations
 - acquisition of partnership interest post formation
 - capital commitment defaults or reductions
 - application of rules to tiered partnerships
 - *de minimis* exceptions
- no comments submitted



recent Tax Court decisions



syndicated conservation easements

REG-106134-22 published 12/08/22, 87 Fed.Reg. 75185

- formalizing Notice 2017-10, 2017-4 I.R.B. 544
- cf. *Green Valley Investors*, 159 T.C. No. 5 (11/09/22), Judges Gale and Nega dissenting
- citing
 - *Mann Construction*, 27 F.4th 1138 (6th Cir. 2022)
 - *CIC Services*, 925 F.3d 247 (6th Cir. 2019), *rev'd* 141 S. Ct. 1582 (2021)
- 26 comments rec'd

REG-112916-23 published 11/20/23, 88 Fed.Reg. 80910

- implementing section 170(h)(7)(B)
- eight comments rec'd



Valley Park Ranch, 162 T.C. No. 6 (03/28/24)

- invalidating reg. section 1.170A-14(g)(6)(ii) the "proceeds" reg
- accepting result in *Hewitt*, 21 F.4th 1336 (11th Cir. 2021), *rev'g* and *remanding* T.C. Memo. 2020-89
- disavowing *Oakbrook Land Holdings*, 154 T.C. 180 (2020), *aff'd*, 28 F.4th 700 (6th Cir. 2022), *cert. den.*, 143 S. Ct. 626 (2023)
- Judges Kerrigan, Pugh, Nega, Ashford dissenting



CRAT listed transaction

REG-108761-22 published 03/25/24, 89 Fed.Reg. 20569

- cf. AM 2020-006
 - https://www.plannedgift.com/uploads/2/4/6/6/24661337/volume_three_number_seven.pdf
- *Eickhoff*, No. 22-cv-04027 (W.D.Mo.) stipulated judgments as to all defendants
- *Gerhardt*, 160 T.C. No. 9 (04/20/23)



Lim, T.C.Memo. 2023-11 (01/23/23)

- fallout from Michael Meyer scheme
 - 99 pct. nonvoting interest into DAF
 - harvest gains
 - lend proceeds to ILIT under split dollar plan
- cf. LAFA 20212502F
- cf. Notice 2004-30

https://www.plannedgift.com/uploads/2/4/6/6/24661337/volume_two_number_fourteen.pdf



Hoensheid, T.C.Memo. 2023-34 (03/15/23)

- stock in closely held corporation, pending merger
- transfer to Fidelity DAF completed July 13
- closing w/ third party purchaser July 15
- stock certificate backdated to June 11
- change in control bonus paid July 10
- cash stripping July 14
- nonqualified appraisal by financial advisor

compare Dickinson, T.C.Memo. 2020-128 (09/03/20)



and briefly

Fairbairn v. Fidelity Charitable, 18-cv-04881 (N.D.Cal. 02/26/21)

- large block of publicly traded stock to DAF
- price spike immediately preceding contribution
- Fidelity sold entire block w/in hours, as price fell sharply [causation?]
- alleged promises re how Fidelity would sell,
- negligence resulting in losses to
 - value of tax deduction,
 - amounts subject to advisory privilege



Dickinson, T.C.Memo. 2020-128 (09/03/20)

re prearrangement

- restricted stock in closely held corp, subject to call by board
- transfer to Fidelity DAF
- board waives restriction, citing anticipated tender by Fidelity
- IRS argues second prong of Rev. Rul. 78-197
- court rejects

cf. *Palmer*, 62 T.C. 684 (1974), *aff'd on other grounds*, 523 F.2d 1308 (8th Cir. 1975)



Fairbairn, cont'd

- motion to dismiss for lack of standing to assert claim on behalf of DAF itself
- denied, court finds "special relationship"
- summary judgment motion arguing estoppel by inconsistency w/ tax reporting position
- denied, court notes return was still open
- re "unclean hands," court says no evidence Fidelity was harmed by undisclosed info



Braen, T.C.Memo. 2023-85 (07/11/23)

- sale of real property to village at discount in exchange for favorable zoning as to adjacent property for industrial use
- acknowledgment incorrectly stated nothing of value given in return
- appraisal reports did not describe terms of purchase agreement
- omissions not insubstantial



Fairbairn, cont'd

- bench trial over seven days in October 2020
- submitted December 04
- opinion issued February 26
- some alleged promises not broken, others not proven
- standard of care re negligence claim
 - advisor acting for client account vs. DAF acting on its own account



relatedly

Pinkert v. Schwab Charitable, No. 3:20-cv-07657
(N.D.Cal. 07/12/21)

- class action on behalf of DAF donors
- alleged breach of fiduciary duty
- accounts invested in Schwab funds w/
higher admin fees, lower returns

- claimed standing premised on
 - "robust" advisory privileges
 - "reputational and expressive interests"

- dismissed on motion



Pinkert, cont'd

aff'd 48 F.4th 1051 (9th Cir. 09/14/22)

- reputational harm speculative

- advisory privileges not contractual,
not a "contingent property interest"

- comparison w/ *Fairbairn*
 - no allegation here of broken promises
in inducing the gift



Russell A. Willis III, J.D., LL.M.

<https://www.plannedgiftdesign.com>

314.566.3386

rawillis3@plannedgiftdesign.com

<https://www.linkedin.com/in/russ-willis-plannedgiftdesign/>
<https://twitter.com/rawillis3>

