



# Discerning the True Policy Debate over Donor-Advised Funds

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**As a vehicle for charitable giving, donor-advised funds (DAFs) have long been a staple of community foundations. They have grown in prominence, particularly as investment companies or “national providers” other than community foundations began to establish charitable gift funds, starting with the Fidelity® Charitable Gift Fund in 1991. By the beginning of 2015, Fidelity Charitable had become the second-largest grantmaking institution in the United States, behind only the Bill & Melinda Gates Foundation. Among others, Vanguard Charitable had become the 11th largest. In its 2014 report, the National Philanthropic Trust estimated that 217,000 DAFs had existed in 2013. Those DAFs held assets of some \$54 billion, compared with private foundation assets of \$615 billion.**

Labeled the “democratization of endowed giving,” DAFs are widely seen as a way to spread endowed giving to donors who have neither the resources nor the time to create a private foundation because of the expenses and complexity involved.<sup>1</sup> They appeal to donors who wish to encourage family giving, build up funds for particular charitable projects, participate with local community foundation efforts, or simplify their tax planning; that leads many to believe that DAFs create a more vibrant and larger charitable sector than would otherwise be possible.

At the same time, the growth of DAFs has been met with the increased scrutiny that naturally accompanies larger institutions. Criticism usually centers on transparency, perpetuity, benefits versus costs, and payout rate, with critics calling DAFs “non-transparent tax shelters.”<sup>2</sup> Many of those criticisms apply to other forms of endowment as well. Some fear that giving to DAFs leads to unspent

resources languishing in the funds, and some charitable officials feel that the anonymity of many givers to DAFs makes it difficult to build relationships with donor advisers.

Accordingly, on June 16, 2015, the Tax Policy and Charities initiative of the Urban Institute—in conjunction with Urban’s Center on Nonprofits and Philanthropy and the Urban-Brookings Tax Policy Center—gathered leading scholars, community foundation executives, national providers of DAFs, legal experts, and policymakers at the conference titled “Donor-Advised Funds: How Have They Changed Philanthropy?” This group of active players in the DAF field worked not to resolve, but to discern and better define the policy issues surrounding DAFs, how the issues differed from those surrounding endowments in general, and how to relate the findings to the practical experience among DAF providers. The session yielded ideas for future research and points of agreement among the actors in the DAF space.

## Legal Differences between Donor-Advised Funds and Private Foundations

Victoria Bjorklund, retired partner of Simpson Thacher & Bartlett LLP, described briefly the major laws and regulations to date governing sponsoring organizations of DAFs, which are public charities, and compared them to laws and regulations governing private foundations and other public charities. She provided an extremely useful chart, updated for this brief (table A.1), contrasting the applicable laws and regulations items, such as deductibility of contributions, grantmaking, and rules regarding distributions.

For the most part, charities with DAFs face laws and rules simpler than those applying to private foundations, but they still must deal with some provisions not applying to other public charities. For example, donors can donate assets and sometimes often capital gains taxes on the unrealized appreciation, but the deduction limits as a share of adjusted gross income for the deduction are lower for donations to private foundations than for those to DAFs, which are treated like most other charities. Private foundations must pay a 1 or 2 percent excise tax on net investment income each year, but DAFs are not subject to the excise tax. Private foundations are mandated to make minimum distributions each year. DAFs do not have a distribution requirement, although some sponsoring organizations have their own policies regarding minimum or occasional distributions. Private foundations must disclose donor information on tax form 990-PF, but sponsoring organizations (e.g., a community foundation or Fidelity Charitable) are not required to publicly disclose donor information. Thus, DAFs can grant more anonymity to donors than can private foundations but not necessarily any more anonymity than donors to other public charities.

Table A.1 details other differences, but note one extremely important similarity: all contributions to any of these charities must essentially stay in the charitable sector once the donation is made. Different rules and penalties prevent them from being used for the private benefit of the donors. Also, the DAF

provider does not have to accept the advice of the donor to a DAF, as when a suggested charity engages in questionable practices.

## Data and Research about Donor-Advised Funds

In the second session of the conference, Nathan Dietz of Urban Institute, Andrew Hastings of National Philanthropic Trust, and Aaron Shill of CF Insights at the Foundation Center provided further information about the size and activity of the DAF sector.

Nathan Dietz presented results of an Urban Institute survey of community foundations conducted in partnership with the Council on Foundations. More than one-half of community foundations report their average DAF is 5 to 10 years old, and over 70 percent report that the average age of a DAF donor is between 46 and 64 years old. Approximately 76 percent of DAFs represent funds that may be dispersed over limited periods and are not permanently endowed. Survey respondents reported their donor advisers (1) are actively involved in leadership for the community and the community foundation, (2) participate in their events, and (3) contribute to the foundation's general fund (Boris and Dietz 2014).

The National Philanthropic Trust, the fourth-largest national DAF provider, surveys about 1,000 sponsors of DAFs for its annual Donor-Advised Fund Report. In 2013, overall grant payout represented 21.5 percent of DAF assets, at \$9.7 billion dollars. Contributions to DAFs total 5 percent of giving in the United States. The study, which tracks giving over the years, notes that DAF grants grew during the Great Recession. Although donors may have reduced the gifts they made from their income when that income fell, they were still able to give from their DAFs (National Philanthropic Trust 2014).

Aaron Shill of CF Insights described results from a survey of 273 community foundations, representing over 95 percent of estimated assets in the field. CF Insights' study includes a comparison of DAF assets, gifts, and grants for community foundations with national providers. The first year that the national providers exceeded community foundations in DAF assets was 2014. Total DAF assets for the community foundations were \$22.4 billion; for Fidelity Charitable, Schwab Charitable, and Vanguard Charitable, assets were \$24.1 billion. Between 2013 and 2014, there was around a 30 percent increase in national DAF providers' assets, whereas community foundations saw a 15 percent increase. Meanwhile, grants to charitable organizations from community foundation DAFs were \$2.9 billion and \$3.6 billion from the national DAF providers (CF Insights 2015). DAF offerings are more of an emerging product at many smaller and newer community foundations.

## Experience from National Providers and Community Foundations

The next two sessions of the conference were focused on DAF providers' experiences in the field, as well as policy proposals. Amy Danforth of Fidelity Charitable offered perspectives from the national

DAF provider standpoint, and Jennifer Leonard of the Rochester Area Community Foundation shared experiences as a community foundation offering DAFs.

Danforth discussed the history of Fidelity Charitable's growth since starting in 1991, with now more than 119,000 donors. Fidelity Charitable has an independent board of trustees and is registered as a 501(c)(3) nonprofit. Danforth cited their low brokerage fees and lack of fees for asset conversions as being among Fidelity Charitable's appealing features to donors because lower costs leaves more money for end charity. In a survey, two-thirds of Fidelity Charitable's donors said they began giving more after opening DAFs (Fidelity Charitable 2015). Danforth noted that Fidelity Charitable has stringent compliance practices, including a grant recipient oversight committee that ensures grants are made to nonprofits that serve as charities for the public good.

Leonard shared experiences from the Rochester Area Community Foundation. She said the community foundation's endowed and pass-through DAFs have proven vital in meeting the needs of the Rochester community, which has struggled with increased poverty after losing Eastman Kodak Company as a major employer. She noted that the community foundation appeals to donors with a strong interest in charitable giving, adding, "Some might have started a private foundation, but they enjoy the combination of frugality in start-up and operating costs, plus our support for their charitable goals." She told an anecdote of a family deeply involved in the community foundation for generations as the result of starting a DAF.

Among DAF grants at the Rochester Area Community Foundation, 85 percent benefit the Rochester region, and the community foundation educates donors about local needs and provides support to ensure that the charities that donors choose are trustworthy and that they avoid self-dealing. The DAF payout rate is 12.4 percent, and DAFs have more than \$100 million in assets. She noted that more than 93 percent of DAFs have paid out some amount in past three years; most others are saving for something, but the community foundation can step in after five years of inactivity.

The discussion of firsthand experiences illuminated differences between the national providers, including Fidelity Charitable, Schwab Charitable, and Vanguard Charitable, and local community foundations. Community foundations provide more guidance to donors (Carson 2015), whereas national providers encourage donors to research charities on their own and usually offer lower fees. Additionally, national DAF providers do not have general endowment funds, unlike community foundations.

## Policy and Practice

The conference moved to discussing DAFs both in policy and practice. Emmett Carson of the Silicon Valley Community Foundation (SVCF) and Ray Madoff of Boston College Law School shared opening remarks about policy issues. The discussion centered on several issues: benefits to donors, successor advisers, payout rates, fiduciary standards, and anonymity.

## Benefits to Donors

The many actors in the DAF space agreed that DAFs are very appealing to donors, especially in comparison to starting private foundations. The costs of DAFs are low, donors receive an immediate full charitable deduction for future grantmaking, and DAFs can serve as a vehicle to pass the tradition of philanthropy on to future generations.

Citing Gene Steuerle's article, Victoria Bjorklund said “the democratization of philanthropy” that Steuerle predicted in 1999 has come to pass through DAFs, thereby enabling middle-income donors to simplify and amplify their giving. DAFs typically have much lower costs to start and administer than do private foundations because a DAF is not a separate, filing charity but rather an account owned by an existing public charity. Additionally, DAFs are open to fewer legal issues than are family foundations, which often employ family members and face criticism for self-dealing. A recent *New York Times* article about the legal challenges facing family foundations that employ family members cited DAFs as an easier alternative for families looking to engage in philanthropy.<sup>3</sup>

A benefit of DAFs is that donations to a DAF can qualify a donor for an immediate full charitable deduction even when a donor hasn't immediately decided on the best allocation of those funds. A donor could receive a tax deduction for a deposit into a DAF on December 31 of one year and then take some time to consider which charities should receive grants. In some situations, individuals or groups save for a large charitable project, such as a community pool, so that annual payouts make little sense.

Critics still worry that the donor can receive a tax benefit while the foreseeable effect on the community remains unknown. Boston College's Madoff agreed that DAFs provide extraordinary tax benefits to donors, but he believes these benefits make it all the more important to both ask whether DAFs are good for society and develop rules to ensure that benefits get to the public within a reasonable time frame. “The flip side of DAFs being so attractive to donors is they are so costly to the American taxpayer,” she noted. Gifts to DAFs, just like gifts to most other charities, not only receive a charitable deduction for the donor, but also can lead to forgone taxes on income, appreciated capital gains, and estates. In light of all of these benefits given to donors, she suggested it is appropriate to have rules to ensure that benefits get to the public within a reasonable period.

Some DAF administrators noted that the endowed aspect of giving is very important to donors. Many donors want to make multigeneration plans so they can pass philanthropic values down to their children and grandchildren. The administrators described DAFs as a way to involve families in philanthropy. Those families can also make one-time grants that they don't necessarily want to advertise.

Despite the rise of DAFs, the rate of charitable giving in the economy as a whole has hovered around 2 percent of gross domestic product for decades. Participants at the conference discussed whether DAFs increase giving or redirect funds that would otherwise go more immediately to charity. Gene Steuerle of the Urban Institute said, “Anytime you create a new vehicle for charity, you are creating both a substitute and a complement.” Substitution doesn't increase aggregate activity, but new,

complementary goods and services usually do increase it, as when new and better forms of restaurants increase spending on eating out.

DAFs facilitate noncash donations to small charities and provide a vehicle for planned, sustained giving. One DAF provider noted that public charities should consider DAFs a “gift beyond cash” because they know donors have money in their funds to grant future gifts. Others noted that many donors make both direct contributions to charities and to DAFs over time.

## **Successor Advisers and the Endowed Aspect of Donor-Advised Funds**

DAFs can outlive the original donor, so donors must plan for what will happen to the fund in the event of their death. Because there is no federal rule governing how to handle successor advisers, each individual DAF provider determines its own rules for successor advisers. Fidelity Charitable’s Danforth outlined options for donors: leaving DAFs to their children or a group of beneficiaries, passing on fund assets to a charity or group of charities, or having some combination of the two. Fidelity Charitable has also established an endowed giving program that distributes funds to charities after the death of the donor.

Leonard said the Rochester Area Community Foundation limits advice to two generations and then grantmaking is done by the community foundation. Ben Pierce of Vanguard Charitable noted that the typical breakdown of successor plans is 55 percent to family, 30 percent to charities, and 15 percent split among other options.

## **Donor-Advised Funds and Payout**

Because DAFs do not have a payout rule, donors are not required to make distributions within a given time frame. Meanwhile, private foundations must pay out 5 percent of their investment assets each year. Former House Ways and Means Committee chair Dave Camp’s proposed legislation, the Tax Reform Act of 2014, proposed a five-year mandated spend down for DAFs, with a 20 percent excise tax for unspent funds—essentially a requirement for DAFs to spend down their assets quickly. This proposal, as might be expected, caused apprehension in the sector. “Shortsighted policies could significantly diminish use of the fastest-growing giving tool, reduce charitable giving among a diverse group of donors, and threaten communities’ ability to quickly respond to local needs,” wrote the Council on Foundations on the proposed five-year spend down.<sup>4</sup>

“I doubt seriously that Chairman [Dave] Camp’s staff [members] saw fully how they would wipe out most community foundations [since qualified to refer to those without a substantial endowment] and confine endowment giving only to the rich,” wrote Steuerle.<sup>5</sup> At the conference, DAF providers described payouts among their funds and emphasized that, in practice, payout tends often to average much more than the 5 percent required of private foundations. Others noted that particular individuals could still pay out much less.

Several participants, including recipients of national providers and community foundations, shared internal data that help illuminate donors’ payouts. Vanguard Charitable’s Pierce said 70 percent of

accounts pay out in a given year. Because the same funds do not necessarily pay out each year, Vanguard Charitable sees constant activity.

Carson of SVCF, an organization with more than 1,047 DAFs that distributed \$474 million from all sources in 2014, shared that \$134 million of that distribution went to local organizations. Of SVCF's 158 DAFs with balances over \$1 million, an aggregate average payout was 15.7 percent, he said. Meanwhile, SCVF had a 57 percent average payout on funds with \$100,000 to \$1 million in assets (SVCF 2015). Carson added, "Only seven of SVCF's funds with balances of \$1 million or more (4 percent) did not make any grant recommendations during the prior two years [2013 and 2014]. SVCF contacts every donor if the DAF becomes inactive over a two-year period to engage [that donor] in grantmaking."

Steven Woolf of the Jewish Federations of North America said DAFs in his organization pay out 16 to 20 percent annually and support as much as 20 percent of those charities' operating budgets.

The DAF providers argued that perceptions of warehousing donations are not based on evidence. Still others wondered whether an annual payout rate made sense. If the concern is about wealthy people controlling their wealth for long periods of time, are smaller DAFs even of concern? Also, does annual payout make sense for funds building up to support some particular activity, such as support for a local playground or swimming pool? How much time and effort should be spent regulating or trying to determine whether the intentions of donors are appropriate, and then by whose standard, as long as the money must remain in a charitable solution?

The controversy over lack of payout rules for DAFs is much the same as that for any endowment. Critics fear that unspent funds sitting in DAFs or other endowments do little for the public immediately but earn donors an immediate tax deduction regardless.

Although Camp's draft legislation suggested a five-year payout, Boston College Law School's Madoff suggested that Congress might want to consider a payout rule for individual donors with a longer term of perhaps 10 to 20 years. Madoff agrees that a 5 percent payout rate would be worse than the status quo and suggests that any payout should be imposed in terms of a set number of years. If the goal is to deny perpetuity, then the 5 percent payout rule for foundations would be too low for DAFs because the 5 percent rule assumes the foundation (earning an average of 5 percent a year on its assets) will last in perpetuity.<sup>6</sup> Madoff argues that a set payout period could be easily accomplished by simply requiring donors to name a non-DAF charity to receive any remaining DAF funds at the end of the designated period.

DAF providers suggested that because the aggregate payouts for DAFs are much higher than are those of private foundations, DAFs should not be subject to a payout rule. Also, they felt that it would be administratively cumbersome to go after all their DAF advisers year after year when the DAFs might have good reason for allocating funds in more discrete but not annual disbursements.

## Fiduciary Standards and Anonymity

DAFs do not have to disclose donors, which can appeal to donors who wish to remain anonymous, but such anonymity can be challenging for charities seeking to build relationships with donors. Some charities hope more information about donors with the funds would improve their fundraising abilities. Critics also think the fiduciary standards for DAF providers are weak and that fees for the funds enrich financial service providers at the expense of the charitable sector.

Participants at the conference addressed the perceived challenges of building relationships with anonymous donor advisers. Joanne Florino of Philanthropy Roundtable noted that not all donors choose to be anonymous. She estimated that 5 to 10 percent of donors choose to be anonymous 100 percent of the time. She also said that charities having difficulty accessing DAFs could communicate with community foundation leaders and other sponsoring organization staff.

National Philanthropic Trust's Hastings shared that, in his career, he's seen only a handful of people who don't know where they want to give. Instead, they have questions about how to give certain types of gifts (for example, how to endow a chair). Some attendees argued that DAFs are just another vehicle for giving and do not have much effect on the needs of charities to build and maintain relationships with donors. Moreover, donors to charities in general have ways of remaining anonymous.

Critics of DAFs often question whether the national DAF providers enrich their investment arms and grant donors charitable deductions simply for shifting money from one account to another. Urban Institute's Steuerle noted that almost every charity wants an endowment or endowment-like asset, such as owned real estate. Why would endowments at a DAF be singled out for harsher treatment when a DAF is more flexible over time than is an endowment or real estate of a single charity whose services may have become relatively less valuable to the public over time? Is Mary and John Smith's family DAF of less societal worth than if they had contributed to the endowment of a charity whose efficiency became superseded by another doing the same thing better, to period artwork likely to become outdated and sit in a museum's basement, or to Harvard's new building drive?

Targeting DAFs for compliance or oversight issues may be more burdensome for small community foundations than for national DAF providers or large community foundations with substantial accounting expertise. Such action could potentially raise administration fees. John Porter of ACT for Alexandria, a community foundation, noted that it would struggle with policy changes that required more reporting, which would increase staffing costs not related to its charitable output.

## Donor-Advised Funds Moving Forward: The Research Agenda

The final session of the conference was devoted to discussing the research agenda and the future of DAFs. Some participants called for national sponsors to share data with independent third-party researchers in ways that could accommodate privacy concerns and minimize expense. Also suggested



was the opportunity to use experiments to better understand the choices and motivations of donors. Sandra Swirski of Urban Swirski and Associates noted that perhaps the lack of robust research and data may have led to the DAF proposal in chair Camp's Tax Reform Act of 2015. She stressed the importance of sharing quality data with policymakers and representatives to avoid future such proposals.

SVCF's Carson suggested that research organizations could serve as intermediaries between national DAF providers and policy officials, and the organizations could obtain salient data for DAF providers and community foundations not set up to experiment or research.

Research topics that were suggested stemmed from the conference's discussion of theory and practice surrounding DAFs. Many topics were related to how to make best use of such vehicles to encourage charitable giving, regardless of what tax rules were in effect.

One major unanswered question is whether DAFs increase overall giving. The participants also wondered whether DAFs have different generational appeals to baby boomers or millennials. DAFs may have an effect on the formation of private foundations, especially small foundations.

Some participants questioned how well self-regulation of the charitable sector, including endowed parts of the sector such as DAFs, is working. Research can help illuminate to charities how to access individual donors and maintain relationships. Elizabeth Boris of the Urban Institute noted that many charities have high churn in donors and that it has been established that it is cheaper to maintain older relationships than to start new ones. Thus, further research is needed into how DAFs can encourage regular giving, including by strengthening donor relationships.

Alex Reid of Morgan Lewis noted that research should extend beyond increasing revenue to DAFs to increasing overall revenue to charities. Perhaps the most important research questions moving forward would be how to strengthen the broader charitable ecosystem and how DAFs fit into that equation.

## Conclusion

DAFs are a quickly growing part of the charitable sector. As a low-cost alternative to private foundations, they appeal to donors with moderate-to-high incomes. DAFs, like most other charities with and without endowments, remain largely free from the rules and regulations of the private foundation sector. Many of the differences among participants on tax and regulatory policy toward DAFs arose from the participants' views on endowments in general. The conference attempted to organize and differentiate more distinctly issues of concern raised with DAFs, so that the merits of any proposed rule could be more easily assessed. Among the most important assessments would be the consequences of applying it evenly or unevenly across endowments in general, among DAFs devoted to different purposes across different timelines, and between DAFs arising in community foundations and other national charities.

# Appendix A

TABLE A.1

**Comparison of Laws and Regulations Applicable to Public Charities, Public Charities Sponsoring Donor-Advised Funds, and Private Foundations**

Provision	Non-sponsoring organization public charity	DAF sponsoring organization public charity	Private foundation
Taxes on taxable distributions / expenditures	Not applicable.	<p>Distributions by a sponsoring organization from a DAF account will be a taxable distribution if the distribution is to (1) any natural person or (2) any other person if (i) the distribution is not for charitable purposes or (ii) the sponsoring organization does not exercise expenditure responsibility in accordance with Code section 4945(h). However, distributions to (i) charitable organizations described in section 170 (b)(1)(A) (other than certain disqualified supporting organizations); (ii) the sponsoring organization of the donor advised fund; and (iii) any other donor advised fund are not taxable distributions.</p> <p><b>Taxes Imposed</b></p> <ul style="list-style-type: none"> <li>■ 20% excise tax on the sponsoring organization that makes the taxable distribution;</li> <li>■ 5% excise tax on a fund manager who knowingly makes a taxable distribution, subject to \$10,000 cap per distribution.</li> </ul> <p><b>26 US Code §4966</b></p>	<p>Private foundations and foundation managers are subject to taxes on taxable expenditures. Taxable expenditures include any amount paid (subject to certain exceptions):</p> <ul style="list-style-type: none"> <li>■ to carry on propaganda, or otherwise attempt to influence legislation;</li> <li>■ to influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive;</li> <li>■ as a grant to an individual for travel, study, or other similar purposes by such individual (unless the foundation has had its grant procedures previously approved by the IRS);</li> <li>■ as a grant to other organizations unless (i) the organization is a public charity (with the exception of certain supporting organizations) or a private operating foundation, (ii) the private foundation exercises expenditure responsibility with respect to the grant, or (iii) in connection with a grant to a foreign organization, the private foundation makes a good faith determination that the foreign organization is the equivalent of a United States public charity;</li> <li>■ as a grant to any other non-charitable organization.</li> </ul> <p><b>Taxes Imposed</b></p> <ul style="list-style-type: none"> <li>■ 20% tax on the foundation for each taxable expenditure, and a 100% tax if such taxable expenditure is not corrected;</li> <li>■ 5% tax on any foundation manager who agrees to the making of the expenditure (subject to \$10,000 cap), and a 50% tax if the manager</li> </ul>

Provision	Non-sponsoring organization public charity	DAF sponsoring organization public charity	Private foundation
			refuses to agree to a correction (subject to \$20,000 cap).  <b>26 US Code §4945</b>
Taxes on prohibited benefits	Not applicable.	<p>Donors, donor advisers and related persons may not recommend that a sponsoring organization make a distribution from a DAF which results in such person (and certain of their family members and related entities) receiving, directly or indirectly, a “more than incidental” benefit as a result of the distribution.</p> <p><b>Taxes Imposed</b></p> <ul style="list-style-type: none"> <li>■ 125% tax on a donor, donor adviser or related person who gives advice resulting in a prohibited benefit or receives the benefit;</li> <li>■ 10% tax on a fund manager who agrees to make a distribution, knowing it would confer a prohibited benefit, subject to \$10,000 cap for any one distribution.</li> <li>■ No tax will be imposed if a tax was already imposed with respect to such distribution under Code section 4958 (i.e., if the transaction already has been subject to taxation as an “excess benefit transaction”).</li> </ul> <p><b>26 US Code §4967</b></p>	<p>Disqualified persons may not engage in self-dealing (i.e., engaging in a financial transaction, with certain exceptions) with a private organization, under penalty of a tax on each transaction.</p> <p><b>Taxes Imposed</b></p> <ul style="list-style-type: none"> <li>■ 10% tax on the disqualified person (unless such person is a government official who does not know the transaction is an act of self-dealing). If the self-dealing is not corrected within the taxable year, a tax of 200% will be imposed;</li> <li>■ 5% tax on a foundation manager who participates in the act of self-dealing, knowing it was an act of self-dealing. A foundation manager who refuses to agree to a correction will be assessed a 50% tax on the amount involved.</li> </ul> <p><b>26 US Code §4941</b></p>
Tax on net investment income	Not applicable.	Not applicable.	<p>Private foundations must pay a 2% excise tax (subject to reduction to 1% in certain circumstances) on net investment income each year.</p> <p><b>26 US Code § 4940</b></p>
Excess benefit transactions	An excess benefit transaction is a transaction in which an economic benefit is provided directly or indirectly to or for the use of any disqualified person, if the value of the economic benefit provided exceeds the value of the consideration (including the	Any grant, loan, compensation, or other similar payment from a DAF to a donor, donor adviser or a related person (each being a disqualified person) is automatically treated as an excess benefit transaction, and the full amount of the payment shall constitute an “excess benefit.”	<p>As described above, disqualified persons may not engage in self-dealing with a private foundation, under penalty of a tax on each transaction.</p> <p><b>26 US Code §4941</b></p>

Provision	Non-sponsoring organization public charity	DAF sponsoring organization public charity	Private foundation
	<p>performance of services) received for providing such benefit, with the difference between the two amounts constituting the “excess benefit.”</p> <p><b>Taxes Imposed</b></p> <ul style="list-style-type: none"> <li>■ A tax of 25% of the “excess benefit” is imposed on the disqualified person benefitting from the transaction. If, following imposition of the tax, the excess benefit fails to be corrected within the taxable year, a 200% tax is imposed on the disqualified person.</li> <li>■ A tax of 10% of the excess benefit is imposed on an organization manager who knowingly participates in an excess benefit transaction, unless such participation is not willful and is due to reasonable cause.</li> </ul> <p><b>26 US Code §4958(c)(1)</b></p>	<p><b>Taxes Imposed</b></p> <ul style="list-style-type: none"> <li>■ A tax of 25% of the “excess benefit” is imposed on the disqualified person benefitting from the transaction. If, following imposition of the tax, the excess benefit fails to be corrected within the taxable year, a 200% tax is imposed on the disqualified person.</li> <li>■ A tax of 10% of the excess benefit is imposed on an organization manager who knowingly participates in an excess benefit transaction, unless such participation is not willful and is due to reasonable cause.</li> </ul> <p><b>26 US Code §§4958(c)(1), (c)(2) and 4958(f)</b></p>	
Excess business holdings	<p>Although generally not applicable to public charities, certain supporting organizations are subject to the same excess business holdings restrictions and excise taxes as private foundations.</p> <p><b>26 US Code §4943(f)(3)</b></p>	<p>DAFs are treated as private foundations with respect to excess business holdings.</p> <p><b>Taxes Imposed</b></p> <ul style="list-style-type: none"> <li>■ 10% of the value of the excess business holdings;</li> <li>■ 200% of the value of the excess business holdings, if the DAF has not disposed of such excess business holdings by the end of the taxable period in which the initial tax was imposed.</li> </ul> <p><b>26 US Code §4943(e)</b></p>	<p>Private foundations are subject to excess business holdings rules, which generally restrict private foundations from holding more than 20% of the voting stock of a corporation, reduced by the percentage of voting stock actually or constructively owned by disqualified persons.</p> <p><b>Taxes Imposed</b></p> <ul style="list-style-type: none"> <li>■ 10% of the value of the excess business holdings;</li> <li>■ 200% of the value of the excess business holdings, if the private foundation has not disposed of such excess business holdings by the end of the taxable period in which the initial tax was imposed.</li> </ul> <p><b>26 US Code §4943</b></p>
Substantiation requirement and exclusive legal control of assets	<p>In general, deductions are not allowed for contributions of \$250 or more to a public charity that is not a sponsoring</p>	<p>In order to qualify for a tax deduction for a contribution to a DAF (assuming a deduction is otherwise available), the taxpayer</p>	<p>In general, the same as public charities, though most private foundations do not solicit charitable contributions from the public,</p>

Provision	Non-sponsoring organization public charity	DAF sponsoring organization public charity	Private foundation
for income tax deduction	<p>organization of DAFs without contemporaneous written acknowledgment of the contribution by the public charity.</p> <p>Such acknowledgement must state (i) the amount of cash and a description of any property contributed; (ii) whether any goods or services were provided by the public charity in exchange for the contribution; and (iii) if so, a description and estimate of the value of any goods or services that were provided. The acknowledgement need not specifically state that the public charity has exclusive legal control over the assets contributed.</p> <p><b>26 US Code §170(f)(8)</b></p>	<p>must obtain a contemporaneous written acknowledgment from the sponsoring organization of the DAF that (i) satisfies the requirements applicable to public charities under Code section 170(f)(8) and (ii) includes confirmation that the sponsoring organization has exclusive legal control over the assets contributed.</p> <p><b>26 US Code §170(f)(18) (see also §§ 2055(e) and 2522(e) for similar rules with respect to estate transfers and gifts, respectively)</b></p>	<p>although by law they can accept them and do issue substantiation letters for all contributions they accept.</p>
Disclosure of donor identity	<p>Although a public charity may be required to include certain contributors' identifying information on Schedule B of its Form 990 (due to the size of the donor's gift) such information is exempt from public disclosure.</p> <p><b>Form 990, Schedule B; 26 US Code §§6104(d)(1) and 6104(d)(3)</b></p>	<p>Subject to the same requirements as non-sponsoring organization public charities.</p> <p><b>Form 990, Schedule B; 26 US Code §§6104(d)(1) and 6104(d)(3)</b></p>	<p>The identifying information of donors that is required to be included in a private foundation's 990-PF is <u>not</u> exempt from public disclosure.</p> <p><b>Form 990-PF; 26 US Code §6104(d)(1)</b></p>
Mandatory distribution	<p>Not applicable.</p>	<p>Not applicable. All sponsoring organizations should have policies in place requiring certain activity in each DAF, however all sponsoring organizations should also have inactive account policies.</p>	<p>Private non-operating foundations are subject to excise taxes for failure to make annual qualifying distributions of at least 5% of the value of the preceding year's average investment assets.</p> <p><b>26 US Code §4942</b></p>
IRA charitable distributions	<p>Public charities other than sponsoring organizations are qualified charities to which charitable distributions from IRAs may be made.</p> <p><b>26 US Code §408(d)(8)(B)</b></p>	<p>Charitable distributions from an IRA may <u>not</u> be made to a DAF.</p> <p><b>26 US Code §408(d)(8)(B)</b></p>	<p>Subject to certain limitations, IRA charitable distributions may be made to private foundations.</p> <p><b>26 US Code §408(d)(8)(B)</b></p>

Provision	Non-sponsoring organization public charity	DAF sponsoring organization public charity	Private foundation
Allowance of income tax charitable deduction	Income tax deductions are allowed for cash contributions to public charities in an amount up to 50% of an individual's adjusted gross income for a taxable year. The percentage is lowered to 30% for contributions of most capital gain property.  <b>26 US Code §170(b)</b>	Income tax deductions are allowed for cash contributions to DAFs in an amount up to 50% of an individual's adjusted gross income for a taxable year. The percentage is lowered to 30% for contributions of most capital gain property.  <b>26 US Code §170(b)</b>	Income tax deductions are allowed for cash contributions to private foundations in an amount up to 30% of an individual's adjusted gross income for a taxable year. The percentage is lowered to 20% for contributions of most capital gain property.  <b>26 US Code §170(b)</b>
Fulfill a donor's legally binding pledge	Not applicable.	Although regulations under Code section 4967 have yet to be promulgated, it is commonly believed that a DAF cannot be used to fulfill a donor or donor adviser's pledge to another charity. Fulfillment of a personal pledge, which is a legally-binding obligation of such person, would constitute a more than incidental benefit to such person, and therefore would constitute a prohibited benefit transaction. As an alternative, a donor or donor adviser may express to a charity the donor's intention to advise the DAF to make a gift to the charity.	A private foundation cannot be used to fulfill a disqualified person's personal pledge to a public charity. Fulfillment of a personal pledge, which is a legally binding obligation of such person, would constitute an act of self-dealing. As an alternative, a private foundation may itself make a pledge to a public charity.  <b>26 US Code §4941</b>

**Source:** Victoria Bjorklund. "Comparison of Laws & Regulations Applicable to Public Charities, Public Charities Sponsoring Donor-Advised Funds, and Private Foundations." New York: Simpson Thacher & Bartlett LLP, 2015.

**Note:** DAF = donor-advised fund; IRA = individual retirement account; IRS = Internal Revenue Service.

## Notes

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