

## Senate Charitable Package Problematic Provisions (formerly H.R. 4297, formerly S. 2020)

The Council on Foundations is working with Senate Finance Committee staff to revise the following provisions in the Senate's charitable package:

- **Creation of special rules for gifts of illiquid assets to donor-advised funds.**

Donor-advised funds are charitable giving vehicles used extensively by community foundations. We support the recommendations of the Panel on the Nonprofit Sector that changes to the rules for gifts of property should apply equally to all charities that accept such gifts. Creating a special rule just for gifts that are used to fund donor-advised funds will create a disincentive for non-cash gifts to community foundations compared with making the same gift to another kind of public charity. Gifts of illiquid assets to donor-advised funds should not be unfairly singled out.

*Revision:* Remove this provision. Such a rule will result in community foundations and other charities that offer donor-advised funds receiving fewer gifts of such property relative to other charities.

- **Ban on grants by private foundations to supporting organizations where a disqualified person of the private foundation is also a disqualified person of the supporting organization or any charity it supports.**

While private foundations generally will be permitted to make grants to Type I and II supporting organizations and new "functionally integrated" Type III organizations, there continues to be a ban on such grants if a disqualified person of the private foundation is also a disqualified person of either the supporting organization or any charity it supports. This is a particular problem for Type I supporting organizations as they are permitted to support a class of charities. Because the members of the class are not all known at the time of the grant, it is possible that there may be one or more overlapping relationships with a supported organization. Thus, a private foundation will be effectively barred from making grants to a Type I supporting organization that supports a class of charities.

A private foundation presumably would be able to make such a grant directly to the supported charity even if there were a common disqualified person. Why, then, should a private foundation not be able to make a grant to an entity, e.g., a Type I supporting organization, that is completely controlled by the supported entity? It is unclear what concern this rule is intended to address. Thus, this overlapping disqualified person rule should be deleted or applied only to the supporting organization.

*Revision:* Delete this overlapping disqualified person rule or apply it only to the supporting organization.

- **Grants to individuals for disaster relief and emergency hardship.**

Disaster relief and emergency hardship funds are not automatically exempt from the definition of donor-advised fund. Thus, grants to individuals from such funds will be prohibited unless the IRS issues a temporary regulation exempting them prior to the effective date of the new law (the beginning of the organization's next tax year). This primarily affects employer-connected funds because they are typically advised by a committee of employees, but also affects other funds if the donor or a person appointed by the donor serves on the fund's advisory committee.

*Revision:* Exempt disaster relief and emergency hardship funds from the definition of donor-advised fund. The definition of donor-advised fund should be clarified to provide that a fund is not "donor-advised" even if the selection of individuals to be benefited is made by a committee of employees of the donor, provided that a majority of the committee consists of persons who are not related to the donor, or, for employer-sponsored funds of persons who are not in a position to exercise substantial influence over the affairs of the employer, the fund serves a charitable class, and recipients are selected based on an objective determination of need. This rule is consistent with current IRS guidance on disaster relief payments by public charities to employees of a particular employer.

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- **Standard for manager liability for penalties.**

The proposed standard for manager liability for the new penalties for approving prohibited or personal benefit distributions from a donor-advised fund has been changed from earlier versions to eliminate the waiver of the tax when the approval “is not willful and is due to reasonable cause.” This exception to the penalty for non-willful, reasonable cause violations is contained in other comparable charity rules (e.g., current IRC section 4958 and the various private foundation penalty taxes). Many charitable boards are volunteer and rely on expert advice (e.g., a reasoned opinion of counsel) to guide them in key decisions. Deletion of the non-willful, reasonable cause exception will likely result in increased difficulty for charities in finding community members willing to serve on boards and put themselves in the position of being subject to such severe penalties.

*Revision:* The waiver language should be reinstated in the two new penalty provisions for donor-advised funds.

**Questions?** Please contact Luis Maldonado, the Council’s Director of Government Relations and Public Policy, at [maldl@cof.org](mailto:maldl@cof.org) or 202/467-0394.