



Notice 2017-73 and 2017 Tax Act

Reynolds Cafferata

Overview

- Notice 2017-73—Proposed Guidance for DAFs
- 2017 Tax Act—Provisions Impacting Charities

Notice 2017-73

- Proposes to issue Regulations to Implement provisions of 2006 Pension Protection Act Impacting DAFs
- Gives some guidance and requests comments for
 - Payment splitting with quid pro quo gifts
 - Payment of pledges
 - Treating DAF payments as public support
 - Private Foundations contributing to DAFs

2006 Pension Protection Act

- IRC 4966(d)(d)(2) Defined DAFs
- IRC 4967 Imposing excise on d distribution from a DAF that provides the donor with more than an incidental benefit—something that would reduce the charitable deduction if provide by charity to donor for a gift
- IRC 4958(c)(2) states that any grant, loan, compensation or similar payment from DAF to donor is automatic excess benefit

Gala Tickets and Memberships

- Donor pays \$1,000 to charity. Donor receives dinner worth \$100. Donor can claim deduction for \$900.
- Clearly DAF could not pay the \$1,000 with donor getting the \$100 dinner under IRC 4967
- Could DAF pay \$900 and donor pay \$100?
- IRS said no in PLR 9021066 related to private foundations.
- IRS believes getting to attend event is a benefit above and beyond the monetary value of the dinner.
- Notice 2017-73 applies same logic to DAF
- IRS says same logic applies to splitting payment for memberships that have taxable benefits.

Possible Responses

- IRS—Donors can go to galas and pay for memberships without involving DAFs
- Look for ways to bifurcate on charity side:
 - Have one or two levels of tickets with all of the non-deductible portions and additional recognition packages that do not have a quid pro quo—ad journal, table location etc.
 - Have a few memberships with all the benefits with value and then other societies etc. that confer benefits without value that has to be counted as quid pro quo.

Payment of Enforceable Pledges

- Treas. Reg. Sec. 53.4941(d)-2(f)(1) prohibits payment disqualified person's enforceable pledge by a PF
- DAFs are not subject to the self-dealing rules, but most did not pay out of concern under 4958 and 4967
- IRS focuses on and limits its ruling to 4967
- IRS acknowledges it is difficult to determine whether a pledge is enforceable.
- IRS notes that a donor's relationship to a PF is much closer than the relationship to a DAF

Don't Ask Don't Tell: DAF can pay pledge

- IRS says it will not be more than an incidental benefit if a DAF payment is applied to an enforceable pledge if:
 - DAF sponsor does not refer to pledge when making payment
 - Donor receives no other benefit that is more than incidental
 - Donor does not attempt to claim a deduction for payment from DAF even if charity sends a receipt to donor

Dealing with Pledges

- Is there a fiduciary or AG issue with applying undesignated payment to pledge?
- DAF—don't reference anything other than identifying the DAF donor. Referencing a named fund or program might be a reference to a gift agreement.
- Possible include language in gift agreements that DAF payments are to be applied to gift commitment. This can be added to existing agreements.
- Consider a general policy of applying DAF payments to pledges
- Don't use enforceable pledges if you don't need to—still an issue with a PF

Other Issues in the Notice

- IRS proposes to treat payments from DAFs as gift from donor, not general public support.
 - DAF payments help publicly supported public charities.
- IRS asks for comments on
 - Use of DAFs generally by PFs
 - A time limit for redistribution if a PF makes a grant to a DAF to satisfy its minimum distribution requirement

2017 Tax Act Key Sections Impacting Giving

- Increase of AGI limit for cash gifts to 60%
- Repeal of Pease phase out of itemized deductions
- Cap on deductions for state and local taxes to \$10,000
- Increase of standard deduction to \$24,000
- Cap on Mortgage deduction to \$750,000 debt
- Elimination of many other itemized deductions
- Decrease in general marginal rates and pass-through tax rates
- Increase of Estate Tax Exemption to \$11.18 million per person

Increase in AGI Limit to 60% for gifts of cash

- Applies to gifts of Cash
- 50% still applies to gift of property if deduction is limited to basis

Repeal of Phase out of Itemized Deductions

- Prior law phased out itemized deductions in an amount equal to 3% of AGI over a certain income level
- 2017 Act eliminates phase out
- In CA , income tax deduction absorbed phase out in most cases, so donor received full benefit of charitable gift
- In states without out income taxes, phase out was could impact deduction significantly

Cap on State and Local Tax Deduction

- Impacts charitable giving calculus because SALT limit is \$10,000 regardless of marital status. But standard deduction is \$24,000 for couples. Charitable gifts and mortgages are other two main deductions. So a CA donor with less than \$24,000 of mortgage interest likely will lose some benefit of charitable gifts.

Increased Standard Deduction to \$24,000

- With limited SALT deduction, most taxpayers will need a substantial mortgage to justify itemizing deductions.
- At 2.8%, a mortgage needs to be about \$850,000 to generate \$24,000 in interest—more than the \$750,000 cap.
- If the donor has \$10,000 of SALT, then a mortgage of \$500,000 would bring donor up to \$24,000 of itemized deductions.
- Donors in low tax states with low or no mortgage will not benefit from a charitable gift until giving exceeds the standard deduction in excess of the other deductions.
- Donor with \$2,000 in SALT and no mortgage would need to give away \$22,000 before obtaining any tax benefit.

Decrease in Tax Rates

- Top Individual Rate 37% and break points increased.
- For pass through business income, top rate could be effectively 29%.
- The lower rates increase the personal cost of giving.

Planning opportunities

- IRA rollover will produce significant savings for taxpayers who do not otherwise have itemized deductions that equal the standard deduction.
- Taxpayers whose itemized deductions without charitable gifts are less than the standard deduction may benefit by bunching their charitable gifts ever 2 or 3 years. If couple has \$10,000 of SALT and no other deductions, and makes \$14,000 of charitable gifts, they get no tax benefit. But if they give \$28,000 every other year, they get \$14,000 of benefit. If they do \$42,000 every 3 years, they get \$28,000 of benefit. Possible fund DAF every 3 years so charities can get funds annually.
- Non-grantor lead trusts effectively give a 100% deduction on the income paid to the charity

Estate Tax

- It is not uncommon for donors to give the tax free amount to children and balance to charity
- In those plans, \$22 million can go to family before charity receives any assets.
- Donors may consider non-charitable vehicles like 501(c)(4) or non-charitable perpetual trusts.