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9-6-2017

Letter to Orrin G. Hatch and Ron Wyden on Donor-Advised Funds

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Kridler, Douglas; Spruill, Vikki; Cardinali, Dan; and Meyerson, Adam, "Letter to Orrin G. Hatch and Ron Wyden on Donor-Advised Funds" (2017). *Law School Publications*. 945.

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September 6, 2017

The Honorable Orrin Hatch
Chairman
Senate Finance Committee
104 Hart Senate Office Building
Washington, DC 20515

The Honorable Ron Wyden
Ranking Member
Senate Finance Committee
221 Dirksen Senate Office Building
Washington, DC 20515

Dear Chairman Hatch and Ranking Member Wyden,

On behalf of the more than 100 community foundations participating in the Community Foundation Public Awareness Initiative, as well as the Council on Foundations, Independent Sector, and the Alliance for Charitable Reform, thank you for the invitation to respond to Ray Madoff and Roger Colinvaux's misguided and misleading letter on tax reform and the rising popularity of donor-advised funds (DAFs).

The proposals suggested by Madoff/Colinvaux (i.e., requiring a 10-year forced payout on all DAF contributions, and disallowing transfers from private foundations to DAFs) are based on erroneous statistics and claims, would severely restrict philanthropy, and would reduce overall charitable giving in communities across the country. These requirements would be particularly harmful to community foundations, which use DAFs as a valuable and essential tool for conducting philanthropic work in their communities. The proposals would not achieve the proponents' aims, and would also add significant complexity to the work community foundations do on behalf of their donors and the charities they support in every Congressional district.

The two main intentions of our response are to:

- Dispel some of the oft-cited critiques and statistics used by Madoff/Colinvaux and other DAF critics; and
- Explain how the two DAF-related proposals in their letter would actually be *harmful* to philanthropy, rather than increase charitable giving or curb abusive practices.

DAF sponsors—which include community foundations, national charitable gift funds, religious groups, other public charities, etc.—stand ready to work with Committee staff to curb any abuses based on actual evidence rather than conjecture. We have already been working closely with Finance Committee staff in recent months on language pertaining to donor activity. However, given the rising popularity of DAFs among donors who are regularly active in their communities, and the value they provide in sustaining philanthropy, we will strongly resist any proposals that would place restrictions on *all* DAFs to address perceived problems with only a small fraction of accounts.

Misused Statistics and Unfounded Claims

At the outset, we would like to address several common — and highly misleading — critiques of DAFs.

Madoff/Colinvaux and other DAF critics frequently cite two key statistics to make their case for additional DAF regulation. First, they argue that because overall charitable giving has remained at about 2 percent of GDP, while contributions to DAFs have been increasing steadily, this somehow provides *prima facie* evidence that DAF contributions are (as they say in their letter to the Finance Committee) “attracting dollars that would otherwise be contributed directly to active nonprofits.” Second, they posit that high average payout rates from DAFs somehow obscure high levels of inactivity. For example, Madoff has argued that a 16 percent average payout can be achieved if 20 percent of DAFs pay out 80 percent of their balance and 80 percent of DAFs make no grants, with no regard to whether this happens in the real world.

The repeated use of these statistics is grossly misleading. Consider:

- GDP is a very large number—\$18.57 trillion in 2016. While total giving has averaged 1.9 percent of GDP annually over the long term, total charitable giving reached \$390 billion in 2016 — or 2.1 percent of GDP. In 2016, all nine major charitable giving categories experienced increases in giving for only the sixth time in 40 years.¹ An increase from 1.9 to 2.1 percent of GDP may sound modest, but that represents a very significant change in dollars going to charity: about \$37 billion, or a 10 percent *increase* in overall charitable giving.

Our point isn't that current levels of charitable giving are acceptable; we would all like to see more philanthropy, and leading charitable groups have been working with Congress on proposals to achieve that result. However, when considering huge numbers such as percentage of GDP, simply rounding to 2 percent and using that to buttress an argument makes little sense. Tenths of a percent make a big difference.

- The implication of this argument about total charitable giving staying constant is that “normal” giving (i.e., gifts that get spent in the year they are made) is being “crowded out” by giving that gets invested rather than spent immediately. But this is not at all accurate; many other types of charities other than public and private foundations invest a portion of their charitable gifts for future needs. The extension of logic behind the argument would then be, it seems, that *all* the money charities raise every year should be spent in that year. Basic principles of organizational management would advise against that. Therefore, it makes little sense to us to single out the treatment of

¹ *Giving USA: The Annual Report on Philanthropy for the Year 2016* (2017). Chicago: Giving USA Foundation™.

a popular philanthropic tool that is intended to achieve future stability while staying silent about similar strategies used by other “active” or “real” charities.

- The GDP statistic also fails to account for how DAFs allow donors to *increase their giving over time*—giving not accounted for in the GDP statistic. To provide a simple example, if someone donates \$100,000 to a DAF at their local community foundation, and then after 10 years the donor has made \$100,000 in grants out of the fund and retains \$100,000 in principal due to the investment gains, the “percent of GDP” statistic will only account for the initial \$100,000 gift made in the first year, even though the initial gift has led to much more than \$100,000 in total grantmaking. Every community foundation can provide numerous examples like this, yet DAF critics repeatedly fail to acknowledge it.

In addition to the misleading use of GDP to characterize charitable giving, we feel it is important to distinguish the realities of DAFs as a charitable giving tool from the perception that drives a number of unfounded claims by DAF critics.

In their letter, Madoff/Colinvaux argue that because current law does not *require* an annual payout, donors “*may* [our emphasis] indefinitely defer contributions from their DAF accounts.” Note the careful use of the word “may.” The key point is, *they don’t know*. They assume it’s happening just because it’s possible. In many of her articles on DAFs, Madoff frames her critique in this way because most DAF critics do not have hard evidence that donors are “parking” their assets and/or failing to make regular grants.

We believe strongly that public policy should be based on what *is* happening. In our experience, donors use DAFs at community foundations to develop a philanthropic plan and become deeply engaged in the community. They are not using the DAF to somehow “hide” or “shelter” their assets, and there is no incentive for either the donor or the community foundation to not make grants. (Remember that the gift to a DAF is a completed charitable gift, where the gift no longer belongs to the donor.) The Community Foundation Public Awareness Initiative conducted an informal survey of its participants in 2014 and 2016 and found that almost all of them had made grants in the prior 36 month period from more than 90 percent of DAF accounts.

Madoff and Colinvaux write that some funds make no distributions at all, but they offer no evidence or statistics on how often this occurs at major DAF sponsors.² In reality, there are a number of perfectly legitimate reasons why a donor may not make a grant in a particular year (e.g., growing a fund over several years to make a grant larger than the initial

² Madoff/Colinvaux cite a statistic that 25 percent of DAF sponsors distribute less than one percent of their assets in a given year, but these aren’t community foundations, or even the commercial sponsors. According to a Congressional Research Service study from a few years ago, many of these “inactive” DAFs are housed at sponsors holding only a single DAF, and these accounts represent a very small fraction of DAF accounts or DAF assets. Congress would be better served to collect data on where these funds are, so they can change tax law to address this specific circumstance.

contribution down the road; the DAF is under advisement by a couple who are going through a divorce; a DAF is established as part of a bequest but cannot make grants until the estate is fully settled, etc.). We would argue that Congress would be better served to collect data on these questions (for example, gathering data on how many DAF accounts are regularly “inactive,” without an extenuating circumstance or a giving plan in place) before changing public policy based on conjecture.

Finally, we strongly object to the implication that DAFs only have value when they make grants to “actual charities.” In their prior and forthcoming work, Madoff and Colinvaux have both conceded that community foundations *are*, in fact, real charities providing charitable services. For example, in a forthcoming paper in the *Brigham Young University Law Review*³, Colinvaux explores this very topic in detail. Why ignore that in their letter to the Committee?

This fact is why we find it so concerning when Madoff/Colinvaux write that DAFs only provide public value when “funds come out of the DAF sponsor and make their way to active charities.” A community foundation is a 501(c)(3) public charity that provides programs and services for the residents in their communities. Madoff and Colinvaux will both concede this point, and even argue that community foundations are effective stewards of philanthropic dollars – yet their public criticisms rarely make this distinction for policymakers. We consider this exclusion a grave disservice.

In the paper cited above, Colinvaux also writes, “a spend-down rule, similar to that which applies to medical and agricultural research organizations, is appropriate for national sponsoring organizations, in large part because of the nature of the NSO’s exemption as a fundraising organization...[H]owever, community foundations have a different purpose and serve a different constituency.” If he feels it is important to note this distinction, then his argument should remain consistent across audiences.

We want to be clear that the community foundations field is not advocating for a special exemption, rule, or definition. We simply want Congress to understand that community foundations *are* real charities providing real services in every Congressional district, and public policy should reflect this reality. We dispute the implication by DAF critics that we are simply a pass-through or a conduit providing no added value to its donors or the community until grants are paid.

Now, we would like to turn to some of the consequences if the Madoff/Colinvaux proposal were to become law.

³ Colinvaux, Roger. (2017). Defending Place-Based Philanthropy by Defining the Community Foundation. *Brigham Young University Law Review* (forthcoming). Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941174.

Unintended Consequences of a Timed Payout

(1) Reduced Charitable Giving. A required payout may increase DAF grantmaking over the first few years as existing DAFs must spend down. But what will happen over the long term? *If Congress’s goal is to increase the money “going out the door,” the proposal for a forced 10-year payout will not have the desired effect.*

Many community foundations have annual DAF payout rates that are several times greater than the required 5 percent rate for private foundations. *According to the National Philanthropic Trust, the average payout rate for the 608 community foundations surveyed for its 2016 Donor-Advised Fund report was 15.4 percent.*⁴ So even absent a required payout, the average payout for community foundation DAFs is still high.

The Madoff/Colinvaux proposal, however, would be to make a DAF very unattractive for donors looking to make a long-term commitment to a community. **How can a community—particularly a small town, rural area, or other locality without a great deal of private philanthropy—build an endowment to sustain support for community needs if all DAF dollars must be spent within 10 years?**

Madoff/Colinvaux would argue that the donor should simply name the community foundation as the ultimate recipient of the funds, taking the family out of the equation. But for many of our donors, the notion of establishing a DAF is attractive *precisely* because it provides a way to engage their children and grandchildren in a lifetime of giving. If the DAF must be spent down within a specific time period, the ability to instill philanthropic values with younger generations to outlive the original donor is diminished. While Madoff/Colinvaux may argue that they are seeking only to curb what they perceive as excesses, **the real-world impact of a timed payout would be to make DAFs so restrictive that it would virtually eliminate them as a tool for building family philanthropy.**

A forced 10-year distribution of all DAF contributions also makes it harder for the philanthropically-inclined entrepreneur to make significant gifts at a point of liquidity (when the ability to give is high but the donor has not yet developed a philanthropic plan). If DAFs become too restrictive relative to other vehicles, community foundations could “lose the moment” when a potential donor will make his or her greatest gift. A timed payout would make it far less likely that these one-time liquidity events will result in large charitable gifts to meet critical community needs. Ultimately, these donors will turn to alternate methods of “moment-in-time” giving, as opposed to creating a vehicle allowing consistent and sustained giving over a period of time.

⁴ <https://www.nptrust.org/daf-report/index.html>.

(2) **Bias in Favor of “Big” Philanthropy.** A required timed payout proposal for DAFs communicates to the public that the concept of “endowment” (building a permanent resource that is there both now and in the future) is reserved only for large, wealthy institutions.

Community foundations across the country work with families that want to sustain charitable giving into the future and/or involve their children in philanthropy—a goal for which DAFs are both a feasible and accessible option. The vast majority of these families have above-average assets, but are not necessarily “rich.” The average size of a DAF at a community foundation was \$451,000 in 2015.⁵ Most financial advisors would recommend against establishing a family foundation unless the donor family has about *ten times* that amount (or more) to give.

What the 10-year payout proposal for DAFs says to these families is this: If you don’t have the wealth (or ability) to start and manage a private foundation, so you want to create a DAF instead, you must:

1. Spend down all gifts within 10 years, with no possibility to let the funds grow;
2. Forfeit any opportunity to sustain support of effective organizations over the long run; and
3. Lose the ability to engage your children in a lifetime of giving.

This philosophy is counterproductive. We should be promoting all types of philanthropy. We believe the idea of building a permanent fund that can help the community both now and in the future, allowing these charitable funds to grow over time, and have giving be “advised” by the family is smart public policy—not an abusive tax practice, as Madoff/Colinvaux would have the Committee believe.

Community foundations were chartered with the specific intent to build access to long-term philanthropic resources in the communities they serve, so a pool of assets is available during hard times. During the Great Recession, many community foundations sustained and even increased their levels of grantmaking for urgent needs when individual giving plummeted. Yet the Madoff/Colinvaux proposal creates an environment where the only way community foundations can build an endowment is through unrestricted giving. We could provide the Finance Committee with hundreds of examples of major accomplishments in communities across the country that simply would not have been achieved had all donor-advisors had to spend down each gift over a 10-year period.

In short, the flexibility DAFs provide leads to greater charitable giving over time as donors become more engaged and see the results of their grantmaking. This objective is one we all share.

⁵ National Philanthropic Trust 2013 Report, Figure 13: <http://www.nptrust.org/daf-report/sponsor-type-comparison.html#figure13>.

(3) Solution in Search of a Problem. The Madoff/Colinvaux proposal implies that inactivity of donor-advised funds is a pervasive problem that requires attention. However, the vast majority of DAF are making grants regularly with deep engagement and input from the designated advisors.

Madoff/Colinvaux and other DAF critics posit that since it might be *technically legal* for DAF advisors to get an up-front tax deduction and then make no grants, this must be a significant problem that needs fixing. But the fact that something is *technically legal* or that it *could* occur does not mean it *does* occur.

Overall, when you consider the full spectrum of DAFs at community foundations, only a small percentage of DAF accounts would be considered “inactive”—and most community foundations have specific policies or procedures in place to ensure that DAFs remain “active” according to a predetermined set of criteria. As a requirement of the National Standards for U.S. Community Foundations® program—which is an accreditation program established by and for community foundations that requires compliances with best practices above and beyond what is required by law—donors must acknowledge and agree to adhere to a policy that outlines “fund activity.” If for any reason a fund becomes “inactive” within the context of the agreement, the foundation maintains a predetermined policy whereby it will take steps to make grants from that fund.

Given that (1) relatively few donor-advised funds are truly inactive, (2) the average payout rate is higher than the rate for private foundations, and (3) community foundations have demonstrated a capability to self-regulate via the National Standards for U.S. Community Foundations® process, we do not see the merit of enacting a DAF payout requirement given the risks and complexity it would entail. If the perceived abuse is that donors can make tax deductible gifts to a DAF but then not make grants, and that high average payouts can obscure significant inactivity, it seems to us that the heart of Madoff/Colinvaux’s concerns would be better addressed with data about how “active” DAFs really are—efforts for which are already underway, as evidenced by several provisions included in the CHARITY Act (S. 1343, H.R. 2916).

(4) Problems for Endowed DAFs. The Madoff/Colinvaux proposal fails to recognize the important difference between *endowed* and *non-endowed* DAFs, and that the forced spend-down on endowed DAFs would require community foundations to spend a significant amount of their charitable resources to go to court to undo thousands of legal arrangements—which could also potentially put some foundations in violation of state law and a donor’s intent.

With an endowed DAF, a donor advisor makes a gift to the foundation’s permanent endowment, and will either designate a portion of the fund as distributable or leave the annual distribution amount to be determined by a foundation’s internal spending policy.

The donor can then “advise” grants out of this annual spending amount. The principal remains a part of the permanent funds, and donors generally may not grant more than their grantmaking budget for the year. Essentially, endowed DAFs operate like small private foundations, with no separate legal entity.

The proposed 10-year payout is thus of great concern because it would force a community foundation to violate or unwind the “contract” it has with the donor. Requiring these funds to be disbursed within a fixed number of years would potentially invite years of litigation, and could put some community foundations in violation of the Uniform Prudent Management of Institutional Funds Act (UPMIFA).

(5) Unprecedented Complexity and Unanswered Questions. Madoff/Colinvaux present their payout proposal as if it would be a very simple proposition to implement: Give a donor 10 years to grant out their contributions, after which time any remainder is distributed to a pre-selected charity. But the proposal would be a nightmare for DAF sponsors, including community foundations. Consider:

- Many community foundations manage hundreds, if not thousands, of accounts—and many of their donors are contributing to their DAFs multiple times during the year. How are they supposed to manage that unprecedented level of complexity, where a new 10-year clock starts every time a donor contributes? Or are all gifts made during a calendar year given the same timetable (i.e., the clock starts on January 1 following the calendar year of the gift)? Proponents of a timed payout have failed to address these central questions.
- What about appreciation on the initial contributions? Does the forced payout apply to investment earnings, or just the amounts that a donor has contributed, since he or she received a charitable deduction for them?

These are not questions that can be easily set aside with a wink and a nod. They require serious thought from policymakers, and we don’t believe the advocates for timed payouts on DAFs have adequately thought them through.

Private Foundation Grants to Donor-Advised Funds

Madoff/Colinvaux also recommend that Congress should ban the ability of private foundations to make grants to DAFs and have them count as “qualifying distributions.”⁶ This practice has also received some attention from the Treasury Department, which asked for public comments on the matter. Both the Council on Foundations and the

⁶ Madoff/Colinvaux suggest precedent for such a ban by noting that the private foundation payout rule cannot be “evaded” by a distribution from one private foundation to another. This statement is inaccurate as the Code provides at least one instance where a private foundation can make a distribution to another private, non-operating foundation, and such distribution may count toward the annual payout requirement. §4942(g)(3)

Community Foundation Public Awareness Initiative have submitted comments to Treasury on this issue.

The private foundation-to-DAF issue raises similar questions as the forced payout. Madoff/Colinvaux assume that because it is *legal* for a private foundation to make grants to a DAF, this is normal practice and a *per se* abuse that should be always curtailed.

CEOs from community foundations across the country will attest, however, that **this practice often furthers a genuine charitable objective and leads to a more efficient and effective use of the charitable resources than would otherwise have been possible**. For example, private foundations may use DAFs to:

- Provide better stability to grantees during periods of major market fluctuations;
- Conduct local philanthropy in close partnership with community and place-based foundations, directing local giving through donor-advised funds; and/or
- Temporarily suspend grantmaking during a period of strategic planning or major transition, and utilize DAFs to meet their minimum distributions during these times, followed by very active grantmaking after the transition period.

These situations further a charitable purpose and would be curtailed by Congressional action that goes too far in restricting the practice. Here are a few examples from leading community foundations explaining how a private foundation might use a DAF at the local community foundation to pursue a genuine charitable objective.

>> EXAMPLE ONE: Helping a Nonprofit Through a Challenging Period or Leadership Change

From Alicia Philipp, President and CEO, Community Foundation for Greater Atlanta

In 2008, the Robert W. Woodruff Foundation in Atlanta wanted to grant \$200 million to Grady Memorial Hospital. At the time, Grady was going through massive financial challenges and leadership upheaval, and Atlanta was on the verge of losing its only public hospital. Due to the leadership challenges at the hospital, it made little sense for Woodruff to give the hospital control of the entire \$200 million in the first year. There needed to be a solution, and the Community Foundation served as the right steward at the right time.

Woodruff originally planned to establish a DAF at the Community Foundation and distribute \$50 million per year for four years to fund Grady's capital needs – which had been seriously underfunded for years – as the hospital incurred the expenses. However, it took much longer for Grady to become stable, and there was an additional leadership change at the hospital midway through. The Foundation continued to make payments regularly, and eight years later, the bulk has been granted out. In the end, the community and the grantee were both better served by having such an arrangement.

In this case, no one could possibly argue the Woodruff Foundation was using the DAF to skirt its payout requirements. By having the flexibility to use the DAF, and by relying on the management expertise of the Community Foundation, the Woodruff Foundation made its gift more meaningful and efficient than had it granted \$200 million directly to the hospital when the management structure was not in place to effectively use the funds.

>> EXAMPLE TWO: Maintaining a Private Foundation's Giving Through Financial Upheaval

From Max Williams, President and CEO, Oregon Community Foundation

In 2008, when the financial market experienced significant losses, a family foundation in Oregon whose mission is to serve rural communities saw their asset base plunge. Many of Oregon's rural communities also suffered extreme losses during this market downturn, and the nonprofits serving these communities saw a tremendous uptick in the number of people requesting services. The foundation's loss in assets was so significant that it was challenged to meet many of its multi-year grant commitments, which were set as fixed dollar amounts and were put at risk when the payout requirement applied to a much smaller asset pool.

To solve this problem, the private foundation turned to a DAF it maintained at the Oregon Community Foundation to augment its 5 percent payout requirement and keep its grant commitments. The DAF was more than halved in value during this period. As the market rebounded, the family foundation rebuilt the DAF's assets with a percentage of their foundation's payout to create a resource to support rural communities if another market downturn occurs. The DAF's grantmaking supports rural nonprofit organizations that fit the criteria of the family foundation and an average of \$1.2 million is paid out from the fund each year.

Allowing the private foundation to make these gifts has resulted in a clear win-win for the community. If this practice was banned or restricted, it would be much harder for foundations to make the multi-year – and often unrestricted – grants that nonprofit organizations so desperately need. The ability of the private foundation to make grants to the DAF makes private philanthropy more willing to make long-term commitments.

>> EXAMPLE THREE: Helping a Family Maintain a Commitment to Their Former Community

From Tim Beaton, Executive Director, Fargo-Moorhead Area Foundation (Fargo, ND)

The Fargo-Moorhead Area Foundation is working with a potential donor who made his/her fortune in the Fargo area, but has not lived in the community for several years. As a result, the donor is no longer familiar with the community's most successful nonprofit organizations. To remedy this, the community foundation is developing an arrangement by which the donor's private foundation would make an annual distribution to a DAF at

the community foundation and the community foundation will provide regular grantmaking assistance to the donor to ensure that its grants are going to effective nonprofits in the Fargo community.

All or most of each year's distribution are expected to be granted within 12 months. As a result, this arrangement will help local nonprofits almost immediately. The donor plans to work with the community foundation to develop a "community needs list," which will be reviewed at least annually. Based on that list, the community foundation would then vet nonprofit organizations and projects that would address those needs. This arrangement would be contractual— the community foundation would have to do this each year.

While it would be possible for the donor to make grants directly from the private foundation to the local organizations in our community, by creating a DAF, the donor can work with the professional (and local) staff of the community foundation to ensure that its resources are achieving the greatest possible impact. Here, the PF's annual grant to a DAF, which represents a portion of its required payout, will do the community enormous good. The resulting philanthropy will be more targeted and efficient.

These are just three examples showing how DAFs at community foundations are very effective grantmaking tools for private foundations. We have also heard from community foundations that have donors who use the DAF as a way to simplify and expand their private foundation's grantmaking. For example, some donors give more money to more organizations because they can make one large grant to the DAF from their private foundation, then the DAF distributes the funds. This makes it easier for a small foundation without permanent staff to support many charities. Another common example is the family that may not have been doing robust grantmaking via their foundations because family members couldn't agree on grantees, so the money would sit. However, these families discovered that splitting the corpus and/or a percentage of the foundation evenly into individual DAFs allowed them spend the grant money immediately to more organizations, thus truly "spreading the wealth."

We understand Madoff/Colinvaux's concern that—in some cases—a family foundation might use a DAF as a means to skirt payout requirements, and clearly we would frown on such activity. But in our experience, private foundations use DAFs at community foundations because they want to further a charitable objective—not because they want to somehow "shelter" the funds and keep the money in their control. The examples above illustrate several common ways in which this occurs.

Conclusion

In conclusion, after studying Madoff/Colinvaux's critiques—and those of other DAF critics—it seems to us that the central underlying policy concern driving both the payout proposal and the private foundation-to-DAF restriction is the concern that the DAF isn't *active* or making regular grants into the community. Critics fear the money will sit, and that a taxpayer who has benefited from a charitable contribution will

somehow keep the funds sheltered away from public needs. They concede that the average DAF payout is several times that of private foundations, but that somehow this average high payout shields significant inactivity.

But these critics are suggesting a new set of restrictive rules based on conjecture, without first asking for more sunlight and data to inform Congressional action. If average DAF payouts are three times the private foundation payout rate, and the vast majority of DAF accounts *are* making grants regularly and/or the DAF advisers have plans in place for future activity, there doesn't seem to be a public policy problem requiring urgent action. For these reasons, we urge the Committee to set aside the extreme proposals advanced by DAF critics and instead acknowledge the self-policing work of the sector by continuing to work with us and other practitioners to write legislation that reflects the realities of philanthropic work, as we did with the provisions around DAF disclosures, as outlined in the bipartisan CHARITY Act.

Sincerely,



Douglas Kridler, President & CEO
The Columbus Foundation
(on behalf of the Community Foundation Public Awareness Initiative)



Vikki Spruill, President & CEO
Council on Foundations



Dan Cardinali, President & CEO
Independent Sector



Adam Meyerson, President
The Philanthropy Roundtable