SPEEDING UP BENEFITS TO CHARITY BY REFORMING GIFTS TO INTERMEDIARIES

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Abstract: Charitable giving tax incentives are intended to encourage giving for public benefit. Gifts to intermediaries frustrate this goal. Presently, $1.26 trillion has accumulated in donor advised funds (DAFs) and private foundations. These are charitable intermediaries that do not benefit the public until they release their funds for public use. Congress has long recognized that intermediaries cause a "delay in benefit" problem because the tax incentive is awarded before the public benefits from the gift. Congress addressed this problem for foundations in 1969 by requiring them to pay out a minimum amount annually. Congress, however, has not addressed the problem for DAFs, and the foundation payout now has too many loopholes. The Article explains that reform of charitable intermediaries is essential to the continued viability of the charitable giving incentives. The status quo allows donors to a take a tax deduction, retain effective control over their donations indefinitely, and provides no guarantees that the public will ever benefit from tax subsidized charitable gifts. This Article responds to arguments against charitable intermediary reform and analyzes bi-partisan legislation, the ACE Act, introduced to accelerate charitable giving from DAFs and foundations. The Article also considers whether community foundations and other mission-driven DAF sponsors warrant distinct legal treatment. The Article concludes that the status quo undermines generosity and perpetuates wealth, and that reform is required. This Article further concludes that, though the ACE Act is sound legislation, it should apply to existing DAF accounts and require further study of its incentives for private foundations and whether DAFs at mission-driven sponsors further their mission.

INTRODUCTION

To be charitable is to help others at a cost to oneself. To be charitable and receive tax benefits requires more explanation. The federal tax regulations on

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charitable giving are about a hundred pages of very fine print, and many additional rules govern what an organization must do to qualify as "charitable." Despite the voluminous rules, however, there is a common feature to every charitable gift: there must be a completed transfer of cash or property from one party to another.[1] A change of ownership makes for sacrifice and enables charity. Mere promises to pay in the future are not charity, are not completed gifts, and do not receive tax benefits.[2]

There has long been a workaround to the completed gift rule, however. Instead of giving to an independent charity, a donor can create their own charity, donate funds to it, and continue to control the funds through personal or family control of the charity. So long as the charity meets the Internal Revenue Service's (IRS) criteria for charitableness, tax benefits are allowed. Further, the IRS long ago ruled that a charity, for tax purposes, does not have to engage directly in charitable activity but can instead fund the charitable activity of others through grants. Thus, a donor can shift ownership of funds to a charity while retaining the ability effectively to complete the gift later through a grant, all while receiving tax benefits up front.

This essentially describes the private foundation. Foundations are charitable intermediaries that pass funds from a donor to the charitable beneficiary through grants. Congress recognized, however, that foundations as intermediaries present a basic problem of tax policy. Donors receive tax benefits for completing a gift to a qualified charity (i.e., the foundation) but there is a delay in the actual charitable benefits being delivered because of the need for the foundation to make a grant. Congress addressed this concern in the Tax Reform Act of 1969, which, among other things, required foundations to pay out to working charities a minimum amount each year as a condition of their charitable status.[3]

Although private foundations are a relatively well-known type of intermediary, another type has emerged to dominate the charitable landscape: sponsors of donor advised funds (DAFs). Fidelity, Schwab, and Vanguard are household names for providing financial services to individuals, yet each also lends its name and investment savvy to a related entity—Fidelity Charitable, Schwab Charitable, and Vanguard Charitable. The DAF accounts that these organizations sponsor are for donors who, after making a donation, have the privilege of later advising grants from their DAF to a working charity. DAF contributions have skyrocketed in recent years. Accounting for virtually no

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[1] Treas. Reg. § 1.170A-1(a) (2021) (allowing charitable deductions only for amounts "actually paid during the taxable year").

[2] Rev. Rul. 68-174, 1968-1 C.B. 81 (ruling that a "mere promise to pay at some future date . . . is not a 'payment' for purposes of deducting a [charitable] contribution").

[3] Tax Reform Act of 1969, Pub. L. No. 91-172, § 101(b), 83 Stat. 487, 502–07 (1969) (codified as amended at I.R.C. § 4942).

charitable contributions in the early 1990s, DAFs now account for roughly one in every seven dollars donated to charity.[4]

Like private foundations, DAFs are intermediaries that can only achieve charity by making donated funds available for others' use. Also like foundations, donors receive upfront tax benefits upon their contribution but there is a delay in charitable benefit until the donor advises a grant from the DAF.[5] Together, DAFs and foundations now receive a startling thirty percent of charitable gifts by individuals and hold approximately $1.26 trillion of assets earmarked for charity.[6]

This massive accumulation of taxpayer-subsidized wealth by charitable intermediaries is a growing problem. The tax incentives for charitable giving are meant to encourage donations that provide immediate charitable benefits. Yet the rise of intermediaries means that taxpayers increasingly are subsidizing contributions that provide full tax benefits for donors but no current benefit to working charities. Further, the growing use of intermediaries is redefining what it means to give. Intermediaries allow donors to keep effective control over their assets, take tax benefits, and decide later when to make the actual gift—contrary to the purpose of the completed gift rule. This in turn is leading to growing accumulations of charitable wealth and power under the effective control of wealthy donors rather than charities.[7]

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[4] *See* CHUCK COLLINS & HELEN FLANNERY, INST. FOR POL'Y STUD., GILDED GIVING 2022: HOW WEALTH INEQUALITY DISTORTS PHILANTHROPY AND IMPERILS DEMOCRACY 20 (2022) (citing NAT'L PHILANTHROPIC TR., 2020 DONOR-ADVISED FUND REPORT (2020) [hereinafter NAT'L PHILANTHROPIC TR., 2020 REPORT], https://www.nptrust.org/wp-content/uploads/2021/02/2020-Donor-Advised-Fund-Report-NPT.pdf [https://perma.cc/6GG9-25JH]), https://ips-dc.org/wp-content/uploads/2022/07/Report-Gilded-Giving-2022.pdf [https://perma.cc/F8C5-AJMK] (noting that DAFs account for fifteen percent, or more than one in every seven dollars, of individual giving); *see also* Nicholas Kulish, *How Long Should It Take to Give Away Millions?*, N.Y. TIMES, https://www.nytimes.com/2021/06/09/business/donor-advised-funds-philanthropy.html [https://perma.cc/DL3B-RN2J] (Aug. 20, 2021) (reporting, based on older data, that DAFs receive one in every eight dollars donated by individuals); Haleluya Hadero, *Critics Take Aim at Charitable Money Sitting in Donor Advised Funds*, ASSOCIATED PRESS, https://www.fox21news.com/news/national/critics-take-aim-at-charitable-money-sitting-in-donor-funds-2/ [https://perma.cc/9FKZ-3VUE] (July 20, 2021) (same). Notably, provided there are no financial motives to disperse donors' funds to a charity, this money tends to rest in DAF accounts for unspecified periods of time. Hadero, *supra*.

[5] *See infra* notes 55–63 (providing a detailed overview of the delayed benefit problem).

[6] COLLINS & FLANNERY, *supra* note 4, at 20 (noting that DAFs and foundations have "quintupl[ed] their share of the charitable pie in less than thirty years"); NAT'L PHILANTHROPIC TR., 2021 DONOR-ADVISED FUND REPORT 12 (2021) [hereinafter NAT'L PHILANTHROPIC TR., 2021 REPORT], https://www.nptrust.org/wp-content/uploads/2021/11/2021-Donor-Advised-Fund-Report-NPT-Single-Page.pdf [https://perma.cc/7C64-4G75].

[7] *See* James Andreoni, *The Benefits and Costs of Donor Advised Funds*, 32 TAX POL'Y & ECON. 1, 9 (2018) (concluding that DAFs become a fiscal tool mainly for "people at the very tops of the wealth and income distributions"). One study, specifically, projects that the average income of a DAF donor is over $1.3 million and potentially much higher. *Id.* at 7. Private foundations have always been the province of the wealthy. Wealthy donors thus retain effective control over $1.26 trillion of wealth and power, raising income and racial equity concerns about accumulations of charitable wealth. *See*

Largely through happenstance and inertia, current law fosters charitable accumulations. DAF donors face no time limit on their privileges to advise grants from their DAF, and no requirement to ever release donated funds. And although foundations have long been required to pay a minimum amount to charity annually, this payout is too easily avoided. Current rules simply fail to ensure that the assets that accumulate in DAFs and foundations actually become available for charitable use in a timely manner, if at all.[8]

In June 2021, two Senators introduced the Accelerating Charitable Efforts Act (ACE Act) to address this problem.[9] The ACE Act would recalibrate charitable giving tax incentives to encourage donors to give and to get money to working charities.[10] For DAFs, the ACE Act requires that donors complete their gifts within fifteen years (or fifty years, if the charitable deduction is delayed until the contribution is distributed from the DAF).[11] The Act contains exceptions to these time limits for certain DAFs that are sponsored by community foundations or other mission-driven DAF sponsors.[12] For private founda-

Racial Disparities and the Income Tax System, TAX POL'Y CTR. (Jan. 30, 2020), https://apps.urban.org/features/race-and-taxes/#charitable-giving [https://perma.cc/73HY-2A9W] (finding that most taxpayers who take the charitable deduction have high incomes and "are significantly less likely to be people of color").

[8] *Philanthropy Divided Over Legislation to Accelerate DAF Grants*, PHILANTHROPY NEWS DIG. (June 11, 2021), https://philanthropynewsdigest.org/news/philanthropy-divided-over-legislation-to-accelerate-daf-grants#:~:text=Under%20current%20law%2C%20DAF%20account,are%20being%20held%20in%20DAFs [https://perma.cc/68AZ-XYJH].

[9] *See* S. 1981, 117th Cong. (2021) (introduced by Senators Angus King of Maine and Charles Grassley of Iowa) (encouraging DAFs to distribute funds to specified charities in an appropriate and accelerated amount of time). The House of Representatives introduced companion legislation on February 3, 2022. H.R. 6595, 117th Cong. (2022) (introduced by Representative Chellie Pingree of Maine and cosponsored by Republican Representative Tom Reed and Democratic Representatives Ro Khanna and Katie Porter) (same).

[10] *See Our Members*, INITIATIVE TO ACCELERATE CHARITABLE GIVING, https://acceleratecharitablegiving.org/about/ [https://perma.cc/W8A9-HC4H] (listing the various nonprofit groups and foundations that seek to accelerate charitable giving). The ACE Act broadly follows proposals of the Initiative to Accelerate Charitable Giving, a coalition of public charities, private foundations, philanthropists, and academics in support of giving reform. *See id.* (detailing the various reforms that can expedite the transfer of resources from intermediaries, such as DAF's and private foundations, to charities). Supporters of the initiative include leading charitable representative groups like CalNonprofits and the Minnesota Council of Nonprofits; public charities such as Global Citizen and Giving Gap; and prominent foundations including the Ford Foundation, the William & Flora Hewlett Foundation, and many others. The author is a founding member of the Initiative.

[11] ACE Act, S. 1981 § 3 (proposing a new section of the Internal Revenue Code, § 4967A(b), which would impose this fifteen-year limit).

[12] *Id.* § 2(a) (proposing a new section of the Internal Revenue Code, § 170(f)(19)(E), to implement these exceptions). The ACE Act also requires that the tax deduction for DAF donations of complex assets (i.e., assets not publicly traded) must match the amount made available for distribution to charity. *Id.* (proposing to add § 170(f)(19)(B)); *see infra* note 74 and accompanying text (detailing the reforms that apply to these specific types of donations).

tions, the ACE Act closes loopholes in the private foundations' charitable payout rules and contains incentives for foundations to contribute more.[13]

The ACE Act reflects years of debate in academic and policy forums and marks the first serious effort to tackle the problem of charitable accumulations. This Article advocates for reforming the rules for gifts to charitable intermediaries and responds to arguments against reform that defend the status quo. Part I of this Article provides context for the reform debate about DAFs, describing their recent rise and the policy challenges they present.[14] Part II explores the problem of delayed benefits to charity that results from gifts to intermediaries, explaining that although the Tax Reform Act of 1969 and earlier legislation addressed the delayed benefit problem in the private foundation, DAFs present a new version of this problem.[15] Part III describes the ACE Act's solution to the problem of DAF contributions, responds to the panoply of arguments against reform, and considers the exception in the ACE Act for certain DAFs at mission-driven sponsors.[16] Part IV discusses the ACE Act's approach to delayed benefits in private foundations.[17] Part V argues that the status quo, anti-reform vision of charitable giving is deeply flawed; that the ACE Act is a reasonable solution; that the ACE Act should also apply in some capacity to existing DAFs; and that stronger measures to increase payouts at foundations may ultimately be required.[18]

I. DAF BACKGROUND AND POLICY CONCERNS

One of the most significant developments of the last two decades in charitable fundraising is the emergence of the DAF as a giving vehicle. This Part provides an overview of this unique and prominent intermediary.[19] Section A of this Part explains the recent history of DAFs and their phenomenal growth.[20] Section B discusses the policy concerns DAFs present.[21]

A. DAF Background

A DAF is a mechanism by which a public charity, known as the DAF sponsor or sponsoring organization, agrees to take technical ownership of a donation and hold it in a separate account awaiting the donor's advice. The

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[13] ACE Act, S. 1981 §§ 5, 7–8.
[14] *See infra* notes 19–50 and accompanying text.
[15] *See infra* notes 51–90 and accompanying text.
[16] *See infra* notes 91–190 and accompanying text.
[17] *See infra* notes 191–213 and accompanying text.
[18] *See infra* notes 214–222 and accompanying text.
[19] *See infra* notes 19–50 and accompanying text.
[20] *See infra* notes 22–44 and accompanying text.
[21] *See infra* notes 45–50 and accompanying text.

DAF sponsor charges the DAF a management fee, and typically has a contract with a separate, often related, entity to help manage the account investments.[22]

The donor's ability to advise on grants from the DAF is called an advisory privilege and the donor can assign it to any person and pass it on for generations.[23] Advisory privileges have no time limit and attach to the DAF upon formation. Thus, a donor to a DAF receives full tax benefits for the contribution and gets an advisory privilege that allows the donor, or other person whom the donor appoints, to advise the grant at any time, or conceivably, never. Once in a DAF, assets grow tax-free and are unavailable for use by any working charity.

Common especially among wealthy donors,[24] DAFs are attractive as a giving vehicle for the various benefits they provide. DAFs allow donors to bunch their contributions together in one year to maximize tax benefits while granting the contributions over later years.[25] DAFs can help donors with sudden liquidity events, such as an inheritance or sale of a business—where the donor might know they want to give but needs more time to choose a charity. DAFs also allow donors to remove assets from their estates for estate tax purposes, with advisory privileges extended to the donors' heirs—a way of passing charitable wealth from one generation to the next. Many donors fund their DAFs with noncash assets and so avoid capital gains taxes despite retaining effective control over the assets, which may be sold or reinvested tax-free while in the DAF.[26] DAF gifts of complex noncash assets like real estate, partnership interests, and cryptocurrency are particularly attractive[27] because the

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[22] For additional information on DAFs and related policy concerns, see generally Roger Colinvaux, *Donor Advised Funds: Charitable Spending Vehicles for 21st Century Philanthropy*, 92 WASH. L. REV. 39 (2017) and Samuel D. Brunson, *"I'd Gladly Pay You Tuesday for a [Tax Deduction] Today": Donor-Advised Funds and the Deferral of Charity*, 55 WAKE FOREST L. REV. 245 (2020).

[23] I.R.C. § 4966(d)(2)(A); DEP'T OF THE TREASURY, REPORT TO CONGRESS ON SUPPORTING ORGANIZATIONS AND DONOR ADVISED FUNDS 22 (2011).

[24] *See* Andreoni, *supra* note 7, at 10 (explaining why DAFs are "much more popular among extremely high-income individuals").

[25] For example, in a given year, a donor might be in the highest marginal tax rate, making charitable deductions more valuable than in a later year when the donor might face a lower tax rate.

[26] *See* FIDELITY CHARITABLE, 2021 GIVING REPORT 24 (2021), https://www.fidelitycharitable.org/content/dam/fc-public/docs/insights/2021-giving-report.pdf [https://perma.cc/F2WR-UA2M] (stating that, at Fidelity Charitable, the nation's largest DAF sponsor, sixty-eight percent of all donations in 2020 were of noncash assets).

[27] For example, eleven percent of Fidelity Charitable's donations in 2020 were of complex assets, accounting for more than $1.6 billion. *Id*. Other sponsors similarly rely on complex asset donations. *See, e.g.*, *Benefits of Donating Appreciated Non-cash Assets to Charity*, SCHWAB CHARITABLE (May 21, 2020), https://www.schwabcharitable.org/non-cash-assets/donate-your-investments#:~:text=By%20donating%20highly%20appreciated%20alternative,on%20the%20distributions%20and%20appreciation [https://perma.cc/3UJF-W9QJ] (discussing the advantages of transferring non-cash assets to DAFs). Fidelity Charitable notes that "donors [can] give more" by donating non-cash assets because doing so can "minimiz[e] capital gains taxes . . . ." FIDELITY CHARITABLE, *supra* note 26, at 24; *see What You Can Donate*, FIDELITY CHARITABLE, https://www.fidelitycharitable.org/giving-account/

donor gets a full fair market value deduction based on an appraisal,[28] whereas the DAF sponsor incurs the costs of selling and managing the asset—making less of the donation available for distribution from the DAF.[29]

Until recently, DAFs were a relatively unknown fundraising tool used by community foundations. Community foundations are unique public charities that raise and pool funds from geographically based communities for the benefit of those communities. Community foundations pioneered DAFs in the early twentieth century to attract donors and keep them involved in the foundation's mission through the donor advice feature.[30]

Today, however, the largest DAF sponsors are affiliated with financial investment firms, such as Fidelity Charitable, Schwab Charitable, and Vanguard Charitable. These commercially affiliated DAF sponsors copied the community foundation model for their DAFs but dispensed with the mission component. They do not purport to serve a community or provide meaningful guidance for donor grantmaking. These sponsors, rather, exist almost as pure intermediaries—raising funds and later sending them off to working charities at the donor's prompt. Commercially affiliated DAF sponsors manage thousands of donor accounts and top the charts in charitable fundraising each year.[31]

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what-you-can-donate.html [https://perma.cc/UF73-AEHX]. Fidelity Charitable's website devotes a page to "[w]hat you can donate," noting that assets including private equity, hedge fund interests, private company S-corp stock, restricted stock, life insurance, bitcoin and other cryptocurrency, and oil and gas royalty interests, among others, can be donated. *See What You Can Donate*, *supra*.

[28] I.R.C. § 170(f)(8). Appraisals of hard-to-value assets, however, are imprecise, prone to overvaluation, and difficult to challenge. Roger Colinvaux, *Charitable Contributions of Property: A Broken System Reimagined*, 50 HARV. J. ON LEGIS. 263, 282–89 (2013).

[29] Because the deduction is based on the fair market value of the property, the costs of sale are deductible by the donor. By contrast, a complex asset donation to a private foundation would provide a tax deduction of only the donor's cost basis (meaning the appreciation cannot be deducted). I.R.C. § 170(e)(1)(B)(ii).

[30] *See* Lila Corwin Berman, *Donor Advised Funds in Historical Perspective*, 2015 B.C. L. SCH. F. ON PHILANTHROPY & PUB. GOOD 5, 13 (discussing the first DAF founded in 1931 and its unique advisory features).

[31] Drew Lindsay, Peter Olsen-Phillips & Eden Stiffman, *Fidelity Charitable Pushes United Way Out of Top Place in Ranking of the 400 U.S. Charities That Raise the Most*, CHRON. PHILANTHROPY (Oct. 27, 2016), https://www.philanthropy.com/article/fidelity-charitable-pushes-united-way-out-of-top-place-in-ranking-of-the-400-u-s-charities-that-raise-the-most/ [https://perma.cc/56S8-VGJR] (noting that after only twenty-five years, Fidelity Charitable "rapidly ascended over legacy organizations like the Salvation Army ([ranked] No. 6), the American Red Cross ([ranked] No. 31), and Harvard University ([ranked] No. 14)"). In 2016, Fidelity Charitable overtook the United Way as top charitable fundraiser in the United States. *Id*. Just two years later, Fidelity Charitable widened the gap, raising more than twice as much as United Way. Drew Lindsay, *A "Lost Decade"?*, CHRON. PHILANTHROPY (Oct. 30, 2018), https://www.philanthropy.com/article/chronicle-data-exclusive-americas-favorite-charities/ [https://perma.cc/MGV5-9YL8] (reporting that Fidelity Charitable raised $6.8 billion to United Way's $3.2 billion). Directors at the Program on Inequality and the Common Good at the Institute for Policy Studies and researchers with the IPS Charity Reform Initiative found that DAF sponsors in 2020 were six of the seven top fundraisers, with Fidelity Charitable leading the way at $10.7 billion, more than double the amount raised by its nearest competitor, the National Philanthropic Trust. COLLINS & FLANNERY, *supra* note 4, at 18.

These new DAFs have consistently generated controversy. When the commercially affiliated DAFs arose in the 1990s, there were serious concerns that these DAF sponsors conferred improper private benefits on the affiliated for-profit companies and were not really charities. Moreover, concerns emerged that donors, through their retained ability to advise grants, did not give up actual legal control and so should not receive a tax deduction.[32] Eventually, the commercial DAF sponsors overcame legal challenges and prevailed both in court and against the IRS, in part by arguing that the advisory privileges of donors were not legal rights to direct fund assets, but mere privileges accorded the donor.[33]

While DAFs quickly grew in popularity, and with essentially no restrictions on where donors could send funds,[34] DAFs became a known vehicle for abuse. The IRS Commissioner testified before Congress that DAFs were a top compliance concern.[35] As a result, in 2006, a Republican controlled Congress established ground rules for DAFs by defining the DAF in the tax code and placing some basic limits on granting activity to avoid the worst abuses.[36] Notably, at that time, there was enough concern about DAFs accumulating assets that the Senate passed an account-based payout requirement on DAFs,[37] which was later removed in favor of ordering a Treasury Department study.[38]

Subsequently, DAFs have boomed, increasing their share of charitable giving by individuals from four to fifteen percent, or one in every seven dollars given.[39] In 2020, "[t]he nearly $48 billion received by donor-advised funds [was] roughly equivalent to the amount of cash and stock raised by the eighty-five biggest [charitable] organizations . . . ."[40] DAF sponsors now control near-

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[32] Colinvaux, *supra* note 22, at 47–48.

[33] I.R.C. § 170(f)(18)(B) (requiring as a condition of the charitable deduction that DAF donors substantiate that the sponsor has "exclusive legal control over the assets contributed").

[34] Before 2006, for example, there was nothing to bar DAF funds going to individuals, who could be related to the donor-advisor.

[35] *See* Letter from Mark W. Everson, Comm'r, Internal Revenue Serv., to Charles E. Grassley, Chairman, U.S. Senate Comm. on Fin. (Mar. 30, 2005), https://www.finance.senate.gov/imo/media/doc/Letter%20from%20Everson.pdf [https://perma.cc/4NK6-5KYC].

[36] STAFF OF JOINT COMM. ON TAX'N, 109TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 109TH CONGRESS 624–44 (Comm. Print 2007). For example, the Secretary of the Treasury may now review the organization and operation of the DAF, and of the supporting organization, with four specific considerations. *Id.* at 627 (detailing the four factors that the Treasury Secretary must consider).

[37] S. 2020, 109th Cong. § 331 (2005).

[38] *See* DEP'T OF THE TREASURY, *supra* note 23 (analyzing the formation and operations of assisting organizations and DAFs).

[39] *See* COLLINS & FLANNERY, *supra* note 4, at 20.

[40] Michael Theis, *Donor-Advised Funds Saw Rapid Growth in 2020*, CHRON. PHILANTHROPY (Nov. 9, 2021), https://www.philanthropy.com/article/donor-advised-funds-saw-rapid-growth-in-2020 [https://perma.cc/8RNK-WGTZ]. In 2017, the four leading DAF sponsors raised more than the top ten working charities combined. Lindsay, *A "Lost Decade"?*, *supra* note 31.

ly $160 billion and show no signs of slowing down.[41] In just three decades, the share of individual giving to DAFs has increased from essentially zero to fifteen percent.[42] At the same time, overall giving has remained relatively constant, hovering at about two percent of disposable personal income.[43] There is no evidence that the DAF boom has increased giving, indicating that DAFs divert contributions that would otherwise go to working charities—thus commanding a greater share of the giving pie.[44]

B. Policy Challenges of DAFs

Although undeniably popular with donors, DAFs present fundamental policy challenges because of the donor's advisory privileges. For the DAF arrangement to work, the DAF sponsor must have formal legal authority over DAF assets. Only with a transfer of ownership from donor to sponsor will the donor be considered to have given up dominion and control as required for a completed, and deductible, gift. Thus, the donor's ability to render advice must be a "privilege" not a right. At the same time, the donor's ability to provide advice operates more like a right than a privilege. Donors expect their advice to be followed and do not expect sponsors to grant their DAF funds without their consent or direction.[45] Any DAF sponsor routinely acting against a donor's wishes would not stay in business long, especially as donors can easily advise funds to move to another sponsor's DAF.[46]

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[41] NAT'L PHILANTHROPIC TR., 2021 REPORT, *supra* note 6, at 12.

[42] The fifteen percent represents the number derived by dividing total giving to DAFs as reported by the National Philanthropic Trust for 2020 ($47.85 billion) by total giving by individuals for 2020 in current dollars as reported by Giving USA ($311.69 billion). NAT'L PHILANTHROPIC TR., 2021 REPORT, *supra* note 6, at 15; GIVING USA, THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2021 at 322 (2022). DAF sponsors that are national in scope account for the bulk of the total, or seventy percent of DAF gifts. NAT'L PHILANTHROPIC TR., 2021 REPORT, *supra* note 6, at 21. The National Philanthropic Trust reported this as 12.7% for 2018 and 2019 and showed a steady increase since its 4.8% figure in 2011. NAT'L PHILANTHROPIC TR., 2020 REPORT, *supra* note 4, at 7. The National Philanthropic Trust did not report the 2020 number in its most recent report.

[43] According to Giving USA, giving as a percentage of disposable personal income was 2% in 1989 and 1.8% in 2021, with a peak of 2.4% in 2005. GIVING USA, *supra* note 42, at 329.

[44] *See* BOS. COLL. L. SCH. F. ON PHILANTHROPY & THE PUB. GOOD, IMPACT OF THE RISE OF COMMERCIAL DONOR-ADVISED FUNDS ON THE CHARITABLE LANDSCAPE 1991–2019, at 6 (May 4, 2021), https://www.bc.edu/content/dam/bc1/schools/law/centers/philanthropy/2021-forum-philanthropy-report-daf-impact.pdf [https://perma.cc/N8AC-HQBT] (estimating that giving to intermediaries has diverted $300 billion dollars from working charities in the past five years).

[45] *See* MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RSCH. SERV., R42595, AN ANALYSIS OF CHARITABLE GIVING AND DONOR ADVISED FUNDS 3 (2012) (noting that DAF donors appear to have "effective control over grants . . . because sponsoring organizations typically follow the donor's advice").

[46] *See* I.R.C. § 4966(c)(2)(C) (stating that federal law permits DAF-to-DAF transfers). For additional discussion, *see infra* notes 133–135 and accompanying text.

The result of the DAF industry's default obedience to advisory privileges is that DAFs resemble distinct charities under the effective control of donors (and indeed are often named for donors). Yet, DAFs are not charities or entities—they are merely financial accounts of the DAF sponsor. As such, DAFs are recognized and regulated at the sponsor level, not at the account level, even though they operate on an account-by-account basis. DAF sponsors report their accounts in the aggregate.[47] Sponsors' tax exemptions thus shelter each DAF from view, making them opaque vehicles unaccountable to the public or the IRS. Some DAFs may make many grants; others may do nothing.

Additionally, DAF sponsors qualify as public charities rather than private foundations—which no individual DAF standing alone would.[48] Thus, DAF sponsors generally receive the same tax and regulatory benefits as regular operating charities, like schools, hospitals, museums, churches, and human service organizations. Sponsors, however, clearly are different from these types of working public charities. As intermediaries, sponsors do not perform charitable work directly but instead fund working charities through DAFs. Unlike contributions to working charities, which inure directly to the benefit of society, DAF contributions are in suspension or limbo. Until contributions are distributed from the DAF, they do not count toward any working charity's endowment, are not available for use by any working charity, and are not reported on any working charity's balance sheet. Funds in a DAF make money for those who manage the assets but provide no benefit to the public while in the DAF.[49]

Further, DAFs are not designed to optimize distributions. Donors gravitate toward DAFs not because the DAF has an appealing charitable mission but because it offers financial and other benefits to the donor and the donor's family. Thus, DAFs inherently facilitate donor convenience and benefits more than direct charitable giving. Moreover, because DAF funds remain under the

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[47] *See* I.R.S. Form 990 Schedule D, Supplemental Financial Statements (OMB No. 1545-0047), pt. I (2022) (requiring the DAF sponsor to report the aggregate value of contributions and grants).

[48] Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 FLA. TAX REV. 1, 32–33 (2011). A standalone DAF account funded by one person or a family would qualify as a private foundation because it would lack sufficient public support. *See* I.R.C. § 509. Although not discussed in this article, one aspect of the ACE Act focuses on how charities that receive support from a DAF treat that support for purposes of qualifying as either a public charity or a private foundation. The ACE Act, specifically, contains a provision that treats support from DAFs as coming from a single person (as opposed to a public charity) unless the DAF sponsor identifies the donor to the charity. ACE Act, S. 1981, 117th Cong. § 6 (2021). This reform essentially prevents individuals from using DAFs to set up their own controlled public charities by funding the charity through the DAF instead of with direct support. *See also* Brunson, *supra* note 22, at 280–86 (arguing that each DAF should be required to satisfy the public support tests independent of the sponsor).

[49] *See* Lewis B. Cullman & Ray Madoff, *The Undermining of American Charity*, N.Y. REV. BOOKS (July 14, 2016), https://www.nybooks.com/articles/2016/07/14/the-undermining-of-american-charity/ [https://perma.cc/KQ7N-ZYUR] (discussing how DAF donors are encouraged to use these accounts to create a "charitable legacy," which only buttresses donors' desire to keep rather than disperse funds).

effective control of the donor, DAFs constitute part of the donor's sense of wealth and net worth—as the donor's charitable fund. A donor with a large DAF balance effectively has charitable resources at their disposal. Sometimes called an endowment effect,[50] this buildup of wealth in a DAF can discourage donors from making grants, as that would reduce their wealth. Because DAF sponsors stand to lose fees when DAF balances decrease, DAF sponsors also have an interest in accumulation.

In short, DAF donations are attractive to donors and DAF sponsors, but functionally, without more, they do not benefit the public. Although the money is dedicated irrevocably to charity, no working charity can actually use the funds. At the same time, however, donors have already received the tax incentive to give, even though the gift in substance is incomplete until there is a distribution. Often all that occurs upon a DAF gift is that a donor moves money from one investment account to another—for example, from a donor's Fidelity Investment account to the same donor's Fidelity Charitable account, with a tax deduction extracted along the way. The public's only gain is a donor's commitment to pay a working charity in the indeterminate future.

II. Private Foundations and the Delayed Benefit Problem

As intermediaries under the control of donors, private foundations provide a historic analogue to DAFs. This Part explains how Congress previously identified and responded to a "delayed benefit problem."[51] In doing so, Congress underscored a fundamental policy concern with linking the timing of tax benefits for donors with the provision of benefits to working charities. Section A of this Part discusses the delayed benefit problem with respect to private foundations.[52] Section B discusses the ways in which Congress has addressed this concern.[53] Section C describes how the delayed benefit problem presents in DAFs.[54]

A. Delayed Benefits in Private Foundations

Private foundations have long dominated the philanthropic landscape. Typically, wealthy individuals found, fund, and take control of private foundations. Through this control, these individuals decide how and when to spend foundation assets. Similar to DAFs, foundations are intermediaries that achieve

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[50] *Id.* (quoting James Andreoni, *Warm Glow and Donor-Advised Funds: Insights from Behavioral Economics*, 2015 B.C. L. Sch. F. on Philanthropy & Pub. Good 35).

[51] *See infra* notes 51–90 and accompanying text.

[52] *See infra* notes 55–64 and accompanying text.

[53] *See infra* notes 65–81 and accompanying text.

[54] *See infra* notes 82–90 and accompanying text.

their mission by making grants to others and therefore differ from working charities.[55]

In part because of their intermediary role, foundations gained full acceptance slowly. Early on, the IRS considered whether a foundation's main activities, raising money and then making grants, furthered a charitable purpose. Ultimately, the IRS concluded (in a one-paragraph ruling) that they did.[56] Nevertheless, foundations became a frequent target of congressional hearings, government reports,[57] and legislation—including directed to their unreasonable accumulation of funds.[58] Eventually, the Tax Reform Act of 1969 codified private foundations. This forged a fundamental distinction between public charities and private foundations in the law of charity, and foundations faced additional requirements and sanctions.[59]

There were—and are—several reasons Congress regulated foundations, but two related concerns stand out. First, donor control of foundation assets raises the specter (and reality) of abuse and self-dealing. Donors might pay themselves and family members excessive compensation and enrich related parties through foundation grants—all with tax-deductible money. Furthermore, donor control introduces a tension between the charitable purposes of the foundation and the private interests of the donor.[60] Because the donor once owned the foundation's assets, the donor (or the donor's heirs) might continue to view the funds as personal property and not manage them for the public interest.[61]

Second, foundations inherently give rise to what the Treasury Department identified in the 1960s as a "major problem," namely a "delay in benefit to charity."[62] Because the foundation is an intermediary, gifts to foundations necessarily cause a delay in the vesting of the charitable benefit. The delay occurs

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[55] The Internal Revenue Code refers to these types of private foundations as "nonoperating." I.R.C. § 4940(d)(2); *see id.* § 4942(a)(1) (providing exemptions for "operating foundations" from the generally applicable private foundation investment income tax and the payout requirement but not for "nonoperating" foundations).

[56] *See* Rev. Rul. 67-149, 1967-1 C.B. 133 (updating a 1924 ruling to provide that an organization that "carries on no operations other than to receive contributions and incidental investment income" is exempt but must also "make distributions of income" to others and should "not accumulate its investment income").

[57] Thomas A. Troyer, *The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings*, 27 EXEMPT ORG. TAX REV. 52, 52 (2000).

[58] *See, e.g.*, Revenue Act of 1950, ch. 994, § 331, 64 Stat. 906, 957; S. COMM. ON FIN., 89TH CONG., TREASURY DEPARTMENT REPORT ON PRIVATE FOUNDATIONS 25–26 (Comm. Print 1965) [hereinafter 1965 TREASURY REPORT] (noting, for example, that many private foundations accumulate assets and proposing that they be required to distribute net income).

[59] I.R.C. §§ 4940–4945; Troyer, *supra* note 57, at 53–59.

[60] 1965 TREASURY REPORT, *supra note* 58, at 15–16.

[61] The private foundation excise taxes on excess business holdings and imprudent investments reflect these concerns. *See* I.R.C. §§ 4943–4944.

[62] 1965 TREASURY REPORT, *supra* note 58, at 15, 23.

between when the donor makes a contribution (and takes a deduction) and the distribution of the funds to a working charity or other charitable beneficiary.[63] Yet, as the Treasury Department and Congress recognized, the tax benefits mainly exist to provide an immediate benefit to charity.[64] Gifts to intermediaries like foundations or, importantly, DAFs, directly frustrate this goal by delaying the charitable benefit. Donor control of foundation assets exacerbates the problem as it increases the risk that donors will accumulate funds, building a form of personal wealth and power through their foundation rather than paying out for charitable benefit.

By contrast, gifts to working charities do not involve a delay in charitable benefit. Because working charities engage directly in charitable work, the charity may use donated funds towards their mission immediately upon contribution. In other words, the charitable benefit vests upon contribution. Further, donors typically do not control working charities, leading to greater independence in the charity's use of donated funds and diminished concerns about accumulations.

B. Addressing Delayed Benefits in Foundations

Congress addressed the delayed benefit problem in foundations in two ways. Subsection One discusses how Congress discouraged contributions to foundations relative to working charities through less favorable charitable deduction rules for donors.[65] Subsection Two discusses Congress's attempt to curb delayed benefits by imposing an annual charitable payout requirement on foundations.[66]

1. Reduced Tax Incentives for Those Who Give to Foundations

First, Congress prioritized working charities over foundations for purposes of the charitable deduction. Initially, all charities were treated the same from a donor's perspective—with identical tax benefits regardless of the charity type. When Congress wanted to incentivize more contributions, however, it gave precedence to working charities like schools, churches, hospitals, and human services and other publicly supported organizations over foundations. Donors to these working charities were allowed an "extra deduction" in the form of a higher cap on charitable gifts as a percentage of the donor's income.[67]

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[63] *Id.* at 24.
[64] *See infra* notes 76–81 and accompanying text.
[65] *See infra* notes 67–74 and accompanying text.
[66] *See infra* notes 75–81 and accompanying text.
[67] Revenue Act of 1964, Pub. L. No. 88-272, § 209, 78 Stat. 19, 43 (codified as amended in scattered sections of 26 U.S.C.); *see* James J. Fishman, *The Private Foundation Rules at Fifty: How Did*

In explaining this preference, Congress emphasized the delayed benefit problem. The Senate Finance Committee stated, "[F]requently[,] contributions to foundations do not find their way into operating philanthropic endeavors for extended periods of time."[68] Thus, "[t]he extra [ten percent] deduction is intended to encourage immediately spendable receipts of contributions for charitable organizations."[69] The Treasury Department agreed, noting that the increased percentage limitation should go only to those charities that "actively engage in charitable operations or which pass funds on to active charities without undue delay."[70]

In other words, Congress recognized that foundations differed from working charities, were not active, and did not have instantly dispensable receipts. Rather, gifts to foundations necessarily caused a delay in benefit to charity and therefore should not receive priority. Gifts to public charities, by contrast, did not raise the same concern because there was "no question that the bulk of the funds involved [in public charity giving], within a reasonable period of time, are devoted to . . . charitable and philanthropic purposes."[71] Public charity giving therefore warranted greater tax benefits due to the nature of a public charity as a working charity.

Furthermore, Congress disfavored foundations with respect to noncash gifts. Donors of noncash property to public charities may receive a higher percentage limitation than for the same gift to a foundation and, if the asset has appreciated in value, a significantly larger deduction.[72] For example, for appreciated assets, the donor may deduct the full fair market value of the asset if donated to a public charity but only the donor's cost basis and none of the appreciation if donated to a private foundation.[73] Donors therefore have essentially no incentive to give appreciated complex assets to a private foundation.[74]

We Get Them and Do They Meet Current Needs?, 17 PITT. TAX REV. 247, 256–57 (2020) (noting that Congress bars private foundations from receiving deductible charitable donations). As the rule now stands, cash gifts to a public charity are allowed up to sixty percent of an individual taxpayer's "contribution base" (roughly, adjusted gross income), whereas cash gifts to a private foundation are limited to thirty percent of the contribution base. I.R.C. § 170(b)(1)(B)(i), (b)(1)(G)(i).

[68] S. REP. NO. 88-830, at 60 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 1673, 1732. The House Ways & Means Committee report contained similar language. *See* H.R. REP. NO. 88-749, at 53 (1963), *as reprinted in* 1964 U.S.C.C.A.N. 1313, 1361.

[69] S. REP. NO. 88-830, at 58.

[70] 1965 TREASURY REPORT, *supra* note 58, at 11.

[71] S. REP. NO. 88-830, at 60.

[72] I.R.C. § 170(b)(1)(D), (e)(1)(B)(ii) (providing for lower percentage limitations and no deduction for long-term capital gain regarding gifts to private foundations).

[73] *Id.* § 170(e)(1)(B)(ii) (disallowing deduction for long-term capital gain for gifts of complex assets to private foundations).

[74] Although not discussed in this article, the ACE Act contains important reforms for donations of complex assets (those not publicly traded) to DAFs. Under the Act, the amount of the charitable deduction for complex assets is tied to the amount made available for distribution from the DAF instead of the appraised value. DAF sponsors typically sell complex assets and deposit the proceeds into the

The below chart summarizes the key the differences in treatment between public charity and private foundation giving relating to the charitable deduction.

Rule/Type of Charity	Working (Public) Charity	Private Foundation
Cash Gifts	Up to 60% of donor contribution base	Up to 30% of donor contribution base
Noncash Gifts	Up to 30% of donor contribution base	Up to 20% of donor contribution base
Amount of deduction for complex assets (those not publicly traded) that have appreciated in value	Fair market value; donors deduct the appreciation	Donor's cost basis; donors do not deduct the appreciation

2. Payout Required for Foundations

Additionally, Congress addressed the delay in benefit problem in 1969 by requiring that foundations, but not public charities, make an annual payout for charitable benefit.[75] The payout obligation followed a recommendation by the Treasury Department in its 1965 report on private foundations. In the report, the Treasury Department described the purpose of the charitable tax benefits as "to stimulate and foster the active pursuit of charitable ends,"[76] a goal that "can be thwarted when the benefits are too long delayed."[77] Foundations, the Treasury Department said, by their nature "can occasion unwarranted delay in benefits to charity . . . ."[78] Thus, for private foundations to be worthy of tax exemption and eligible to receive tax-deductible contributions, there must be some guarantee of an actual benefit to charity, not merely an accumulation of money.

In the legislative history explaining the payout requirement, the Congressional Joint Committee on Taxation explained that with a foundation gift, "[although] the donor may have received substantial tax benefits from his contribution currently, charity may have received absolutely no current benefit."[79] The Joint Committee thus not only invoked a delayed benefit rationale for the payout, but also confirmed that intermediaries are not the same as working

donor's DAF. There is no reason to base the charitable deduction on a speculative valuation or allow donors to deduct the administrative costs the sponsor incurs by the sponsor from the sale. The ACE Act sensibly ties the amount of the charitable deduction to the benefit to charity.

[75] I.R.C. § 4942. Congress set the payout as a percentage of the foundation's investment assets at a level intended to be consistent with a foundation's perpetual life. Troyer, *supra* note 57, at 57. The payout rate has been at five percent for decades. I.R.C. § 4942(e)(1).

[76] 1965 TREASURY REPORT, *supra* note 58, at 10.

[77] *Id.* at 6.

[78] *Id.* at 13.

[79] STAFF OF JOINT COMM. ON INTERNAL REVENUE TAX'N, 91ST CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, at 36 (Comm. Print 1970).

charities. The statement that "*charity* may have received absolutely no current benefit"[80] from foundation-giving acknowledged that even though foundations technically are charities, giving to them is not the same as actually conveying a charitable benefit. The point of the charitable tax benefits therefore is not just to encourage donors to give to a legally recognized 501(c)(3) charity, or to commit funds irrevocably to a charitable purpose (both of which are true with a private foundation gift).[81] Rather, the point is to deliver an actual benefit, which is better achieved with gifts to a working charity instead of an intermediary like a foundation.

In short, the private foundation payout requirement sought to ensure that foundations, at a minimum, would direct a portion of their assets annually to a working charitable beneficiary so as to avoid an unreasonable delay in charitable benefit.

C. Delayed Benefits Today

Today, the growing dominance of DAFs in the philanthropic infrastructure signals the rise of a new form of institutionalized delay in the benefit to charity and requires a policy response. Like foundations, DAF sponsors are intermediaries between the donor and the working charity. The charitable benefits from DAF gifts do not vest immediately, but only after a distribution from the DAF. Donor advisory privileges have no time limit, and there are no incentives or requirements for DAFs ever to pay out funds over which donors have effective control. DAFs normalize a practice of deduct-now-but-give-later, which treats deferred giving as the equivalent of a completed gift for current benefit.

Further, the delayed benefit problem DAFs engender is facilitating growing accumulations of charitable wealth, by the wealthiest. The very ease and convenience of a establishing a DAF, the lack of commitment to a cause, and the absence of time limits on advisory privileges, is a recipe for accumulation. DAFs hold $160 billion (and growing) of taxpayer-subsidized delayed benefit funds, wealth that is earmarked for charity but under the effective control of donors.[82] Fundamentally, DAFs privilege donors, who are predominantly the wealthiest in society, creating a new and growing charitable wealth gap that

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[80] *Id*. (emphasis added).

[81] *See* Ray D. Madoff, *Considering Alternatives: Are There Methods Other Than the Estate and Gift Tax That Could Better Address Problems Associated with Wealth Concentration?*, 57 B.C. L. REV. 883, 890 (2016) (discussing how the present income, estate, and gift tax structures treat charitable contributions to 501(c)(3) corporations favorably).

[82] Chuck Collins & Helen Flannery, *Visualize This: Donor-Advised Funds as Largest Recipients of Charitable Gifts*, INEQUALITY (June 9, 2022), https://inequality.org/great-divide/visualize-donor-advised-funds/ [https://perma.cc/WLS9-6STJ].

also has racial implications.[83] So, although DAFs may "democratize philanthropy" by allowing charitable accumulations within a public charity instead of a private foundation,[84] the result is that tax benefits are used to favor primarily wealthy donors above charities.

In addition, although Congress provided a framework in 1969 to address the delayed benefit problem in foundations, history has demonstrated that foundations tend to hover around the statutory minimum five percent payout,[85] and they have no incentive to pay more. Moreover, foundations are able to satisfy their payout without any actual contribution to a working charity. Foundation transfers to DAFs count towards the payout[86] even though the foundation retains advisory privileges and faces no further obligation to advise the funds from the DAF. These transfers are common[87] and yet are nothing more than shifting funds from one charitable intermediary to another, further delaying charitable benefit. Foundations may also consider compensation and payments to related parties, such as family members and donors for example, as charitable payouts[88] even though this confers clearly private benefits.

In its report on private foundations in 1965, the Treasury Department noted that because the federal government:

> in substantial measure, finance[s] private charity, it is altogether proper—indeed, it is imperative—for Congress and the Treasury Department periodically to reexamine the character of these laws and their impact upon the persons to which they apply to [e]nsure that they do, in fact, promote the values associated with philanthropy and that they do not afford scope for abuse or unwarranted private advantage.[89]

Today, fifty-three years since the Tax Reform Act of 1969, the intermediaries of DAFs and private foundations hold approximately 1.26 *trillion* dollars in assets—all representing delayed benefit funds.[90] It is time once again to reex-

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[83] *See Racial Disparities and the Income Tax System*, *supra* note 7 (finding that the charitable deduction is taken mostly by taxpayers with high incomes who "are significantly less likely to be people of color").

[84] Benjamin Soskis, *What We Talk About When We Talk About Democratizing Philanthropy*, URB. INST. (June 2017), https://www.urban.org/policy-centers/center-nonprofits-and-philanthropy/projects/what-we-talk-about-when-we-talk-about-democratizing-philanthropy [https://perma.cc/KPN9-M89N].

[85] *See* Fishman, *supra* note 67, at 285.

[86] The payout is phrased in terms of "qualifying distributions," which include grants to accomplish a charitable purpose, and in turn includes grants to a DAF sponsoring organization. I.R.C. § 4942(g)(1).

[87] *See infra* note 203 and accompanying text (discussing the amount of money private foundations provide to DAFs).

[88] "Qualifying distributions" specifically include "reasonable and necessary administrative expenses . . . ." I.R.C. § 4942(g)(1)(A).

[89] 1965 TREASURY REPORT, *supra* note 58, at 1.

[90] NAT'L PHILANTHROPIC TR., 2021 REPORT, *supra* note 6, at 12.

amine the charitable giving incentives in light of their purpose to generate current benefits—not only to encourage donors to give, but also to foster the flow of funds directly to working charities and their beneficiaries.

III. Imposing Time Limits on DAF Advisory Privileges

This Part begins with a discussion of the ACE Act, which follows the historic precedent of the Tax Reform Act of 1969 to tackle the delayed benefit problem in DAFs, and to a lesser degree in foundations.[91] Section A of this Part explains the general rule of the ACE Act as applied to DAFs.[92] Section B assesses the panoply of arguments against DAF reform, most specifically arguments against time limits to advisory privileges.[93] Section C further discusses the ACE Act's exception for certain DAFs at mission-driven sponsors.[94]

A. ACE Act General Rule: Time Limits on Advisory Privileges

The ACE Act's main reform is to impose a time limit on advisory privileges for DAF contributions. The Act would require a donor's advisory privileges for a contribution (including earnings on the contribution) to expire after either fifteen or fifty years.[95] This means that a donor would have fifteen or fifty years to provide advice and complete the gift as opposed to no time limit, as the law currently stands.

The duration of advisory privileges in turn would affect the timing of and requirements for the donor's charitable deduction. If the DAF limits advisory privileges to fifteen years, then a charitable income tax deduction would be allowed at the time of the contribution, as under current law.[96] (Other tax benefits, including the exclusion from capital gains taxes and avoidance of estate tax would be unaffected.) The donor would have to designate a charity to receive any funds that were not advised within the fifteen-year period.[97] DAF sponsors could then honor the donor's intent by distributing the funds to the donor's named charity (which donors would be free to change).

If the DAF allowed advisory privileges to last for up to fifty years, then the charitable deduction would be delayed until the funds were released from the DAF. This would align the timing of the tax incentive with the making of distributions from the DAF. With a fifty-year time limit, the amount of the chari-

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[91] *See infra* notes 91–190 and accompanying text.

[92] *See infra* notes 95–102 and accompanying text.

[93] *See infra* notes 103–176 and accompanying text.

[94] *See infra* notes 177–190 and accompanying text.

[95] ACE Act, S. 1981, 117th Cong. § 3(a) (2021) (proposing the addition of § 4967A(a)–(b) to the Internal Revenue Code).

[96] *Id*. Under the bill, fifteen-year DAFs are termed "[q]ualified donor advised fund[s]." *Id.* § 2(a).

[97] *Id*. § 2(b) (proposing to add § 170(f)(18)(C) to the Internal Revenue Code, which would require this designation).

table deduction would be the amount the donor advised from the DAF, including any earnings on the contribution.[98] Thus, under the fifty-year rule a donor would be able to deduct any growth that accrued to the contribution while it was in the DAF. For example, if a donor contributed $10,000 to a DAF in Year One and advised a distribution of the contribution to a charity in Year Thirty (when the contribution was worth $60,000), the donor would be allowed a charitable deduction in Year Thirty equal to $60,000. Only the original donor would be allowed a deduction.

If a DAF sponsor allowed advisory privileges on a contribution (and related earnings) to extend beyond the fifteen- or fifty-year periods, the sponsor would be subject to an excise tax of fifty percent of any amounts that remained subject to donor advice.[99] For all practical purposes, DAF sponsors would never pay the excise tax. Avoiding the tax would just require the sponsor to ensure that a donor's advisory privileges for a contribution expire on time.

The ACE Act considers a donor's advisory privileges expired when there is a "qualifying distribution" from the DAF. A qualifying distribution is a distribution to any organization eligible to receive deductible contributions, but not including distributions to other intermediaries, such as a private foundation, another DAF, or a supporting organization.[100] A qualifying distribution includes a release of advisory privileges, meaning that the funds may remain with the DAF sponsor's funds but would no longer be donor advised.[101] There is no requirement in the ACE Act for DAF sponsors affirmatively to make distributions.

In short, the ACE Act would give donors a choice: take an upfront income tax charitable deduction and provide advice within fifteen years or delay that deduction for up to fifty years until ready to provide advice. In both cases, donors would remain eligible for capital gains and estate tax benefits from the contribution.[102] The ACE Act would not force distributions from the DAF sponsor or impose a payout requirement. The ACE Act simply would place a time limit on a donor's advisory privileges.

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[98] *Id.* § 2(a) (proposing a new § 170(f)(19)(A)(i)(III) of the Internal Revenue Code for this purpose). As with the fifteen-year time limit, the exclusion from capital gains taxes and avoidance of estate tax remains fully available.

[99] *Id.* § 3 (proposing to impose this tax by adding § 4967A(a) to the Internal Revenue Code).

[100] *Id.* § 2 (defining this term by adding § 170(f)(19)(A)(ii) to the Internal Revenue Code). A supporting organization is a special kind of public charity intermediary that exists to support designated public charities. *See* I.R.C. § 509(f)(3).

[101] This is because a qualifying distribution includes a distribution to the DAF sponsor when the funds are not in a DAF. Releasing advisory privileges thus is the same as distributing the funds to the DAF sponsor, which already owns the funds.

[102] Substantiation rules also apply. Just as in current law, the taxpayer must obtain a contemporaneous written acknowledgement from the DAF sponsor with information about the distribution. ACE Act, S. 1981, § 2(a) (proposing a new section of the Internal Revenue Code, § 170(f)(19)(C)).

B. Assessing Arguments Against Time Limits

The ACE Act's general approach of placing time limits on DAF contributions squarely targets the delayed benefit problem. Its goal is to convey money to working charities faster, consistent with the purpose of the tax benefits. With fifteen or fifty years for donors to complete their gifts, the ACE Act would not eliminate the delayed benefit problem. It would, however, provide minimal assurances that donated funds would be made available for charitable use within a set period of time after donation.

Although the ACE Act's approach has the support of a wide variety of charitable stakeholders,[103] it has also attracted organized opposition.[104] The arguments advanced against DAF reform are varied, but most rest on the premise that the status quo is acceptable.[105] Under this view, DAFs and foundations make sufficient grants, and despite accumulations in DAFs, donors nonetheless have committed their funds for charitable purposes. That is, eventually there will be a benefit. Other arguments against reform include assertions that reform would harm charitable giving and introduce new burdens on charities, that the timing of grants within a DAF does not matter and so does not require regulation, and that limiting advisory privileges is tantamount to targeting DAFs and to attacking philanthropic freedom. This Section assesses these and other arguments against time limits on advisory privileges, including the alternative suggestion that DAFs be subject to the private foundation five-percent payout.

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[103] This includes leading public charity member organizations, public charities, private foundations, community foundations, philanthropists, academics, and policy experts. Many supporters of reform are listed on the website of the Initiative to Accelerate Charitable Giving. *See Our Members*, *supra* note 10 (describing the many individuals and entities signed on to support reform). There are also advocates for more assertive versions of DAF reform. *See* Chuck Collins & Alan S. Davis, *A Proposal to Accelerate Giving Won't Even Get Philanthropy Out of Park*, INSIDE PHILANTHROPY (Dec. 17, 2020), https://www.insidephilanthropy.com/home/2020/12/17/a-proposal-to-accelerate-giving-wont-even-get-philanthropy-out-of-park [https://perma.cc/Z5Q8-EVCV] (arguing that the Initiative to Accelerate Charitable Giving proposals do not appropriately fix the problems related to philanthropy).

[104] As described *infra*, some organizations opposed to the ACE Act include the Philanthropy Roundtable, the Community Foundation Awareness Initiative, the Jewish Federations, and the Council on Foundations. *Infra* note 118 (outlining some of the objections to the ACE Act these groups have expressed).

[105] *See* Howard Husock, *The Pandemic and a "Rainy Day Fund" for American Charity*, THE HILL (Nov. 25, 2020), https://thehill.com/opinion/finance/527022-the-pandemic-and-a-rainy-day-fund-for-american-charity/ [https://perma.cc/LB5V-L956] (stating that time limits on advisory privileges "should be thought of as a solution to a problem that doesn't actually exist"); PHILANTHROPY ROUNDTABLE, WHAT'S IN THE KING/GRASSLEY ACE ACT? (2021), https://www.philanthropyroundtable.org/wp-content/uploads/2022/02/King-Grassley-Ace-Act-One-Pager.pdf [https://perma.cc/RJF6-3WNH] (stating that "S. 1981 is a solution in search of a problem"); *Statement on the King-Grassley DAF Reform Bill*, CMTY. FOUND. AWARENESS INITIATIVE (June 10, 2021), https://www.commfoundations.com/blog/2021/6/10/statement-on-the-king-grassley-daf-reform-bill [https://perma.cc/5E9G-MY9P] (stating that the ACE Act represents "solutions in search of problems").

Subsection One responds to the argument that DAFs are sufficiently paying out money to working charities.[106] Subsection Two addresses the argument that DAFs are acceptable because they will eventually benefit charities.[107] Subsection Three explains misleading payout information vis-à-vis private foundations.[108] Subsection Four responds to the argument that DAFs should be treated as private foundations.[109] Subsection Five argues that because DAFs are intermediaries, the timing of grants from DAFs is important.[110] Subsection Six considers critics' concerns about philanthropic freedom.[111] Similarly, Subsection Seven details the argument that DAFs should be subject to the same rules as public charities.[112] Subsection Eight explains that the imposition of time limits on advisory privileges will not deter charitable giving.[113] Subsection Nine explores the criticism that this new approach will place an administrative burden on DAF sponsors.[114] Subsection Ten discusses the partisan label applied to DAF reform.[115]

1. DAFs Make Billions in Grants in Each Year

A main argument against DAF reform is that DAFs pay out billions of dollars a year to working charities.[116] For example, Fidelity Charitable's annual report for 2021 conveyed that donors collectively made $9.1 billion in grants.[117] DAFs collectively paid out $34.67 billion in 2020. DAF proponents cite this as proof of donor generosity and successful impact.[118]

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[106] *See infra* notes 116–120 and accompanying text.
[107] *See infra* notes 121–123 and accompanying text.
[108] *See infra* notes 124–135 and accompanying text.
[109] *See infra* notes 136–142 and accompanying text.
[110] *See infra* notes 143–148 and accompanying text.
[111] *See infra* notes 149–156 and accompanying text.
[112] *See infra* notes 157–164 and accompanying text.
[113] *See infra* notes 165–169 and accompanying text.
[114] *See infra* notes 170–172 and accompanying text.
[115] *See infra* notes 173–176 and accompanying text.
[116] *See, e.g.*, NAT'L PHILANTHROPIC TR., 2021 REPORT, *supra* note 6, at 10 (reporting that DAFs paid out more than $34 billion in 2020).
[117] FIDELITY CHARITABLE, *supra* note 26, at 4. Notably absent from the forty-page report, however, is any mention of the total funds raised in 2021 or the aggregate value of all accounts held. *See id.*
[118] *See, e.g.*, *The Roundtable Leads Coalition Letter Asking Congress to Oppose New Mandates on Charitable Giving*, PHILANTHROPY ROUNDTABLE (Jan. 27, 2021), https://www.philanthropyroundtable.org/the-roundtable-leads-coalition-letter-asking-congress-to-oppose-new-mandates-on-charitable-giving/ [https://perma.cc/RPH9-2R9E] [hereinafter *Philanthropy Roundtable Letter*] ("Charity helps us come together as a nation, overcome partisan divides, and face serious societal challenges, both now and in the future. The current COVID-19 pandemic is a case in point: [c]haritable giving was up [7.5%] during the first half of 2020, and major donor-advised fund providers have seen both the value and number of charitable grants rise by about [50%]."); Letter from the Jewish Federations of North America and the Community Foundation Public Awareness Initiative to Members of Congress (Aug. 2, 2021) [hereinafter Jewish Federations Letter], https://www.jewish

Citing total outflows, however, ignores the issue of delayed benefits. The amount of money flowing from DAFs is an essentially meaningless number without knowing how much is available to be distributed from DAFs. It also ignores the accumulation and warehousing of funds and the delay in benefit to charity that ungranted funds pose.[119] In fact, DAFs controlled $32 billion in 2007, $70 billion in 2014, $142 billion in 2019, and $160 billion in 2020.[120] Thus, even while DAFs grant funds, they concurrently accumulate and warehouse many times what they grant. Further, the trend is toward more—not less—giving to DAFs, and more delayed benefits and accumulations instead of current giving. Approximately one in every $7 given by individuals now goes to a DAF, a trend that increases each year. Unless the money comes out in the same year as it goes in, the gift is deferred to the future, and not available for use.

Thus, contrary to the purpose of the giving incentives, DAFs urge the massive and growing accumulation of wealth inside DAFs, which is unavailable for use by working charities and remains under the effective control of donors. Funds are being warehoused in DAFs to the tune of billions of dollars each year.

To put the problem another way, assume for simplicity that in a given year five donors gave $2,000 each to one of five different DAFs. One donor advised a grant of $2,000 to a working charity whereas the other four donors advised no grants. The result is a current deduction of $10,000 for $2,000 of current benefit.

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publicaffairs.org/wp-content/uploads/sites/10/2015/09/DAF-Support-Coalition-Letter-for-Congress-final.pdf [https://perma.cc/ZV2D-CPYN] (citing $200 million in pandemic-related grants as proof that DAFs do not warehouse funds).

[119] One term sometimes used in this context is the "flow rate," which compares the contributions going into DAFs with the flows coming out of DAFs in a given year. H. Daniel Heist, Understanding Donor-Advised Funds: The Behavioral Economics, Macroeconomics, and Public Policies Relating to an Emerging Trend in Philanthropy 50–51 (2019) (Ph.D. dissertation, University of Pennsylvania), https://repository.upenn.edu/edissertations/3346/ [https://perma.cc/N6ND-DU85] (describing the flow rate as the ratio of grants to contributions in the same year and the median flow rate for 2015 as eighty-seven percent); *Statement on the King-Grassley DAF Reform Bill*, *supra* note 105 (claiming that if eighty community foundations in the aggregate grant more in one year than was contributed in a prior year this "disproves the notion that funds are sitting idle"). Flow rate, however, is not a helpful measure because it ignores the amount of funds already in DAFs. Assume, for example, that DAFs in total held $100 billion, and in a given year, $1 billion was contributed to DAFs and $1 billion was granted from DAFs. The flow rate would be 100% but the aggregate payout would be 1%, rendering flow rate meaningless for determining whether DAFs are warehousing funds. *See* James Andreoni & Ray Madoff, *Calculating DAF Payout and What We Learn When We Do It Correctly* 9 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27888, 2020), https://www.nber.org/system/files/working_papers/w27888/w27888.pdf [https://perma.cc/7XZ7-AL7S] (concluding that flow rate as a ratio of grants to contributions "is uninformative for most policy purposes").

[120] Roger Colinvaux, Letter to the Editor, *The Status Quo Is Not Acceptable When It Comes to Donor Advised Funds*, CHRON. PHILANTHROPY (Jan. 31, 2022), https://www.philanthropy.com/blogs/letters-to-the-editor/the-status-quo-is-not-acceptable-when-it-comes-to-donor-advised-funds [https://perma.cc/9ALM-VVSS].

DAFs facilitate a total disconnect between the granting of the tax benefits and the vesting of the charitable benefit. And once the deduction is awarded, without time limits on advisory privileges, there are no further incentives or requirements to ever distribute the funds or achieve the charitable benefit.

In short, as DAFs grow in popularity, the charitable tax incentives increasingly subsidize delayed benefit funds, in which no charitable benefit accrues until the DAF releases the funds. Citing the total amount of money flowing from DAFs ignores this basic problem.

2. Accumulated Funds Are Dedicated to Charity

Defenders of the status quo might respond that the accumulation DAFs cause is not concerning because DAF funds are committed irrevocably to a charitable purpose and so must eventually be distributed to a working charity.[121] In this way, defenders liken DAFs to an endowment—or mass societal accumulation of wealth for the benefit of charitable causes.[122] Thus, defenders of the status quo might argue that if the five donors above gave $10,000 to a university instead of a DAF, and the university spent only $2,000 and put the remaining $8,000 in its endowment, the result would be the same. The $10,000 deduction yielded $2,000 of current spending and $8,000 of saving for the future.

This line of reasoning, however, ignores that DAFs are intermediaries. DAF money does not actually do any good for charity—not as wealth, not as leverage, not as accessible capital. A university endowment, by contrast, is an asset of a working charity and available for use—and thus provides a current benefit*,* even as it accumulates.[123] DAFs, however, represent $160 billion of taxpayer-subsidized funds that no charity can use and that remains under the thumb of the donor. Further, the goal of the tax benefits is not *just* to encourage

[121] HOWARD HUSOCK, AM. ENTER. INST., APPRECIATION IN DONOR-ADVISED FUNDS: AN ANALYSIS OF MAJOR SPONSORS 3 (2021), https://www.aei.org/wp-content/uploads/2021/02/Appreciation-in-donor-advised-funds.pdf?x91208 [https://perma.cc/QCK8-MGJL] (touting DAFs as in the public interest because funds "are reserved for future charitable use only").

[122] *See* Howard Husock, *A Boon for Charitable Giving Is Being Threatened by Congress*, AM. ENTER. INST. (Feb. 12, 2021), https://www.aei.org/op-eds/a-boon-for-charitable-giving-is-being-threatened-by-congress [https://perma.cc/R6VF-MGTQ] (arguing that "[j]ust like a university endowment, these hundreds of thousands of accounts can be thought of as an 'American Endowment,' which can be tapped for immediate giving or allowed to grow in value to help people at a later date").

[123] There is a separate tax policy question regarding the extent to which Congress should allow large endowments to accumulate tax free. In 2017, for example, Congress imposed an excise tax on large university endowments. I.R.C. § 4968. The Uniform Prudent Management of Institutional Funds Act, adopted in most states, provides rules for the prudent management of endowments by charities. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (UNIF. L. COMM'N 2006); *see* Erik Dryburgh, *The Law of Endowments: The Uniform Prudent Management of Institutional Funds Act (UPMIFA)*, ADLER & COLVIN (Dec. 2017), https://www.adlercolvin.com/wp-content/themes/adlercolvin/pdf/The-Law-of-Endowments-The-Uniform-Prudent-Management-of-Institutional-Funds-Act-UPMIFA.pdf [https://perma.cc/CZ4P-6X9R].

donations or commitments but is also to convey funds to working charities. The inherent problem with DAFs is that funds are simply not available for use by a working charity.

3. DAFs Pay Out More Than Private Foundations

Defenders of the status quo also rely on output data from DAFs to draw favorable comparisons of DAFs to private foundations. Because both are intermediaries, and private foundations face a mandated payout, if DAFs pay out more than private foundations, then rules to speed up distributions from DAFs are unnecessary under this view. In this regard, a twenty-percent aggregate payout from DAFs is often used as a benchmark comparison to the five-percent payout required of foundations.[124]

Yet it is important to put this argument about DAF payouts into appropriate context. Most critically, the generic payout numbers for DAFs are averages across the more than one million DAF accounts.[125] An average payout, however, is essentially meaningless. Averages provide no information about what happens at the account level, meaning that high payout DAFs inflate the average to the benefit of low payout DAFs.

By way of illustration, assume that at the beginning of the year 2020 a DAF sponsor held four DAF accounts, with a balance of $250,000 each for a combined balance of $1 million across accounts.[126] Assume next that during 2021, a new donor set up a DAF with a $260,000 gift. That same donor also made $210,000 of grants in 2021. None of the other donor-advisors made contributions or grants that year. (For simplicity also assume no earnings on amounts held during the year.)

The DAF industry would say that the payout for the hypothetical sponsor for 2021 was 20%, which is the amount of grants made in 2021 ($210,000) divided by the ending balance of all its DAF funds in 2020 ($1,050,000).[127] Although 20% may sound like a significant number, the reality is quite different. In fact, the entirety of the payout was by one donor, who paid out 81% of their contribution, whereas the other four donors paid out nothing. In other words, because reported payouts are averages across accounts, individual ac-

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[124] NAT'L PHILANTHROPIC TR., 2020 REPORT, *supra* note 4, at 17 (noting that "[a]ggregate grant payout rates from DAFs have exceeded [twenty] percent for every year on record"); Jewish Federations Letter, *supra* note 118 (citing the same twenty percent figure).

[125] NAT'L PHILANTHROPIC TR., 2021 REPORT, *supra* note 6, at 10 (reporting 1,005,099 accounts in 2020).

[126] Most DAF sponsors hold far more accounts; this small number is for ease of illustration. *See, e.g.*, FIDELITY CHARITABLE, *supra* note 26, at 8 (stating that Fidelity Charitable held 153,430 accounts in 2020).

[127] NAT'L PHILANTHROPIC TR., 2021 REPORT, *supra* note 6, at 9 (defining "grant payout" as "grants made in the current year divided by donor-advised fund assets held at the end of the prior year").

counts escape scrutiny and low paying accounts free ride on the payout efforts of others.[128]

Studies show that payouts across accounts vary widely. One recent study of community foundations in Michigan, for example, showed that 25% of DAFs paid out nothing in a given year, 57% of DAFs paid out at less than 5%, and half of DAFs paid out at an average of 3.5% over four years.[129] Another study of thirteen thousand DAFs at community foundations and religiously affiliated sponsors found that 35% of accounts had a payout of less than 5%, 52% of accounts had four-year average payout rates of between 5% and 49%, and 13% of accounts had payouts of 50% or more.[130] Another study showed that 24% of DAF sponsors paid out below 5%.[131]

In other words, although the data is not definitive, many accounts pay out little to nothing, which is disguised by average payout data. In addition, the range of payout rates across accounts illustrates the need for account-based rules, particularly to include accounts with the highest value where the potential for delayed benefits is greatest. Because DAFs operate based on donors' advice, it makes sense to view DAFs at the account level, and to establish expectations on an account-by-account basis. It is no answer to say that some accounts pay out robustly so that other, non-paying accounts, can be ignored.[132]

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[128] In addition, there is debate about the appropriate method for calculating payout. The National Philanthropic Trust's calculation of payout applies 2021 grants against the 2020 asset base, ignoring the 2021 contributions. *See id.* at 9, 36. Thus, in the hypothetical, the value of the new DAF established in 2021 is not in the asset base, even though this is the DAF from which all grant activity occurred. Yet at the same time, grants from this DAF are counted. A more accurate reporting of payout would include in the asset base all contributions made during the year (plus earnings) because this better represents the funds available for grantmaking. *See* Andreoni & Madoff, *supra* note 119, at 6 (noting that this method was used in evaluative studies of payout by the Treasury Department and the Congressional Research Service). Thus, in the hypothetical in the text, a recalculated payout for 2021 would be 16.66%, which is the amount of grants made in 2021 ($210,000) divided by the ending balance for 2021 plus 2021 grants ($1,260,000). Scholars articulate this payout formula as grants divided by end of year asset value of all DAFs held by the sponsor plus grants. This formula thus captures contributions made during the year and earnings. *Id.* at 5.

[129] COUNCIL OF MICH. FOUNDS., ANALYSIS OF DONOR ADVISED FUNDS FROM A COMMUNITY FOUNDATION PERSPECTIVE 11–12 (2021), https://www.michiganfoundations.org/system/files/documents/2021-09/CMFDAFReport_Final_6_21_2021.pdf [https://perma.cc/7AAH-MRVP]; Michael Theis, *New Study Shows That Majority of Donor-Advised Funds Are Sending Little or No Money to Charity Every Year*, CHRON. PHILANTHROPY (July 1, 2021), https://www.philanthropy.com/article/new-study-shows-that-majority-of-donor-advised-funds-are-sending-little-or-no-money-to-charity-every-year [https://perma.cc/LQD5-K7W4].

[130] *See* DANIELLE VANCE-MCMULLEN & H. DANIEL HEIST, DONOR ADVISED FUND RSCH. COLLABORATIVE, DONOR-ADVISED FUND ACCOUNT PATTERNS AND TRENDS (2017–2020), at 4 (2022).

[131] Andreoni & Madoff, *supra* note 119, at 3, 12 (reporting this statistic based on 2017 data).

[132] Defenders of the status quo also argue that there is insufficient data about account-level payouts to justify account-based rules. *See* Letter from Community Foundation Public Awareness Initiative, Council on Foundations, Independent Sector, The Philanthropy Roundtable, and United Philanthropy Forum to Members of Congress (June 11, 2021), https://www.unitedphilforum.org/system/files/resources/National-Philanthropic-Organizations-Letter-ACE-Act-06-11-2021.pdf [https://perma.

Further, even as a flawed payout based on averages, the industry's reported payout number is inflated because it includes transfers from one DAF to another.[133] Assume, for example, that the donor's $210,000 grant in the above hypothetical was to a DAF of another sponsor. If so, then the reported payout of twenty percent would not change, but the reality would be a payout of zero, because no charitable benefit resulted from the transfer. The donor merely swapped one DAF for another but made no grants to a working charity. DAF-to-DAF transfers are common, accounting for $1 billion of DAF grants in 2019, for example,[134] yet they are misleadingly credited in the payout data.[135]

In short, the aggregate payout numbers are both inflated and unhelpful metrics to use as a defense against time limits on advisory privileges. DAFs hold $160 billion and continue to grow. DAF sponsors are the biggest charitable fundraisers. Many donor advisors do not regularly advise grants or advise at low rates. When money remains in a DAF, it is not available for use in a charitable mission—to the detriment of working charities and their beneficiaries. This is contrary to the purpose of the tax incentives to encourage current charitable benefit. Account-level rules and limitations on advisory privileges will address this problem.

4. Regulate DAFs Like Foundations

Some accept the need for account level rules for DAFs and argue that it makes sense to regulate DAFs like foundations because DAFs resemble pri-

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cc/C6FG-E75C] (stating that "there is no data to indicate whether these measures would propel more charitable giving"); *see also* Daniel Hemel, Joseph Bankman & Paul Brest, *Are Donor-Advised Funds Good for the Nonprofit Sector?*, 87 EXEMPT ORG. TAX REV. 287, 303 (2021) ("It is almost a cliché for academic articles to conclude with a call for more data. But this is surely the case with DAFs."). A main reason for the lack of comprehensive account-based data is that DAF sponsors do not share account-based payout rates. Presumably, given the impetus for reform, if the data were favorable to the status quo, DAF sponsors would widely publicize it. Further, the available data amply demonstrates the problem.

[133] The National Philanthropic Trust defines a grant as a "transfer of assets from a donor-advised fund to a qualified charitable recipient." NAT'L PHILANTHROPIC TR., 2021 REPORT, *supra* note 6, at 9. Under the Internal Revenue Code, another DAF is a qualified recipient. I.R.C. § 4966(c)(2)(C).

[134] Eden Stiffman, *At Least $1 Billion Has Been Shuttled from One Commercial Donor-Advised Fund to Another in a Year—and Not to Working Charities*, CHRON. PHILANTHROPY (Sept. 15, 2021), https://www.philanthropy.com/article/at-least-1-billion-has-been-shuttled-from-one-commercial-donor-advised-fund-to-another-in-a-year-and-not-to-working-charities [https://perma.cc/M4U8-THWS]. One study by *The Economist* showed that in the 2015–2016 time period, the biggest recipient from Vanguard and Schwab DAFs was Fidelity Charitable. *A Philanthropic Boom: "Donor-Advised Funds,"* THE ECONOMIST (Mar. 23, 2017), https://www.economist.com/finance-and-economics/2017/03/23/a-philanthropic-boom-donor-advised-funds [https://perma.cc/7M9J-RH6L] (finding also that some private foundations distribute ninety percent of their qualifying distributions to DAFs).

[135] Scholars have found, for example, that in 2017 DAF-to-DAF transfers allowed Fidelity Charitable "to overstate grants by 3.8%," and likely by more as the data included only transfers to commercial DAFs, not community foundation or other mission-driven DAF sponsors. Andreoni & Madoff, *supra* note 119, at 3.

vate foundations. Some scholars, for example, urge application of the private foundation five percent payout rule to each DAF.[136] They reason that because "[d]onor-advised funds are functional substitutes for private foundations," "[c]onsiderations of fairness and efficiency counsel that similar persons and entities should be taxed and regulated similarly."[137] Therefore, they suggest, foundations and DAFs "should be treated equivalently by the law."[138] In fact, because they are similar, DAFs already are subject to some of the private foundation rules, or variations of them.[139]

Importantly, however, DAFs are not the equivalents of private foundations.[140] Although both DAFs and foundations are intermediaries that make grants, DAFs are not entities. They are mere financial accounts, housed in public charity DAF sponsors.[141] Congress could, as scholars suggest, ignore the DAF sponsor and regulate each DAF account as if it were a private foundation.[142] A better approach, however, is to adopt a distinct policy response that accounts for the sponsor's public charity status. Put another way, it makes sense to approach intermediaries differently depending on whether the intermediary is a public charity or a private foundation.

As discussed above, Congress favored public charities historically for the very reason that they do not represent a delay in the benefit to charity as do private foundations. As intended by Congress, a typical gift to a public charity, therefore, means giving to an entity that not only controls the funds but also provides the public benefit. DAFs represent neither—in that effective control remains with the donor rather than the DAF sponsor, and the funds are unavailable for use by *any* working charity. Thus, it is appropriate and sensible to adopt a different solution to delayed benefits at DAFs, based not on perpetuity and a percentage of assets-based payout but on completing the gift to a working public charity in a timely fashion through time limits on advisory privileges.

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[136] Edward A. Zelinsky, *A Response to the Initiative to Accelerate Charitable Giving*, 170 TAX NOTES FED. 755, 762 (2021).

[137] *Id.* at 755.

[138] *Id*. If Congress decided to treat DAFs like private foundations, there is no reason to be selective about which rules to apply. Some Scholars sensibly conclude that in the case of equivalent treatment, DAFs should also have to pay the private foundation tax on investment income. *Id*. (citing I.R.C. § 4940). In addition, under this reasoning, but not considered by some scholars, DAF gifts should face the same charitable deduction rules as gifts to private foundations, namely a basis deduction for gifts of appreciated complex assets and less favorable percentage limitations. *See* I.R.C. § 170(b), (e).

[139] DAF sponsors are subject to the private foundation excess business holding rules, stricter self-dealing provisions, and private foundation-like excise taxes for non-charitable distributions. I.R.C. §§ 4943(e), 4958(c)(2), 4966–4967.

[140] For further discussion of this point, see Colinvaux, *supra* note 22, at 51–54.

[141] This is because DAF sponsors receive sufficient public support from DAF donors to satisfy the public support test for public charity status. *See* I.R.C. § 509(a)(2) (defining a public charity as one that receives at least "one-third of its support" from contributions from the public).

[142] Zelinsky, *supra* note 136, at 761.

To impose a 5% payout rule for DAFs, for example, would convert them into perpetual funds, contrary to the public charity classification. In addition, a 5% account-based payout would also be a mistake from the standpoint of speeding up giving to working charities. Many DAFs pay out at a rate much higher than 5% (which accounts for the average and overstated 20% payout rate). If a 5% payout became the norm for DAFs, this could lead to lower payouts on average than currently exist.

5. The Timing of Grants from DAFs Now or Later Does Not Matter

Another defense of the status-quo questions the policy basis for accelerating giving from DAFs. Under this view, acceleration is unbeneficial because there is no inherent preference between spending now and spending later. The argument is that because donated funds are legally obliged to be spent on charity eventually, and current unspent funds are invested productively, the choice of "spend now" or "spend later" is a choice between serving present or future needs—neither of which is normatively preferable.

One recent illustration of this view by scholars posits that "[t]he CEOs of nonprofit organizations that deliver services to disadvantaged communities understandably want funds as soon as possible . . . . Yet the lives of their future beneficiaries are no less valuable than present ones."[143] Thus, "[e]ven if DAFs result in less money reaching operating charities now, that outcome is only to be lamented if now is categorically better than later. And . . . this is by no means inevitably true."[144] Under this view of DAFs, given the ambivalence between serving present or future needs, "donors may have good reasons for making charitable contributions today rather than growing the DAF assets, or good reasons for postponing gifts. But one cannot say which is the better choice . . . ."[145]

This argument, however, reflects a misunderstanding of the underlying problem of DAFs as intermediaries. The delay in benefit to charity problem is not about a choice between serving present and future needs. Rather, it is about who controls the funds: donors or charities. The ultimate goal of the giving incentives is a completed gift to a working charity where the charitable benefit vests immediately. Intermediaries interfere with this goal because they delay access by the working charity to donated funds. The critical question, therefore, is not whether a charity chooses to spend money today or saves for tomorrow. The critical question is whether a working charity has a choice by having access to capital, which the *charity* may then decide to use for current or future needs.

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[143] Hemel et al., *supra* note 132, at 291 (citing Michael Klausner, *When Time Isn't Money: Foundation Payouts and the Time Value of Money*, STAN. SOC. INNOVATION REV., Spring 2003, at 51, 51).

[144] *Id.* at 297.

[145] *Id.* at 294.

Thus, the viewpoint quoted above inadvertently illustrates the central problem of DAFs by crediting donors with a choice they do not have. If DAF donors actually retained a choice, as scholars suggest, of "making charitable contributions today" or "postponing gifts" with respect to money already contributed to the DAF, then the DAF sponsor is nothing more than the donor's agent, holding funds until the donor chooses when to contribute.[146] Then, scholars' point about choosing between serving present and future needs might have merit. But if donors retained this choice, no charitable deduction would be allowed because the gift would not be complete. Legally, with a DAF donation, the donor has already made the charitable contribution by giving to the DAF sponsor; therefore, there is nothing to "postpone."

Of course, scholars who advance this view do express the reality of DAFs—which is that the functional decision to give now or give later remains with the donor because the donor has effective control of the donated funds. Thus, the problem of the DAF is that the donor gets the tax benefits but in effect retains *the choice to make the "real" gift later*. The authors therefore nicely but unintentionally illustrate that DAFs have succeeded in twisting giving into a backwards reality of "deduct now, give later," providing donors an ability to choose that the donor, by law, is not meant to have.[147]

In sum, to view the timing of DAF distributions as reflecting a choice between serving present or future needs is to miss the central problem of DAF sponsors as intermediaries that facilitate an end-run around the completed gift rule. Gifts to DAF sponsors satisfy the letter of the law because a donor has in form (but not in substance) given dominion and control of funds to an organization recognized under section 501(c)(3).[148] But gifts to DAF sponsors undermine the purpose of the law to convey funds to working charities. As discussed above, the tax incentives are meant to incentivize current giving. DAF sponsors, as intermediaries that allow unlimited advisory privileges, frustrate this goal.

6. Limits Violate Philanthropic Freedom

Another criticism of DAF reform centers on a concern about philanthropic freedom.[149] The main contention here is that donors, not the government, should be trusted to make the right decision about the timing of grants from

[146] *See id.* at 294, 299.

[147] *Id.* at 299.

[148] I.R.C. § 501(c)(3) (listing organizations exempt from taxation).

[149] *See, e.g.*, *Philanthropy Roundtable Letter*, *supra* note 118 (representing the view of sixty-five signatories that DAF reform would undermine the freedom to give); Jewish Federations Letter, *supra* note 118 (stating that the ACE Act would "suppress" philanthropy).

their DAFs.[150] Under this line of reasoning, a fifteen-year limit on advisory privileges—or any time limit—is arbitrary and can frustrate donor goals. In this view, concerns about the money never being spent are misguided. Donors have given up lawful control of the funds, and, by law, the money may only benefit charitable causes. Thus, the donor, or even the donor's heirs, should have the freedom to decide when the timing is right for a gift.

This is, however, an extreme view of philanthropic freedom. The argument amounts to a donor's rights argument: that DAF funds effectively *are* donor funds and that any time limit on advisory privileges impacts a donor's rights, and so a donor's freedom. As discussed above, however, once a donor chooses to give to a DAF, the donor has no further *right* to choose, or to direct DAF assets. The DAF sponsor has that right and honors the donor's advice as a matter of mutual convenience. Limiting the advisory *privileges* a DAF sponsor allows a donor limits a benefit that DAF sponsors provide to donors, but it does not limit donor freedom in any meaningful way. Allowing donors fifteen years to complete their gift is a reasonable amount of time—generous even, considering that, in fact, the donor has no further legal right to direct distributions at *any* time.

Further, the idea that the government has no legitimate interest in donor choices or providing any kind of timeframe for distributions from charity ignores reality and good public policy.[151] Tax law necessarily places limits on philanthropy, whether as exercised by donors or charities. As a threshold matter, donors must give to a qualified entity to take a deduction.[152] Thus, the government defines "philanthropy" in the first instance, albeit very broadly, by defining a qualified charity. Moreover, the law requires that donors relinquish dominion and control of their property when making a gift (which is freedom-limiting) and provides many other restrictions.[153]

[150] HUSOCK, *supra* note 121, at 6 (arguing that "[b]ecause, ultimately, all appreciated assets will have to be disbursed, this decision as to the timing of charitable giving should be understood as personal and need not be regulated").

[151] In general, Congress has the power to condition eligibility for a federal subsidy upon satisfaction of requirements Congress sees fit to impose. *See, e.g.*, Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 544 (1983) (upholding a limitation on the lobbying activity of charities as a constitutional condition of a subsidy and noting that "[b]oth tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system").

[152] *See* I.R.C. § 170(c) (stating that a contribution or gift qualifies for a deduction when it is exclusively used within the United States).

[153] For example, donors may not retain a partial interest in donated property *and* take a deduction. I.R.C. § 170(f)(3). Private foundations and certain types of public charities face payout rules. *Id.* § 4942. Charities may not engage in substantial lobbying activity or any political campaign activity. *See id.* § 501(c)(3). All these rules affect "philanthropic freedom" in some abstract sense.

Although reasonable minds can differ about whether the time limit on advisory privileges should be fifteen years or five,[154] the debate about DAFs fundamentally is not a debate about philanthropic freedom. The important freedom in this context is the choice to donate, or not donate, to any organization (or individual) of the donor's choosing.[155] A time limit on advisory privileges does not limit in any way a donor's decision to give or their selection of a grantee.[156]

7. It Is Not Fair to Pick on DAFs

Related to the philanthropic freedom argument is a concern that because DAF sponsors are bona fide public charities rather than private foundations, the government should not subject them to special rules that other public charities do not confront. This is essentially a fairness argument—in effect, that all public charities should be treated the same.

Congress, IRS, and the courts, however, frequently take notice of the charity's purpose and write rules based on that purpose. For instance, hospitals and credit-counseling organizations must meet special requirements for charitable exemption.[157] Congress recently imposed a tax on large university endowments.[158] Community foundations have their own distinct set of regulations.[159] Schools face anti-discrimination rules.[160] These examples are not exhaustive.

Furthermore, in the context of DAFs, Congress has already noted the delayed benefit problem DAFs create. In 2005, after Hurricane Katrina, Congress passed a congressional relief package that included temporary increased giving incentives intended to get money to working charities for disaster relief.[161] Congress, however, did not want to encourage delayed benefit funds and so made donor advised funds ineligible for the extra incentives.[162] Congress has continued to disfavor delayed benefit funds in subsequent disaster relief pack-

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[154] In 2014, Republican Dave Camp, Chair of the House Committee on Ways and Means, proposed a five-year payout for DAFs. Tax Reform Act of 2014, H.R. 1, 113th Cong. § 5203 (2014).

[155] Some critics of the ACE Act incorrectly suggest that it somehow affects a donor's choice of charity. *See Philanthropy Roundtable Letter*, *supra* note 118 (stating that "this proposal would severely hamper Americans' ability to give to causes they care about").

[156] Notably, Congress has already limited the scope of a donor advisor's choice by requiring that DAF grants be to other public charities and not to individuals or other organizations (without the exercise of expenditure responsibility). I.R.C. § 4966(c).

[157] *Id.* § 501(r) (hospitals); *id.* § 501(q) (credit counseling organizations).

[158] *Id.* § 4968.

[159] Treas. Reg. § 1.170A-9(f)(10)–(11) (2021).

[160] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 598–99 (1983) (stating that I.R.C. § 501(c)(3) does not provide charitable exemptions to racially discriminatory private institutions).

[161] The legislation was the Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, §§ 301–306, 119 Stat. 2016, 2022–26.

[162] STAFF OF THE JOINT COMM. ON TAX'N, 109TH CONG., TECHNICAL EXPLANATION OF H.R. 3768, THE "KATRINA EMERGENCY TAX RELIEF ACT OF 2005" AS PASSED BY THE HOUSE AND THE SENATE ON SEPTEMBER 21, 2005, at 16 (Comm. Print 2005).

ages, for purposes of exclusions from income for charitable distributions from IRAs,[163] and, most recently, in the temporary nonitemizer charitable deduction—which excluded DAFs (and private foundations) from eligibility.[164]

Moreover, just as with private foundations in the 1960s, the unique characteristics of DAFs as intermediaries and the delayed benefit problem they create is a legitimate basis for Congressional concern and special rules for DAF sponsors.

8. Reforms Would Deter Charitable Giving

A related argument is that imposing time limits on advisory privileges, by disadvantaging donors relative to current law, will drive donors away and therefore reduce—rather than accelerate—charitable giving. Some claims include that the ACE Act would be "devastating to the vulnerable," "pave the way for [DAFs] elimination, and sharply curtail philanthropic giving to charities and their beneficiaries,"[165] and "would reduce charitable giving—and ultimately hurt community nonprofits."[166] The claim essentially is that unless donors have unlimited advisory privileges, they will forego all tax benefits, stifle their charitable impulses, and keep the money for themselves.

This is a fantastic claim. For it to have any merit, there should at a minimum be some evidence that DAFs in their current form have actually increased overall charitable giving. Yet there is no such evidence. And even if DAFs do foster some giving that would not otherwise occur, modest restrictions on advisory privileges are unlikely to deter donors. Under the ACE Act, for example, all the tax benefits remain available, as would the personal motivation to give and support causes donors care about. By establishing a fifteen- or fifty-year timeline for advice, all donors will have an incentive to complete their giving.

A useful comparison is whether the regulatory regime that the Tax Reform Act of 1969 imposed on private foundations harmed foundation growth.[167] For perspective, in 1974, there were 26,889 foundations holding

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[163] I.R.C. § 408(d)(8)(B)(i).

[164] *Id.* § 170(p)(2).

[165] Jewish Federations Letter, *supra* note 118. *See* Husock, *supra* note 122 (stating that "[a]nything that increases the costs and complications of this popular charitable giving vehicle will inevitably discourage its use, likely reducing charitable giving in the long run and harming the very nonprofits who are already struggling to continue to serve those in need").

[166] *Statement on the King-Grassley DAF Reform Bill*, *supra* note 105; *see also* Philanthropy Roundtable Letter, *supra* note 118 (calling on Congress "to oppose attempts to discourage donors or undermine important vehicles for charitable giving, particularly during times of crisis when philanthropic engagement is most needed").

[167] The payout rule was but one of several rules applied to foundations, now found in sections 4940–4945 of the Internal Revenue Code. The rules were focused both on policy (payout and prudent

$25.5 billion in assets.[168] By 2017, there were 92,897 foundations holding $926 billion in assets.[169] Clearly, the common-sense rules of the 1969 Act were no impediment to foundation growth. Nor will common-sense rules on DAFs drive donors away; instead, they will spur inert donors to action.

9. Administrative Burden

A more practical criticism of time limits on advisory privileges is that they would impose new compliance burdens on DAF sponsors. Critics argue that DAF sponsors would need to track and segregate both contributions and earnings on contributions.[170] They would also have to note when the time limit is up, thus creating an ongoing duty to monitor contributions.[171]

On the merits, the administrative burden argument should be viewed with skepticism. DAF sponsors already keep separate accounts for each donor and keep track of donor advisors for the account. Limits on advisory privileges would require that, in addition, DAF sponsors would make a note of the calendar year of all donor contributions and treat donor grants as arising in earlier years first. For example, if a donor in 2020 made five contributions of $10,000 each, the DAF sponsor would maintain a "2020" account for that donor. The balance in the account would be $50,000 plus earnings (or less losses). If the donor took an upfront deduction, the advisory privileges for the 2020 account would cease in 2035, meaning that as of January 1, 2035, any remaining funds in the 2020 account would lose advisory privileges.

Are DAF sponsors capable of performing this type of tracking? Fidelity Charitable, for one, already does so.[172] Further, DAF sponsors are essentially in the business of managing donor-based accounts. By choosing to sponsor DAFs, sponsors already are, by choice, segregating their assets based on donors. They also already send donors statements about their DAF funds. The

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investing) and concerns about abuse (self-dealing, excess business ownership, and non-charitable payments and activities).

[168] INTERNAL REVENUE SERV., PUB. NO. 1416 (7-91), STATISTICS OF INCOME: COMPENDIUM OF STUDIES OF TAX-EXEMPT ORGANIZATIONS, 1974–87, at 172 (1991).

[169] Stats. of Income Div., Internal Revenue Serv., *Table 1. Domestic Private Foundations: Number and Selected Financial Data, by Type of Foundation and Size of Fair Market Value of Total Assets, Tax Year 2017*, IRS, https://www.irs.gov/statistics/soi-tax-stats-domestic-private-foundation-and-charitable-trust-statistics [https://perma.cc/4EHX-PG3G] (Mar. 1, 2022).

[170] *See, e.g.*, Jewish Federations Letter, *supra* note 118 (stating that ACE Act would "add to the administrative burden and expenses" of DAF sponsors).

[171] *See, e.g.*, Husock, *supra* note 105 (arguing that "[m]anagement fees for such accounts inevitably would go up, as 'sponsoring organizations' faced the red-tape headache of tracking which funds had been deposited at what time—and whether they had been disbursed within the required time limit").

[172] *See* FIDELITY CHARITABLE, *supra* note 26, at 15, 37 (noting that Fidelity Charitable performs a "first-in, first-out analysis of contribution and grant dollars"). Specifically, "[t]he analysis reviews donor contributions each year and then analyzes grant recommendations associated with these contributions in subsequent years." *Id.* at 37.

novelty of time limits is simply to further separate DAFs by year of contribution. DAF sponsors should be able to perform this accounting to the extent they are not doing so already.

10. DAF Reform Is Partisan

Finally, the partisan label has been applied to DAF reform as if limiting advisory privileges somehow fits into "left" and "right" ideological viewpoints.[173] In fact, looking for ways to donate more efficiently and effectively to convey funds to working charities does not lend itself to partisan bias.[174] Charitable donors hail from all political parties. Republicans and Democrats in the past have been bipartisan advocates for reform in this area.[175] The ACE Act is evidence of this: a Republican and an Independent (who caucuses with Democrats) introduced it in the Senate and sponsors from both sides of the aisle introduced it in the House of Representatives.[176] Plainly, DAF reform is not partisan—it simply aims to improve charitable giving laws to get more money to working charities.

C. Exception for Mission-Driven DAF Sponsors

Given the strong case for time limits on DAF advisory privileges, the question arises as to whether there should be an exception for DAF sponsors who use DAFs to further a distinct, community-based mission. The largest DAF sponsors are commercially affiliated and mission-neutral—meaning their main, if not exclusive purpose is simply to process donor grants. There are other types of DAF sponsors, however, including community foundations and mis-

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[173] *See, e.g.*, Elise Westhoff, Opinion, *The Left Wants a Philanthropy of the Few*, WALL ST. J. (Dec. 14, 2020), https://www.wsj.com/articles/the-left-wants-a-philanthropy-of-the-few-11607989273 [https://perma.cc/C94B-URHL] (arguing the Initiative to Accelerate Charitable Giving aligns with the goal of progressive individuals who want to influence how smaller donors donate).

[174] *See* Alex Daniels, *New Poll Finds Support for Foundations—but Not the Hefty Tax Breaks Their Donors Get*, CHRON. PHILANTHROPY (July 14, 2022), https://www.philanthropy.com/article/new-poll-finds-support-for-foundations-but-not-the-hefty-tax-breaks-their-donors-get?cid2=gen_login_refresh&cid=gen_sign_in [https://perma.cc/22Z2-NNSX] (discussing a recent poll that found eighty percent of people who classified themselves as "very left" and seventy-three percent of people classified as "very right" concurred with the statement that "U.S. taxpayers shouldn't have to subsidize billionaires/wealthy Americans who wish to create permanent legacy foundations to give donations to charities of their choosing").

[175] In fact, most of the reform initiatives for DAFs and foundations (and to the charitable sector more broadly) have come from the right of the political spectrum. *See* Colinvaux, *supra* note 48, at 39–44 (discussing scandals at charities and legislative responses).

[176] *See* ACE Act, S. 1981, 117th Cong. (2021) (introduced by Senators Angus King of Maine and Charles Grassley of Iowa) (encouraging DAFs to distribute funds to specified charities in an appropriate and accelerated amount of time). The House of Representatives introduced companion legislation on February 3, 2022. H.R. 6595, 117th Cong. (2022) (introduced by Representative Chellie Pingree of Maine and cosponsored by Republican Representative Tom Reed and Democratic Representatives Ro Khanna and Katie Porter) (same).

sion-driven organizations like the Jewish Federations of North America among others.[177] These DAF sponsors are established to serve a mission distinct from sponsoring DAFs. Historically, they have used DAFs as but one tool among many to serve their missions. The issue is whether time limits should apply differently to DAF sponsors based on their type.

As an initial matter, the case for different treatment is weak. DAFs of mission-driven sponsors are still DAFs, meaning that they are intermediaries that also generate the problem of delayed benefits to charity. DAF assets at a mission driven sponsor are not available for use by the sponsor. Donor advice is not limited to the mission of the sponsor but may be for any charitable cause, just like advice for a DAF at a commercially affiliated sponsor. Preferential rules for mission-driven DAF sponsors thus would effectively be to prefer one DAF sponsor over another, providing mission-driven sponsors an advantage in the DAF fundraising market. Considering that DAFs are merely an activity of a charity, the policy assumption should be uniform treatment of an identical activity—meaning, no special rules.

In favor of an exception, however, community foundations and other mission-driven DAF sponsors likely would argue that preferential treatment for their DAFs is warranted because their DAFs actually do operate to foster the sponsor's mission. The argument would be that donors who choose mission-driven DAF sponsors do so because of their interest in the mission. Therefore, donors inevitably make grants in furtherance of that mission and are more responsive to the DAF sponsor's expertise to guide donor grant making.[178] Furthermore, mission driven sponsors would claim that they are already at a disadvantage to commercially affiliated DAFs because, as smaller organizations with independent missions, their costs are higher. Therefore, a preference for mission-driven DAF sponsors also protects their fundraising base.

The ACE Act is responsive to this argument and provides a broad exception to the time limits on advisory privileges for certain DAFs at "qualified community foundation" DAF sponsors. The exception applies to contributions to DAFs that have a value of one million dollars or less,[179] and so would cover

[177] Some of these DAF sponsors defend the status quo for one or more of the reasons discussed above. Jewish Federations Letter, *supra* note 118 (writing on behalf of over 285 "national and community organizations representing each of the [fifty] states" to oppose the ACE Act).

[178] For additional discussion of the role of the mission-driven DAF sponsor and community foundation regulations, see Roger Colinvaux, *Defending Place-Based Philanthropy by Defining the Community Foundation*, 2018 BYU L. REV. 1, 28–33.

[179] ACE Act, S. 1981 § 2 (proposing the addition of § 170(a)(19)(E)(ii)(I) to the Internal Revenue Code). The $1 million amount is determined based on all accounts advised by the donor at the community foundation and is per-donor-per-community foundation, meaning that a donor may have multiple exempt $1 million accounts at different community foundations. *Id.* The $1 million limit would also be adjusted for inflation. Contributions to accounts with a value in excess of $1 million would be treated as a contribution under the general ACE Act framework, meaning either the fifty-year or fif-

all but the largest DAFs at qualified organizations. The exception also applies to endowed accounts, which are those required by the organization to make qualifying distributions each year of at least five percent of the value of the fund assets.[180] A "qualifying distribution" is defined as it is for other DAFs[181] and would include distributions to non-DAF funds at the qualified community foundation and administrative fees. Thus, if a DAF at a qualified community foundation paid five percent of its assets a year to the community foundation sponsor (as fees or otherwise), the account would be exempt from the time limits.

To be a "qualified community foundation" an organization must be a section 501(c)(3) organization that satisfies three tests.[182] A purpose test requires that the organization provide for the needs of a community by engaging donors and pooling funds to advance the community's charitable needs.[183] This test describes the historic purpose of the community foundation.[184] This purpose fits other mission-driven organizations as well, namely those that foster a community of donors and pool their funds to further a distinct community.

Next, a geographic limitation requires that the organization be organized and operated for the purpose of understanding and serving the needs of a particular area "no larger than four States."[185] This test reflects the longstanding purpose of community foundations as place-based, not of national scope. Importantly, however, the geographic limitation does not restrict the types of needs a qualified organization serves—meaning it could be a community's general needs, or needs specific to a particular purpose, such as health, religion, education, or human services. Thus, many if not most of the mission-oriented sponsors with a regional focus (such as the Jewish Federations) would likely satisfy the test.[186] The term "qualified community foundation" is thus a misnomer as nothing in the definition limits the exception to what are traditionally viewed as community foundations.

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teen-year time limits would apply. *Id.* Contributions made before the account exceeded $1 million would remain exempt from the time limits. *Id.*

[180] *Id.*

[181] *See* I.R.C. § 4942(g)(1) (defining "qualifying distributions").

[182] ACE Act, S. 1981 § 2 (proposing § 170(a)(19)(E)(iv) of the Internal Revenue Code).

[183] *Id.* (proposing § 170(a)(19)(E)(iv)(II)).

[184] Treas. Reg. § 1.170(A)-9(f)(10) (2020).

[185] ACE Act, S. 1981 § 2 (proposing § 170(a)(19)(E)(iv)(II) of the Internal Revenue Code, which would impose this geographic limitation).

[186] *See Meeting the Needs of the North American Jewish Community*, JEWISH FED'NS OF N. AM., https://www.jewishfederations.org/about-jfna [https://perma.cc/QLT6-DG8E] (stating that the Jewish Federations of North America supports "build[ing] the capacity of local Jewish communities"). The signatories to the letter sent to Congress on behalf of over 285 organizations opposing the ACE Act represent local organizations that facially would satisfy the definition of a qualified community foundation. Jewish Federations Letter, *supra* note 118. Most represent towns, counties, regions within a state, or cities. *See id.*

Finally, an asset test requires that the organization keep at least twenty-five percent of its aggregate assets out of DAFs.[187] This test ensures that a qualified organization actually conducts substantial activities for its communities apart from sponsoring DAFs.[188] Without a test requiring some threshold of non-DAF activity, nothing would prevent a commercially affiliated sponsor from reorganizing into a DAF provider for the benefit of specific geographic regions. Further, the twenty-five percent minimum is generous, requiring simply that a community-based organization have at least one-quarter of its assets under its full control.[189] Qualified organizations are therefore allowed to have DAFs as a substantial, even predominant activity.

On the whole, the exception for qualified community foundations in the ACE Act effectively prioritizes the mission of community foundations and similar mission-driven DAF sponsors in the law. This would be a significant legal development that could have far-reaching positive effects for community foundations and similar organizations. DAFs at mission-driven sponsors would have benefits available at no other DAF, thereby attracting donors to their mission—a considerable advantage over present law, which makes no distinction among DAF providers. As two community foundation leaders expressed, "the ACE Act recognizes the unique role of community foundations and includes protections that ultimately strengthen these pillars of our communities and ensure the highly localized, extremely critical missions of these organizations can continue without additional regulatory burden."[190]

The policy of the ACE Act's exception for mission-driven sponsors is to elevate local and regional needs, including of rural philanthropy, and to preserve the original value of DAFs as supporting the mission of community-based philanthropy. The question for reformers is whether this goal outweighs

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[187] ACE Act, S. 1981 § 2 (proposing to establish this requirement by adding § 170(a)(19)(E)(iv)(III) to the Internal Revenue Code). Under the Act, if a community foundation failed the asset test, subsequent contributions to any DAF of the community foundation would become subject to the ACE Act's general framework—at least until such time as the community foundation again met the twenty-five percent test. *Id.* Nothing in the ACE Act requires that the twenty-five percent test be applied on an annual basis. *Id.*

[188] Colinvaux, *supra* note 178, at 49 (noting that community foundations offer multiple non-DAF funds for donor contributions).

[189] One study of 206 of the largest community foundations found that the median percentage of total assets held in DAFs was twenty-four percent. CHUCK COLLINS & HELEN FLANNERY, INST. FOR POL'Y STUDS., LARGER COMMUNITY FOUNDATIONS HAVE BECOME HEAVILY RELIANT ON DONOR-ADVISED FUNDS 3 (2022). For the largest community foundations (over $1 billion in assets), the median was forty-four percent. *Id.* For the smallest (less than $10 million in assets), the median was eleven percent. *Id.* The study found that nine community foundations had DAF assets of more than seventy-five percent of total assets, including the Silicon Valley Community Foundation for which DAFs constitute eighty-eight percent of its asset base. *Id*. at 3, 6.

[190] Paul Major & Lora Smith, Opinion, *Rural Community Foundations Support the ACE Act—You Should Too*, THE HILL (Aug. 14, 2021), https://thehill.com/opinion/finance/567648-rural-community-foundations-support-the-ace-act-you-should-too/ [https://perma.cc/FS6M-2D36].

concerns about delayed benefits to charity that DAFs cause at mission driven sponsors. Here, Congress could strengthen the ACE Act to require mission-driven DAF sponsors to report in the aggregate on how DAF grants relate to the sponsor's mission. This would convey the extent to which their DAFs in fact advance their mission and therefore warrant special treatment.

IV. Private Foundation ACE Act Provisions

This Part describes the ACE Act's proposed rules pertaining specifically to private foundations.[191] As Part II of this Article explains, the Tax Reform Act of 1969 addressed the delayed benefit problem in foundations by requiring a minimum annual charitable payout each year. More than a half-century later, however, the rules no longer work as intended. Section A of this Part discusses how the ACE Act aims to improve the existing foundation payout rules.[192] Section B explains how the ACE Act provides incentives for foundations to pay out more than the statutory minimum five percent of their investment assets each year.[193]

A. Changing What Counts as Payout

The ACE Act seeks to amend the current payout rules by limiting what payments count toward the required five percent. Subsection One describes how this Act would improve on the existing payout structure by placing restrictions on payments to foundation insiders.[194] Subsection Two then discusses how the ACE Act would no longer allow foundation transfers to DAFs to count toward the five percent minimum.[195]

1. Payments to Insiders

Current law allows a foundation to satisfy the five percent minimum payout requirement by making payments for the benefit of the founder of the foundation or their family—such as by compensation or travel.[196] For example, if Bob Smith started the Bob Smith Private Foundation with a $10 million gift, and the foundation then had to pay out five percent or $500,000 each year, the entire $500,000 could be used to pay expenses for Bob Smith's salary (or that of his family members) and travel to conferences or annual family foundation meetings.

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[191] *See infra* notes 191–213 and accompanying text.
[192] *See infra* notes 194–207 and accompanying text.
[193] *See infra* notes 208–213 and accompanying text.
[194] *See infra* notes 196–198 and accompanying text.
[195] *See infra* notes 199–207 and accompanying text.
[196] I.R.C. § 4942(g)(1)(A) (including as qualifying distributions amounts paid for reasonable and necessary administrative expenses).

The ACE Act provides that payments to foundation insiders do not count towards the required five percent payout.[197] The Act still permits such payments (as under current law), just not as substitutes for actual charitable grants. Thus, in the example above, the foundation would have to make $500,000 in grants to someone other than Bob Smith or his family members.

Some have argued that this proposal is an attack on family foundations, to the extent these types of expenses are essential for family foundations to operate.[198] The ACE Act, however, does not change the rules that allow family members to receive compensation, or to travel on foundation business. The issue is whether these expenses should qualify as the equivalent of charitable grants. These expenses, even assuming they are necessary for the foundation, have an element of private benefit. They also replace actual distributions to charity, and do not resemble the reason for the payout requirement, which is to convey funds to charity. It is basic common sense that foundation transfers to insiders (and, as discussed next, to DAFs) are not the same as direct grants for charities.

2. Payments to DAFs

In addition, the ACE Act closes a loophole in the foundation payout requirement by providing that foundation transfers to DAFs generally do not qualify as charitable payments for purposes of the five percent minimum.[199] For example, under current law, the Bob Smith Private Foundation example above could satisfy its payout by making a $500,000 transfer to a DAF that the foundation advises. With such a transfer, the funds just move from one intermediary to another, prolonging the delay in charitable benefit contrary to the purpose of the payout.

A recent study by the Minnesota Council of Nonprofits examined foundation to DAF transfers and found that:

> [Three billion dollars] was transferred from over 2,200 U.S. private foundations to five donor advised fund (DAF) sponsors between 2010 and 2018. Within this universe, a growing number of private foundations have made a *single* grant during a reporting year to a commercial DAF. Looking just at transfers to the top five commer-

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[197] ACE Act, S. 1981, 117th Cong. § 4(a) (2021) (proposing to implement this limitation by adding § 4942(g)(5)(A)–(B) to the Internal Revenue Code).

[198] *Philanthropy Roundtable Letter*, *supra* note 118 (stating that the proposal "takes aim at a family's ability to serve its own foundation, which would unfairly target smaller and less-wealthy institutions").

[199] ACE Act, S. 1981 § 5(a) (providing, by amending I.R.C. § 4942(g), that a foundation transfer to a sponsoring organization would not be a qualifying distribution unless funds are release before the end of the tax year following the transfer).

> cial DAF sponsors, [thirty-five] foundations transferred the entirety of their annual grantmaking to DAFs between 2010 and 2018.[200]

Another study found that private foundation giving to commercially affiliated DAFs averaged $737 million per year from 2016 to 2018.[201] The same study also found that for 157 foundations, grants to DAFs constituted all of their distributions, and DAF giving represented ninety percent or more of grants for 152 additional foundations.[202] Foundation use of DAFs, in some cases as the foundation's *only* grant for the year, is a startling trend that undermines foundation payouts and their legitimacy.[203]

The ACE Act's solution is to treat foundation-to-DAF grants the same as present law treats foundation-to-foundation grants.[204] This means that a foundation-to-DAF transfer may count towards the foundation's five percent payout but only if the grant is distributed from the DAF by the end of the tax year following the contribution year.[205] Thus, in the example above, if the $500,000 grant to a DAF was made on December 31st (the last day of the foundation's tax year), the foundation could count the grant towards its payout if the funds were advised from the DAF by December 31st of the following year.[206]

When Congress passed the payout rules in 1969, Congress could not have foreseen the emergence of DAF sponsors as public charities that could be used to satisfy a private foundation's payout. Delayed benefit funds are meant to originate from the foundation and inure directly for the benefit of a working

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[200] Kari Aanestad, Kerry Gibbons & Jon Pratt, *Private Foundation Grants to DAFs: Attorney General Charitable Trust Oversight Calls for Disclosure of Use of Funds*, 2020 INDEP. SECTOR PUB. POL'Y SYMP. 1, 3.

[201] CHUCK COLLINS & HELEN FLANNERY, INST. FOR POL'Y STUDS., PRIVATE FOUNDATION GIVING TO COMMERCIAL DONOR-ADVISED FUNDS 2 (2022). The authors note that this figure covers only "foundations filing electronic tax returns . . . [and] national DAF sponsors," but not community foundation or mission-driven DAF sponsors. *Id.* They estimate that total foundation-to-DAF transfers in 2018 could be as high as $1.4 billion if foundations filing paper returns made transfers to commercial DAFs at the same rate as electronic filers did. *Id*. at 5.

[202] *Id*. at 2.

[203] *See* Noah Buhayar, Sophie Alexander & Ben Steverman, *Wealthy Use Loophole to Reap Tax Breaks—and Delay Giving Away Money*, BLOOMBERG (Oct. 2, 2022), https://www.bloomberg.com/news/features/2022-10-03/rich-use-tax-loophole-to-get-deductions-now-for-donating-later?leadSource=uverify%20wall [https://perma.cc/F8XB-5TEF] (reporting that "[f]oundations shift billions to donor-advised funds, skirting U.S. laws requiring transfers to the needy").

[204] I.R.C. § 4942(g)(3) (allowing amounts transferred from a private foundation to another foundation to count as a qualifying distribution if the amount is distributed before the end of the tax year following the contribution year).

[205] ACE Act, S. 1981 § 5(a)(2) (2021) (proposing an amendment to I.R.C. § 4942(g)(3)). The grant cannot go to another DAF.

[206] The Biden Administration proposed this change as well. *See* DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2023 REVENUE PROPOSALS 59 (2022), https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf [https://perma.cc/9CSY-RYPZ] (providing that a foundation-to-DAF distribution is not a qualifying distribution unless DAF funds are spent for charitable purposes before the end of the following tax year).

charity or other charitable beneficiary. As intermediaries, DAFs should not qualify. Moreover, even if there were an efficiency advantage for foundations to conduct grantmaking through DAFs (for example because using a DAF reduces paperwork or administrative costs), the ACE Act would not undermine the practice. Under the ACE Act, foundations can continue to count DAF grants toward the payout so long as the money promptly comes out of the DAF.[207]

B. Incentives to Pay Out More

The ACE Act also contains incentives to encourage foundations to pay out more than the five percent minimum. In 1969, Congress imposed an annual excise tax on the investment income of private foundations. Although this tax did not initially relate to the delayed benefit problem, Congress subsequently amended the tax in 1984 to create an incentive for foundations to pay out more than the statutory minimum.[208] Foundations would be eligible for a reduced excise tax rate for years in which the payout exceeded a five-year average.[209] This incentive, however, never worked as intended and was repealed in 2019 in favor of a single rate of excise tax of 1.39%.[210]

The ACE Act restores the policy that foundations should have an incentive to pay out more than the minimum. Under the ACE Act, foundations that pay out seven percent a year are exempt from the investment income tax for that year.[211] In addition, newly formed foundations that commit in their organizing documents to a twenty-five-year life are entirely exempt from the excise tax.[212]

The incentives to increase foundation payout have not received much, if any, direct criticism. As pure incentives, they impose no new obligations on foundations. From a delayed benefit perspective, however, this may be viewed as a weakness. If the goal is to get foundations to pay out more, a straightforward solution would be to increase the minimum payout percentage.[213] That the ACE Act does not mandate higher foundation payouts suggests an incremental approach to change—testing the waters first to determine whether foundations respond to new incentives to pay out more.

Overall, the private foundation provisions are important, if modest, common-sense adjustments to the private foundation payout. The five percent min-

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[207] *Id.*

[208] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 303(a), 98 Stat. 494, 781 (1984) (current version at I.R.C. § 4940).

[209] The regular tax rate was 2%, but if a foundation showed increasing payouts over a five-year period, the tax rate was reduced to 1%. *Id.*

[210] I.R.C. § 4940; Fishman, *supra* note 67, at 285.

[211] ACE Act, S. 1981 § 7(a).

[212] *Id.* § 8(a).

[213] *See* Brian Galle, *Pay It Forward? Law and the Problem of Restricted-Spending Philanthropy*, 93 WASH. U. L. REV. 1143, 1186 (2016) (arguing that foundations can afford to pay more than the five percent minimum consistent with perpetuity).

imum is there for one reason: to generate an immediate benefit to charity. If the payout does not work as intended, and foundations do not generate sufficient current benefits to charity, then the public benefit of private foundations is called into question.

V. EMBRACING THE ACE ACT VISION OF GIVING, WITH IMPROVEMENTS

Giving to charitable intermediaries is quickly becoming the new normal. The growing use of DAFs in particular is redefining both what it means to give and be charitable and what the tax benefits should encourage. Some arguments against intermediary reform are predictable as reflexive responses to proposed new rules that would disrupt current practice and require change. This Article has responded to many of those types of "sky is falling" arguments. This Part now considers visions for charitable giving and how the ACE Act should be improved.[214] Section A addresses why we must reject the status quo model of charitable giving to intermediaries.[215] Section B then discusses the ways in which we can enhance the current version of the ACE Act.[216]

A. Rejecting the Status Quo Vision of Giving

Debate about charitable accumulations and the role of intermediaries reflects two competing visions for charitable giving. At stake is whether a charitable gift means actually to give to charity and make funds available for use, or whether it means a donor can keep effective control indefinitely and provide no benefit to charity.

Some defend the status quo on charitable giving to intermediaries as the right policy choice. Policymakers should recognize, however, that the status quo is a radical departure from history and common sense. Under the status quo, donors can delay gifts indefinitely, receive full tax benefits, effectively control funds that are shielded from accountability, and provide *no current charitable benefit*. A gift to a DAF—where money can sit forever— is equal to a gift to a working charity. An earmark for the indefinite future is the same as money in hand. All that matters under the new normal of intermediaries and delayed benefit funds is that, eventually, in theory, working charities and their beneficiaries will benefit.

In the meantime, until the money comes out of the DAF, the benefits from the gift are for noncharitable parties. Donors, money managers, and DAF sponsors benefit—but working charities do not. And different even from a private foundation, working charities cannot apply for grants or solicit DAFs be-

[214] *See infra* notes 214–222 and accompanying text.
[215] *See infra* notes 217–221 and accompanying text.
[216] *See infra* note 222 and accompanying text.

cause DAFs are hidden beneath the shroud of the DAF sponsor. The status quo is facilitating massive accumulations of charitable wealth under the effective control of the wealthiest in society to the detriment of working charities. This is a profoundly flawed vision of charitable giving that is contrary to the historical basis for the tax benefits, and if successful, would make giving more about the rights and privileges of donors than about serving charitable beneficiaries.

High on the legislative wish-list of charities is for Congress to expand the charitable deduction to make it available for more taxpayers.[217] Some suggest that this, not intermediary reform, would be the best way to accelerate charitable giving.[218] To focus therefore on DAFs and foundations in this view is to achieve a smaller (and critics say uncertain) boost to charitable receipts and would miss the bigger prize of a new giving incentive.

This position, however, minimizes the severe and growing cost of failing to act. Although it is essential for a giving incentive to be made available to more taxpayers (and in a cost-effective way),[219] charitable intermediary reform is a defining cultural issue about the nature of giving and who benefits. To focus only on getting more dollars into charitable giving vehicles ignores the structural problem of delayed benefits and would exacerbate the problem by extending a flawed status-quo vision. Charitable intermediary reform must be addressed even if—and especially if—giving incentives are expanded.

Presently, the charitable giving incentive is the exclusive province of roughly the top nine percent of income earners,[220] who can reap up to seventy-four percent of their gifts back in tax benefits when all tax benefits are combined.[221] Yet, through DAF giving, these gifts *may provide no current benefit to charity*. If nothing is done, DAF giving will become the ambassador for giving in America—another tax-minimizing perk for those at the top of the income distribution.

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[217] As an itemized deduction, only those taxpayers who itemize can claim the full charitable deduction, which is currently about nine percent of taxpayers. C. EUGENE STEUERLE, ROBERT MCCLELLAND, NIKHITA AIRI, CHENXI LU ET AL., TAX POL'Y INST., DESIGNING AN EFFECTIVE AND MORE UNIVERSAL CHARITABLE DEDUCTION 1 (2021), https://www.urban.org/sites/default/files/publication/103824/designing-an-effective-and-more-universal-charitable-deduction_1.pdf [https://perma.cc/L5LC-PRSK].

[218] *See* Letter from National, Regional, State, and Local Organizations to Chairman Neal, Ranking Member Brady, Chairman Wyden, and Ranking Member Crapo (Dec. 6, 2021), *available at* https://perma.cc/Q6AJ-JGU7 (arguing that intermediary reform would "divert congressional attention from multiple higher priorities for the charitable sector" especially a non-itemizer deduction); Letter from Independent Sector to President Biden, Speaker Pelosi, and Leaders Schumer, McCarthy and McConnell (July 21, 2021), https://independentsector.org/resource/charitable-nonprofit-policy-priorities-letter-to-president-and-congress-july-2021/ [https://perma.cc/B2G8-7RLN] (arguing for expanded giving incentives and the need to increase resources to charities but not mentioning the ACE Act).

[219] Roger Colinvaux, *The Importance of a Participatory Charitable Giving Incentive*, 154 TAX NOTES 605, 610–11 (2017).

[220] STEUERLE ET AL., *supra* note 217, at 1.

[221] Roger Colinvaux & Ray D. Madoff, *Charitable Tax Reform for the 21st Century*, 164 TAX NOTES FED. 1867, 1867 (2019).

The current charitable deduction is quickly losing credibility as a legitimate tool of tax policy. Reform of intermediary giving is essential. The vision of reformers is based on history and common sense and would restore the charitable giving tax incentives to their original meaning and purpose.

B. Improving the ACE Act

The historic purposes of the tax benefits are to promote giving and to convey funds to working charities. Intermediaries frustrate both goals. The ACE Act's vision of DAF reforms is simply that full tax benefits ought to be paired with some basic assurance that the gift will be completed in a reasonable time. At a bare minimum, the law should provide a timeline for DAF gifts to be completed. This, the ACE Act does.

One could argue that reforms should go further and that fifteen years is too long to wait. Importantly, however, a fifteen-year limit on advisory privileges does not mean that all DAF contributions will take fifteen years to be completed. Many donors will continue to use DAFs as they currently do and advise grants months or a few years after the contribution. And donors who do not provide timely advice will be nudged to complete their gifts or lose their privileges. Further, once the first fifteen-year period is up (fifteen years from the date of enactment), every year there will be a regular outflow from DAFs, as all advisory privileges from fifteen years ago expire.

This points, however, to a weakness of the ACE Act, which is that it applies only prospectively. Nothing in the Act would spur the giving of the $160 billion in delayed benefit funds already accumulated in DAFs and not available for immediate charitable use (and for which tax benefits have already been awarded). Accordingly, Congress should require that advisory privileges for existing DAF balances expire within some time period after enactment.[222] A reasonable period might be twenty-five years—enough time for donors and their families to plan how to advise the distribution of these accumulated funds.

In addition, for private foundations, the ACE Act's all-incentive approach might prove ineffective. Congress should modify the ACE Act to send a signal to the foundation community that the five percent payout minimum is intended to be a floor, not a ceiling by coupling the new payout incentives with a study from the Treasury Department to report on the extent to which foundations respond to the incentives.

[222] Congress should further lock-in the fifteen-year time limit by amending the effective date of the ACE Act to apply to contributions made after the date of the bill's next introduction.

CONCLUSION

If DAFs were little more than a few funds held by the occasional sponsor, Congress would not need to intervene. But DAFs are big business. Over the past decades, money in DAF accounts has grown from essentially zero to $160 billion and counting—all delayed benefit funds in which donors get full tax benefits but charities receive no current benefit. A reasonable time limit on a donor's advisory privileges will address the delayed benefit problem and result in more money going to working charities without discouraging giving. In the case of foundations, although Congress has long conceived of them as perpetual funds, the five-percent payout is not working as intended. Payout loopholes should be closed and foundations should be incentivized to do more with the $1.1 trillion dollars that they have accumulated, $830 billion in the past thirty years.[223]

Quite simply, current law was not designed with DAFs in mind. If Congress were starting from scratch, it strains belief that Congress would provide full tax benefits for gifts to an intermediary without any requirement that the intermediary *ever* distribute the funds for charitable purposes. When Congress enacts tax benefits, there typically is a clear objective, and the benefit is awarded to the taxpayer for achieving the objective. The charitable giving tax incentives are meant to encourage generosity *and* to benefit charitable constituencies. A gift to a DAF accomplishes neither goal fully. By retaining effective control over the funds, the donor does not make a full sacrifice of the funds, and no charity—or the people the charity serves—can yet benefit.

As the Treasury Department explained in 1965, "[t]he tax laws grant current deductions for charitable contributions upon the assumption that the funds will benefit the public welfare. This aim can be thwarted when the benefits are too long delayed."[224] The ACE Act is a historic opportunity for Congress, on a bi-partisan basis, to adjust the charitable tax incentives so they better serve their intended purpose to get money to working charities. Failure to speed up giving from intermediaries will foster greater accumulations of income by the wealthiest through their DAFs and foundations to the detriment of working charities and the public interest. Failure to act will also cement the growing reality of charitable giving as the prerogative and privilege of donors over the current needs of charitable beneficiaries. Congress should embrace the ACE Act and strengthen it by limiting donor privileges on existing accounts, requiring a study to review whether the foundation payout incentives work, and requiring additional reporting by mission-driven DAF sponsors about how their DAF grants facilitate their mission.

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[223] BOS. COLL. L. SCH. F. ON PHILANTHROPY & THE PUB. GOOD, *supra* note 44, at 4 fig.3.
[224] 1965 TREASURY REPORT, *supra* note 58, at 6.