



Feb. 15, 2024

The Honorable Lily Batchelder, Assistant Secretary (Tax Policy)

The Honorable Daniel Werfel, Commissioner, Internal Revenue Service

Mr. William Paul, Acting Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service

*Re: Proposed Rulemaking, REG 142338-07*

Dear Assistant Secretary Batchelder, Commissioner Werfel, and Chief Counsel Paul:

As the CEO of Philanthropy Colorado, I am writing to provide comments on the proposed donor-advised fund regulations released in November 2023. We appreciate the willingness of your agencies to grant an extension to give us more time to prepare the response we are submitting today.

Philanthropy Colorado is a statewide network of 125 philanthropic organizations, including almost two dozen community foundations based in many of the rural and urban regions of our state. Many of the leaders of these member organizations are signing on to support these comments (please see list below) and some have also submitted their own.

With their local connections and knowledge, our community foundations are often the go-to institutions taking on the challenges of supporting communities during times of extreme crisis - whether it's mass gun violence, devastating wildfires and flooding, or a large influx of immigrants and refugees.

We want to understand the problem that these proposed rules aim to solve, particularly for community foundations with comprehensive policies and procedures in place that ensure they ethically and responsibly approach their work in getting grants to charitable entities serving the communities in their respective regions. They often work collaboratively to build relationships with local donors, nonprofits, businesses, and government, in contrast with commercial DAF sponsors that are focused on transactions and have little expertise on local challenges or nonprofits doing outstanding work in communities throughout our state.

In addition to mobilizing charitable giving and investing in communities, community foundations offer several avenues for donors to give generously right away or over a sustained period - whether it's through a direct donation, contributions to a donor-advised fund, or to various other types of funds. Community foundations actively steward these investments with the aim of regularly distributing money to nonprofits working to address diverse challenges, including those unique to marginalized populations and communities of color that face systemic inequities.

All of this background is important because our communities depend on the myriad forms of philanthropy supporting a nonprofit sector that data show ultimately generates tens of billions of dollars a year in overall economic impact in Colorado alone. While charitable giving remains generous by historic standards, overall demand for services and support continues to escalate. It is in this

context that we ask you to consider the ramifications of enacting sweeping rules changes that would significantly change the environment in which our sector has operated for nearly two decades.

On behalf of our Colorado community foundation partners, **we respectfully ask the Treasury Department and IRS to take the time to consider the full implications of drafting regulations that greatly expand what constitutes a donor-advised fund and a donor-advisor.** We are most concerned about the unintended consequences, confusion and the greatly increased administrative burden that would be caused by changing rules that have been in place for so long. **As drafted, we believe the proposed rules could cause major disruptions in the ability of many of our community foundations to encourage local philanthropy on behalf of Colorado communities.**

Philanthropy Colorado has three overall concerns about the proposed rules. These include:

- The extensive expansion of DAF definitions that would effectively result in a new and different regulatory framework for several important collaborative giving vehicles that community foundations have developed over decades as a means of motivating donors to give more to help address emergencies, solve longstanding issues, or support emerging causes;
- Provisions that would potentially impose stiff tax penalties when donors have their trusted personal investment advisors manage the DAF assets they donate to community foundations. This proven practice has been known to encourage higher levels of giving and also provides increased capacity to community foundations that would otherwise need to invest and manage these assets;
- An immediate effective date for final regulations that would essentially apply retroactively and necessitate large and costly changes to operating structures, while impeding opportunities to raise new funds and assess evolving community needs.

## Background

Community foundations use a range of tools to help donors give generously and leave a lasting impact locally. Donor-advised funds have been popular and effective giving tools at Colorado community foundations for many decades.

Donor-advised funds give donors who partner with community foundations the flexibility they need to be responsive to the evolving needs of their communities. Typically, donor-advised funds at community foundations are created with a single charitable gift - often representing multiple years of a donor's giving - that is then strategically deployed to a variety of nonprofits. Donors can add funds to their DAF over time through contributions and other assets. Once a donor contributes to a DAF, those funds no longer belong to the donor.

Among their many attributes, donor-advised funds at community foundations promote:

- **Community wealth:** DAFs at community foundations are a locally controlled source of grant dollars to support local nonprofits for the long term.
- **Active giving:** DAFs held at our Colorado community foundations have aggregate annual payout rates that often far outpaces those of other types of foundations (the average payout rate for the total amount held in Philanthropy Colorado member community foundation DAFs exceeded 15% for a total of \$120 million in 2020).
- **Long-term impact:** Community foundation DAFs often serve as a “gateway” to lifelong philanthropy as donors become more engaged in the community and see the results of their grantmaking. Many DAFs lead to legacy gifts, which provide significant grant support for local nonprofits.

## Issues Related to Definition of Donor-Advised Funds and Donor-Advisors

The proposed expansion of what constitutes a DAF would go far beyond the current understanding and the newly proposed rules as drafted appear to cause many commonly used types of collaborative funds to become DAFs, thereby subjecting them to an entirely different set of regulations. The funds that would be captured under this much broader proposed definition cast a much wider net and include: field of interest funds, giving circles, and other collaborative or pooled giving accounts.

The issue here is also that many of these types of funds have multiple donors and often rely on advisory committees to provide guidance to the community foundations on grantmaking. These creative funding initiatives are clearly not donor-advised funds where one individual or family has exclusive advisory privileges as originally defined. But they would be regulated as DAFs and potentially subject to punitive taxes, reporting, and other new requirements.

Here are a few examples:

- A special collaborative fund set up to support recently arriving immigrants entering the region from Central and South America. The effort has been financially supported by multiple community members, some of whom might serve on a committee to advise how the funds are distributed or on the board that approves the grants themselves;
- Various giving circles, hosted by community foundations, have been formed by members of communities of color that had historically been disconnected from the philanthropic landscape. These donors decide together which nonprofits or community projects to support. This growing trend has helped to democratize philanthropy and at the same time has increased support for diverse populations.

We appreciate that some types of scholarship and disaster relief funds at community foundations would not be considered DAFs under the proposed rules. But we are concerned that the proposed exemption for federally declared disasters is too narrow to cover some of the disaster funds that have recently been established to deal with more isolated and local emergencies. In one instance, a community foundation set up a fund to deal with mitigation of flood damage to many homes in the northwestern region of Colorado. The severe impact locally did not rise to the level of a federal disaster designation. But these types of community relief funds would be subjected to the newly proposed DAF rules even though they are clearly different.

We are also concerned that the concept of fiscal sponsorship would be jeopardized by these new rules. These arrangements allow community foundations and other nonprofits to lend their tax-exempt designation to nascent projects and initiatives so they can raise funds and make grants before they can obtain their own independent charitable status. Under the proposed regulations, any individuals that act in a way that constitutes advisory status would effectively turn these fiscally sponsored projects into DAFs and potentially subject them to more rules and excise tax penalties.

Furthermore, we object to the proposals that would treat personal investment advisors as donor-advisors and believe it would cause significant harm to the way some community foundations are able to facilitate their donor-advised fund investment management activities. Existing rules already cover potential conflicts in this regard. In addition, if donors were no longer allowed to use their own investment advisors to manage DAF assets, it would spur more of them to set up private foundations or they could turn to several large, national DAF sponsors, removing valuable philanthropic assets from our local communities.

What's more, the rules as written could unintentionally impose personal liability risks on community foundation employees that administer DAFs, making it more difficult to hire future staff to oversee this work. **We ask that collaborative community funds, giving circles and fiscal sponsor arrangements be excluded from the final DAF regulations, or that community foundations themselves be exempted from the proposed new requirements.**

## Effective Date

And, as we have mentioned above, making these regulations effective as soon as they are published would subject community foundations to the final rules retroactively to the beginning of the year in which finalized. The repercussions would be extensive and burdensome from a legal and financial standpoint and could immediately put our members in a position of having to expend significant time and resources to come into compliance. **We ask that any final rules not be effective for at least two tax years after the end of the year in which they are announced.**

Philanthropy Colorado has also signed in support of comments being submitted by our national network, United Philanthropy Forum. We refer Treasury and IRS to that document for more details about the potential impact of these proposed rules on our field. We respectfully ask that these concerns and cautions be considered in drafting the final rules.

We appreciate the opportunity to provide comments and thank Treasury and IRS for the efforts to seek feedback and clarify the proposed donor-advised fund regulations. We welcome any questions that may arise as public comments are reviewed and considered.

Sincerely,

Joanne Kelley  
Chief Executive Officer  
Philanthropy Colorado

*Colorado Community Foundation leaders signing in support of these comments include:*

Lauren Casteel  
President and CEO  
Women's Foundation of Colorado

Jason Corzine  
President and CEO  
Telluride Foundation

Margaret Dolan  
Chief Executive Officer  
Pikes Peak Community Foundation

Kelly Dunkin  
President and CEO  
Colorado Gives Foundation

Lindy Eichenbaum Lent  
President and CEO  
Rose Community Foundation

Eric Hozempa  
Chief Executive Officer  
Longmont Community Foundation

Lauren Kugler  
Executive Director  
Community Foundation of the Gunnison Valley

(continued below)

Megan Ledin  
Executive Director  
Grand Foundation

Jason C. Medina  
Executive Director  
Community Foundation of the San Luis Valley

Javier Alberto Soto  
President and CEO  
The Denver Foundation

Kristin Todd  
President and CEO  
Community Foundation of Northern Colorado

Tim Wohlgenant  
President and CEO  
Yampa Valley Community Foundation

Briggen Wrinkle  
Executive Director  
Community Foundation Serving Southwest Colorado