

AN ARGUMENT AGAINST CONGRESSIONAL RESPONSE

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Abstract: Our conference title assumes that such danger lurks in the increased utilization of donor-advised funds for charitable giving that Congress may need to respond. Statistics from 2013 certainly reveal the broad popularity of this vehicle: 217,000 funds (up from 20,000 in the mid-1990s), charitable assets of \$50 billion, and nearly \$10 billion in grants. DAF critics choose to describe their growth as “unbridled,” and speak of the “warehousing” of charitable assets, but other observers maintain that DAFs are democratizing philanthropy and fostering more strategic and thoughtful giving.

Donor advisors typically choose this vehicle for simplicity and convenience. In selecting a specific sponsoring organization, donors balance cost against ease of use and services provided. Those who distinguish among sponsoring organizations fail to account for the value of donor choice in promoting frequent and generous contribution activity. The donor-advised fund universe displays both vibrancy and diversity – qualities that should be welcomed by those who want more private resources directed toward community, national, and global challenges.

While the charitable community and its regulators are understandably interested in learning more about the variety of sponsoring organizations and their operational procedures, the appeal of donor-advised funds, and their short- and long-term impact on charitable giving, nothing about the “rise” of donor-advised funds warrants a legislative response from Congress.

- We don’t need Congress to act when sponsoring organizations are educating and monitoring their donor advisors about prohibited uses of donor-advised funds.
- We don’t need Congress to act when DAFs are limited by law to charitable purposes, when they are capturing non-cash resources for charity, when they provide a philanthropic cushion in hard times or when disaster strikes, when the industry’s aggregate payout rate already exceeds 20 percent, and when we may be witnessing the start of a long-term breakthrough in the level of charitable giving in the United States.

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- We don't need Congress to act when sponsoring organizations are voluntarily evaluating and implementing policies regarding inactive accounts and succession, although consideration may be given to requiring disclosure of such policies.
- We don't need Congress to change the donor privacy rules around donor-advised funds when sponsoring organizations and most donors themselves are providing access to grant-seeking charities. We should respect the wishes of donors who choose anonymity.

In short, if anything is being “warehoused” in donor-advised funds, it is a powerful legacy of generosity.

This conference is based on the premise that such significant change is occurring in one particular corner of American philanthropy that Congress may need to take some action in response. Yet the premise remains vague and is thus worth exploring.

What does it mean that donor-advised funds are “rising?” They are not just now coming into existence, as in “the rise of the city;” they have existed since the William and Françoise Barstow Foundation was established at the New York Community Trust in 1931. Nor are they “getting on their feet,” though one might note that both donors and sponsoring organizations have contributed to the maturing of donor-advised funds, or “DAFs,” by developing creative ways to utilize this vehicle as an adjunct to family foundations, to promote collective impact in communities, to insure timely disaster response around the world, and for the incubation of projects and new charities under the sponsoring organization's fiscal sponsorship.

The “rise” with which this conference is intended to grapple is two-fold: 1) the increase in the number of DAF accounts and the amount of dollars being held in those accounts, and 2) the fact that DAFs have become the fastest-growing, and arguably the most popular, vehicle for donors who seek to move beyond kitchen-table philanthropy. While the charitable community and its regulators are understandably interested in learning more about the appeal of donor-advised funds, the variety of sponsoring organizations and their operational procedures, and the short- and long-term impact of DAFs on charitable giving in and beyond the United States, nothing about the “rise” of donor-advised funds warrants a legislative response from Congress.

We can agree that the increase in the utilization and funding of DAFs has been dramatic. As noted above, bragging rights to the country's first donor-advised fund go to the New York Community Trust, where in 1931, the William and Françoise Barstow Foundation was established. William Barstow had worked with Thomas Edison in his Menlo Park laboratory, served as general manager of the Edison Electric Illuminating Company in

Brooklyn, and also achieved success in his own entrepreneurial ventures. New York Community Trust CEO Lorie Slutsky has commented that the fund was an experiment of sorts - a means by which Barstow and his wife first got acquainted with the Trust and the philanthropic advice and support it offered. The couple no doubt deemed the experiment a success; Francoise Barstow followed her husband's example, instructing in her will that a second DAF be created after her death in 1958. Both funds continue to support charitable endeavors today.

The Barstow funds are now part of a donor-advised fund community that spans the globe. In the United States over one thousand sponsoring organizations include place-based community foundations; a wide variety of mission-oriented funds; universities and federations; and national funds like Fidelity, Schwab, and Vanguard, whose rapid growth since their launch in the 1990s has propelled them into the ranks of America's largest charities. Unlike private foundations, donor-advised funds grew slowly through much of the twentieth century, but with their recent dramatic growth they now outnumber private foundations in the United States by more than two to one. Aggregate statistics from 2013 make clear the broad popularity of this giving vehicle: 217,000 funds (up from 20,000 in the mid-1990s), charitable assets of \$50 billion, and nearly \$10 billion in grants.¹

The statistics at particular sponsoring organizations are also impressive. At the National Christian Foundation, founded in 1982, \$50 million in grants were distributed in its first 16 years; in the second half of its life, donors have recommended an amazing \$5 billion for the charities of their choice. Other mission-focused funds tell a similar story. In 1976, Tides Foundation founder Drummond Pike recognized the potential of donor-advised funds to advance left-leaning causes both in the United States and abroad. Today Tides manages 373 such funds, with an average size of \$320,000. In 2013, the Tides Foundation distributed over \$94 million to drive its agenda. Liberty-minded donors find common ground in northern Virginia at Donors Trust. Founded in 1999, Donors Trust has received over \$700 million in contributions and its donor advisors have recommended grants totaling over \$600 million.²

The FY 2014 Columbus Survey of community foundations, administered by CF Insights, revealed significant growth in DAF assets since 2013 at the 129 survey participants, up 9.4 percent from \$20.3 billion to \$22.2 billion. Gifts and grants to donor-advised funds at community foundations also increased from 2013 to 2014 – by 15 percent, from \$4.3 billion to \$4.9

¹ National Philanthropic Trust, *2014 Donor-Advised Fund Report 1* (2014).

² Joanne Florino, "Giving Made Easy", *Philanthropy*, Spring 2015, available at http://www.philanthropyroundtable.org/topic/philanthropic_freedom/giving_made_easy.

billion. And community foundations also increased DAF grants to the community in the same year by 9 percent.³

The significant growth in community foundation DAFs between 2013 and 2014 was nonetheless smaller than the growth in DAF assets at the three largest national funds: Fidelity Charitable, Schwab Charitable, and Vanguard Charitable. The Columbus Survey notes that in 2014, the three funds combined surpassed all 129 community foundations in total DAF assets: \$24.1 billion for the nationals as compared to \$22.2 billion for the community foundations.⁴ The nationals also received more gifts and grants into their donor-advised funds and disbursed more grants from their DAFs.

Statistics released by Fidelity and Schwab at the close of their 2015 fiscal years on June 30 indicate that those strong gains continue. Fidelity Charitable's DAF assets reached nearly \$15 billion in 75,000 funds and its FY 15 DAF grants totaled nearly \$3 billion, a 32 percent gain over FY 14. Schwab Charitable reported an all-time high \$1 billion in grants, an increase of 30 percent over the prior fiscal year.⁵

With so many charitable dollars flowing in and out of donor-advised funds, we might be cheering the creativity of American philanthropy and the entrepreneurial market forces which transformed an under-utilized giving vehicle into the fastest growing grantmaking instrument in the country. In a 1999 piece in *Tax Notes*, Urban Institute scholar Eugene Steuerle credited the mutual fund industry for "the democratization of endowment giving," noting that the low-cost, low-minimum donor-advised funds being offered had the potential to reach beyond the wealthy citizens of any given community to "the tens of millions who own mutual fund assets."⁶ Thirteen years later, writing in *Nonprofit Quarterly*, Rick Cohen – who has never hesitated to turn a critical eye on institutional philanthropy – reported on how that potential was being realized. "DAFs, he wrote, "are part of a movement in philanthropy that stands as an alternative to ginormous foundations created by millionaire and billionaire families whose grantmaking is determined by a handful of rich board members. In contrast, DAFs are, dare we say it, an instrument toward democratizing philanthropy . . ."⁷

Yet critics of donor-advised funds like Alan Cantor choose to describe the growth of DAFs as "unbridled," and speak of "reining them in," assuming, I imagine, that Congress should be armed with lassos and bits, ready to

³ Foundation Center, CF Insights, *FY 2014 Columbus Survey* 10 (June 2015).

⁴ Id.

⁵ Press Release, Fidelity Charitable (2015); Press Release, Schwab (2015).

⁶ Eugene Steuerle, Urban Institute, *Tax Notes*, January 8, 1999.

⁷ Rick Cohen, "Overcoming Outmoded Skepticism: Seeing National Donor-advised Funds for What They Are", *Nonprofit Quarterly*, April 19, 2012.

“break” these wild and dangerous creatures.⁸ Why such a stark difference in characterization? While the critics have focused all their attention on supposedly mis-timed tax benefits, money manager fees, payout rates, time limits, and “strings on DAFs that are making charity supporters angry,” Steuerle and Cohen have zoomed in on charitable donors and the advantages of DAFs in promoting more strategic and thoughtful giving. In an article I wrote for *Philanthropy* magazine this spring, I profiled some of these donors – a few by name. Their stories reveal a great deal about the initial attractiveness and longer-term value of DAFs in advancing philanthropy.⁹

Texan Dan Smith had lost his wife Joellyn to breast cancer and he and his children were determined to honor her giving legacy. Already a donor at Communities Foundation of Texas (CFT) where he and his wife had established the Smith Family donor-advised fund, Smith sought advice and direction from that organization. The result was the Joellyn Smith Fund for Breast Cancer Support, a second DAF which CFT staff helped connect with the Bridge Breast Network to assist low-income uninsured women who were battling that disease.

Dan Smith is like many DAF donors who, after experiencing a happy or tragic life event, may be moved to mark that event by setting aside a considerable amount of money for charity, but may not want to take on additional administrative burdens and may not have defined his giving intent. A DAF offered Smith the needed efficiency and flexibility, provided growth, and gave him access to a community foundation’s accumulated knowledge of local needs and the nonprofit organizations doing the best work. The Joellyn Smith Fund is also an example of multi-generational giving, as more families use donor-advised funds to transmit values and teach younger members how to engage in more creative community giving. As the Smith family story shows, DAFs can actually encourage already generous people to set aside more for charity.

In New Jersey, MaryAnn Rich, a retired schoolteacher and mother of two sons in their twenties, cherishes the donor-advised funds she established for herself and her children at Vanguard Charitable. When her husband died suddenly at the end of 2000, Rich found herself the recipient of insurance and other payments that she was moved to earmark for charity. On the advice of a friend, she turned to Vanguard Charitable and funded the Gordon and MaryAnn Rich Family Fund. She has been pleased with the fund’s performance, and not simply for financial reasons. “I keep making

⁸ Alan Cantor, “Wall Street’s Charitable Gold Rush,” *Inside Philanthropy*, February 25, 2015.

⁹ Florino, *supra* note 2.

gifts and the money is still there,” she told me. “Through this fund, Gordon is still with us.”

The donors who are drawn to mission-oriented funds constitute a community with shared values and a common mission. The San Francisco-based Tides Foundation offers its donors not only DAFs, but also the opportunity to fund new projects which are administered under the tax-exempt status of the Tides Center, created in 1996. In addition to serving as their fiscal sponsor, the Tides Center advances the stated goals of “shared prosperity and social justice” by providing these novice organizations with significant technical assistance in the areas of management, fundraising, and public relations. Currently about 160 projects are operating under the center’s umbrella. They range from the Center for Care Innovations, a well-funded initiative that has re-granted \$100 million to non-profit health care safety net organizations in California, to Raising Voices, a much smaller operation which seeks to prevent violence directed at women and children in East and Southern Africa.

In Virginia, Donors Trust is committed to advancing “the ideals of limited government, personal responsibility, and free enterprise.” Donors Trust began by administering donor-advised funds but was encouraged by the creativity of its donors to expand its sights. The organization can incubate both projects and new charities under its tax-exempt umbrella. Through their DAFs donors can band together and provide collective funding for common areas of interest.

At its Alpharetta, Georgia central office, National Christian Foundation president David Wills recognizes that giving is - at its core - about relationships. To build and sustain these relationships, NCF maintains 30 local offices around the country which advise donors on their giving and connect them with the nonprofits that will best help them achieve their charitable goals. They function, Wills says, “as community foundations for faith-related giving.” For those who want to move beyond individual giving to collective action, NCF offers its Generosity Catalyst Fund, enabling like-minded donors to support evangelization and encourage generosity in others through faith-focused stewardship of resources.

Donors who choose to use DAFs have a wide variety of sponsoring organizations from which to choose, based on considerations that include ease of use, fees, grant minimums, mission, and services offered. It’s a market, and the consumer is free to buy the value he or she needs in order to accomplish his/her giving goals. And money may move from one sponsoring organization to another, though not all sponsoring organizations allow such transfers. In my hometown, our local community foundation reports that several of its donor-advised funds regularly receive transfers from the na-

tional funds at the request of donors who wish to utilize the community foundation for their local grantmaking.

For DAF users in general, the key factor driving donors to this vehicle is simplicity. That simplicity begins when a contribution is made, since most sponsoring organizations can accept and monetize complex assets like real estate and closely-held stock – property that donors would be unable to give to smaller charities and unwilling to give to any one large charity. Among the 18,000 to 20,000 charities which will receive gifts this year through DAFs at the National Christian Foundation, many will be low-budget organizations – small ministries and other nonprofits unable to accept the complex assets which NCF can convert into cash. In San Francisco, the Tides Foundation has begun processing full and partial business interests. The Communities Foundation of Texas will take in even tangible personal property like art. In its 2015 Giving Report, Fidelity noted that more than half of the contributions to DAFs were non-cash assets, adding, “Three-quarters of donors say the ability to donate such assets is a reason they set up or use a donor-advised fund.”¹⁰ At a recent Urban Institute conference, Drew Hastings of the National Philanthropic Trust used the phrase “philanthropic fracking” to describe this unlocking of assets that would otherwise be unavailable. Sponsoring organizations of all types can demonstrate that when givers are encouraged to look at their full complement of assets for philanthropic purposes, more value is captured for charity.

Donors quickly find that DAFs make it simple to get that value out to nonprofit organizations as well. With tax issues already resolved at the time a contribution is made to establish or enlarge a fund, donors can recommend a grant at any time. Online account access is quickly improving, especially at the national funds, expanding donors’ ability to monitor their giving in real time and promoting collective decision making in families whose members live in multiple locations. And sponsoring organizations do report increased family involvement in donor-advised funds, including funds established to promote multi-generational philanthropy. Parents and grandparents are establishing funds as Christmas presents or to celebrate a bar or bat mitzvah. Families with established foundations are utilizing donor-advised funds to integrate family members beyond those on the foundation boards into family philanthropy. Other foundations are turning to DAFs for their off-mission grants or to enhance their local giving in a specific community.

In the choice of a sponsoring organization donors typically perform a familiar calculation, balancing cost against ease of use and services provided. Those who choose to open a fund at a higher-cost community foundation are typically seeking the more direct and even personalized guidance

¹⁰ Fidelity Charitable, 2015 Giving Report.

which those place-based organizations offer to those who find giving choices daunting and time-consuming – educational programs on particular issues, site visits to nonprofit agencies, and advisory services on philanthropic strategies. The Communities Foundation of Texas, for example, curates collective knowledge about North Texas needs, producing a “Giving Guide” available to the whole community.

Community foundations are also able to aggregate grants from multiple DAFs for ongoing community needs and emergencies, sometimes through a challenge issued by one donor advisor or a local private foundation. A donor-advised fund at a community foundation may be used by a local employer to match employee gifts or to organize an employee-run giving program without incurring the administrative burdens of running such operations within the company. Even a self-directed donor may choose to invest his or her funds in a local DAF in order to support the operational costs of the community foundation whose convening and community building roles distinguish it from other sponsoring organizations. And in rural America - far less likely to enjoy the home-grown private foundation resources of major metropolitan areas and too frequently bypassed by funders seeking large, concentrated populations for their educational and economic development programs – community foundations are often the only potential source of geographically-focused philanthropic dollars.

The CEO’s of the three diverse mission-focused funds with whom I have spoken directly – David Wills of the National Christian Foundation, Kriss Deiglmeier of the Tides Foundation, and the late Whitney Ball of Donors Trust – agreed that their donors were highly motivated by the desire to join an organization of like-minded individuals to change the world. Asked about Boston College Law Professor Ray Madoff’s criticism of the “warehousing” of wealth that might be better utilized if donors simply made gifts directly to the organizations and causes they choose, their responses were also similar. For Donors Choice, where the aggregate annual payout rate is 85 percent or more, Whitney Ball noted, “Our experience is that DAF donors give more, and give faster, because they’ve already parted with the money and resolved tax issues.” With a payout rate of 35 to 40 percent, NCF turns over assets every three years. “Our folks are moved to give their money out quickly,” noted David Wills. The story is the same at Tides, where Kriss Deiglmeier reminded, “Our mission is to accelerate impact of partners’ in social change, so our culture is about ‘right now.’” The aggregate payout rate at Tides, she reported, is about 50 percent.

And what of donors who select one of the three largest national funds? Vanguard donor Mary Ann Rich’s appreciation for her DAF stemmed from the simplicity and efficiency of giving – tax issues that were already resolved, an on-line platform that made paperwork unnecessary, and the basic

due diligence that insured that her gifts would go to the legitimate charities. In speaking with me, Rich addressed those critics who wish to impose time restrictions or payout mandates on donor-advised funds. To those who suggest that DAFs are ‘warehouses’ for funds that would be better distributed directly to charities, she responded that this simply would not have happened in her case. At the time of her husband’s death she was teaching full-time and raising two young children. She knew she wanted to earmark financial resources for charity, but was not prepared to make specific grant recommendations. She needed time to settle down, and time to learn to be a good donor, and – in her words - “That takes hard work.” A time limit would also have prevented her sons from participating in the family giving practices that they have cultivated and now enjoy. “It would have changed the way we did things, and not for the better,” Rich concluded.

Rich and her children typify the self-directed donors who find the lower-fee national funds most appropriate for their giving practices. They’ve developed a system that works for them: when the three of them want to make a large gift they use the family fund, and everyone participates in the research and decision-making. This process led to a significant grant to their local food bank, where one of the Rich sons had volunteered and had been surprised to see whole families among the clients. Using their own DAFs, the young men recommend smaller grants to other nonprofits with which they are familiar.

Those who try to distinguish among sponsoring organizations frequently fail to account for the value of donor choice in promoting frequent and generous contribution activity. It is wrong to conclude that all donors need the “high touch” environment of community foundations. Those who opt to give through donor-advised funds and are self-directed find their primary value in efficient, low-cost administration. And at the very least, the most-utilized sponsoring organizations provide essential due diligence and easy access to publicly available information about charities, linking prospective donors to websites like Charity Navigator or GuideStar. Yet even at the national funds, which began operations in the 1990s, the context is changing somewhat, driven in large part by the donor advisors themselves.

For the first ten years of his work at Vanguard Charitable, former CEO Ben Pierce saw the organization’s role as “making gifts happen for those who know what they want to do.” Now, however, as donors see the power of DAFs for longer-term, higher-impact philanthropy they are asking more questions about strategy, about the pros and cons of scholarship grants, conditional and matching grants, about the wisdom of multi-year grants and grants for general operating support. In some cases donors are seeking “deep-dive” knowledge about specific subject areas. In short, Pierce re-

marked, donors who have learned to give well are asking, “What else can/should we do?” In response, Vanguard is providing more philanthropic consultation, though he acknowledged that this is still not a core function of the organization.

At Fidelity Charitable, the story is similar. Fidelity’s website offers a great deal of information and guidance for disaster relief, but only spotty references for other common giving areas. CEO Amy Danforth has noted that in most of their giving decisions, her donors are self-directed – some 75%, she points out, do not request assistance. For those who do, Fidelity partners with philanthropy advisors around the country to whom donors can be referred. The future may look somewhat different as Danforth anticipates the expanded use of donor-advised funds as the older members of Gen Y enter their giving years: “Fidelity Charitable is sitting at the intersection of digital technology and philanthropy, and DAFs will be their strategic giving vehicles.” For that future, Fidelity is beginning to explore the donor appetite for sharing and collaboration as a means to greater impact. In September, Fidelity Charitable held “INSPIRE 2015,” a convening of representatives from academia, charities, and foundations to discuss ways to advance philanthropy, but there is as yet no indication that any of the national funds plan significant increases in donor support beyond the basic services currently offered.

The donor-advised fund universe displays both vibrancy and diversity – qualities that should be welcomed by those who look toward a future where more private resources will be directed toward community, national, and global challenges. If nothing else, the rise of donor-advised funds has prompted more conversations about philanthropy between financial advisors and estate planners and their clients – conversations that may previously have been limited to the wealthiest customers and which began and ended with private foundations. Will DAFs change philanthropy in the United States? Will they increase giving and the community of givers? Most donor advisors at community foundations are now between the ages of 46 and 64 – will we see those demographics change?¹¹ If DAFs are indeed democratizing charitable giving, then will we see different charities being supported? The current answer to all of these questions is simply “we don’t know.” This is a universe begging for exploration, and we are beginning to see better reporting from the sponsoring organizations themselves and more research from those who study charitable giving in the United States.

I am optimistic about the future of donor-advised funds and the positive role they will play in American philanthropy. But I am also aware that

¹¹ Donor demographics from Urban Institute, Center on Nonprofits and Philanthropy, Study of DAFs, 2014.

critics of DAFs are vocal, quite persistent, and somewhat influential. Some of the issues they have raised are more easily dismissed than others, and a quick review is warranted.

1. ISSUES RAISED AROUND THE CHARITABLE DEDUCTION

Because the organizations which sponsor donor-advised funds are all public charities, gifts to establish or grow DAFs are deductible under federal tax law at the time the gift is made. Grants are disbursed, however, on a variable schedule at the discretion of the donor advisor. Alan Cantor may still be wondering “what went through the minds of the tax regulators” who approved public charity status for the Fidelity Charitable Gift Fund in 1991,¹² but in fact Fidelity and the other national funds are administering accounts that are by law no longer owned by their donors and whose assets are permanently restricted for charitable use. Professor Ray Madoff likes to put “legal niceties aside,” claiming “that it is the donor who calls the shots regarding whether a distribution is made.” Well yes, that’s what it means to be a donor advisor, but all grant recommendations are ultimately approved by the sponsoring organization and there are critical prohibitions in place which are enforced.

Returning to Alan Cantor’s horsey analogies, I’ll use a phrase I’ve uttered before – this is not the Wild West. Sponsoring organizations are quite aware that the violation of particular rules brings down the wrath of the Internal Revenue Service, as was the case with the New Dynamics Foundation in 2006.

”In *New Dynamics Found. v. United States*, 70 Fed. Cl. 782 (2006), the court determined that New Dynamics Foundation (“NDF”) did not qualify for exemption because it permitted donors to use funds to serve their private interests (e.g., to allow the donor to attend retreats, conferences, or seminars; to research investment opportunities; to save for retirement; to provide scholarships to the donor’s family members; to be paid “administrative,” “fundraising,” and “consulting” expenses; and to pay the donor’s children for performing charitable work).”¹³

Alan Cantor’s August 12, 2015 piece in *The Chronicle of Philanthropy*, “Strings on Donor-Advised Funds Are Making Charities Angry,” acknowledges “the very real restrictions on how grants from donor-advised funds can be distributed,” but then continues with the hyperbolic statement

¹² Cantor, *supra* note 8.

¹³ IRS Donor Advised Funds Guide Sheet Explanation, Jul. 31, 2008, at 2 (http://www.irs.gov/pub/irs-ege/donor_advised_explanation_073108.pdf).

that “these restrictions are increasingly causing headaches and inefficiencies for nonprofits, while giving rise to misunderstanding and resentment between those organizations and their donors.” He concludes that the fault lies with the “commercialization” of donor-advised funds and the financial advisors who recommend them, because “in the old days” when DAFs were primarily found at community foundations, “there was good communication about the limits of giving through this mechanism.”¹⁴ I did a bit of on-line searching and found wonderful grantmaking guidelines on the websites of a number of community foundations, but an even more useful document on the Schwab Charitable Fund’s site. The latter instructs donors quite specifically that to accept the tangible benefits of a membership, for example, “the donor must pay for the full amount of the membership using funds outside of a donor-advised fund account.” Might we agree that the donor advisor bears significant responsibility for following this guidance?

We don’t need Congress to act when sponsoring organizations are educating and monitoring their donor advisors about prohibited uses of donor-advised funds.

Donor-advised funds are criticized by those who perceive a lack of symmetry between the full charitable deduction allowed at the time the fund is created and the distribution of grants from the fund over a longer period. There is, of course, the obvious response: that the money has been donated irrevocably to a public charity, and is therefore fully deductible by law. But the underlying accusation is that too much DAF value remains idle because the law allows donors to stockpile tax-free assets while charities go without. In January 2014 Professor Ray Madoff wrote that with the rise of DAFs, “Charities and the people they serve are being starved of resources.”¹⁵ *Giving USA* numbers have been used to prove this point, particularly the fact that although the current dollars contributed have increased every year since 1974 (with the notable exception of 1987, 2008, and 2009), charitable giving has held firm at about 2 percent of GDP over four decades.¹⁶

But Giving USA’s numbers for 2014 show something else: a bump-up in overall charitable giving to 2.1% of GDP. Giving to all categories of charity – other than international affairs – also increased in 2014, as did the number of 501(c)(3) organizations. Finally, Giving USA reported that the fiscal year summaries from the four largest (non-community foundation) charitable gift funds demonstrated growth in contributions from 2013 and

¹⁴ Alan Cantor, “Strings on Donor-Advised Funds Are Making Charities Angry,” *The Chronicle of Philanthropy*, August 12, 2015.

¹⁵ Ray Madoff, “5 Myths about Payout Rules for Donor-Advised Funds,” *The Chronicle of Philanthropy*, January 13, 2014.

¹⁶ Giving USA 2015 Annual Report.

2014, but not the increases of recent years.¹⁷ Grantmaking from those four funds, however, did show sustained growth. Might this be a signal that DAFs are, in fact, beginning to move the giving needle beyond 2 percent of GDP? The honest answer is again “we don’t know,” but the narrative is certainly changing.

What we do know is that aggregate annual payout numbers among donor-advised funds are far greater than the 5 percent mandatory rate for private foundations, and are considerably higher at mission-related sponsoring organizations. While the rate is lower at sponsoring organizations which are not issue-focused, the National Philanthropic Trust reported the overall aggregate payout rate for donor-advised funds in 2013 as 21.5 percent. While DAF critics have dismissed the aggregate numbers, using in one instance a Congressional Research Service calculation that a 16 percent aggregate payout can be achieved if only 20 percent of accounts distribute 80 percent in a year while 80 percent distribute nothing, we have data from community foundations and the largest sponsoring organizations that tell a different story. Yes, there are some donor advisors who use their accounts like a checkbook, but overall participation rates are high. At June’s Urban Institute conference, Jennifer Leonard of the Rochester Area Community Foundation reported that 94 percent of the foundation’s DAFs distributed grants in the past three years; in its *2014 Giving Report*, Fidelity noted that 92 percent of its accounts had granting activity in 2013 alone.

An aggregate 5 percent payout mandate for sponsoring organizations may be appealing to those who would like to see consistency between private foundation and DAF rules, but there are sound reasons for tax law to treat the two differently, and sponsoring organizations are generally distributing significantly more than 5 percent a year now. From many years of private foundation experience I find myself in agreement with Senator Chuck Grassley (R-IA) who recently commented, “If we set a payout at 5 percent and they pay out 5 percent, well then they’re meeting the law. We think an attitude is better, because we hope some people will exceed [a mandated percentage].”¹⁸ I would add that imposing an account-level payout requirement creates administrative burdens which will drive up fees and reduce the amount of money given to charity – a high price to pay for donor advisors and sponsoring organizations who have already complied with, and indeed are going beyond, what is required.

What we also know is that donor-advised funds are ideally suited for the counter-cyclical giving so desperately needed when times are hard. Dur-

¹⁷ Id.

¹⁸ “Sen. Grassley Worries Payout Rule for Donor-Advised Funds Would Backfire,” *The Chronicle of Philanthropy*, September 9, 2015.

ing the recession years, while individual donations given directly to charities and private foundation grants declined, donors continued to recommend grants from their donor advised funds. Howard Husock has noted that in 2008 and 2009, gifts from donor-advised funds surpassed their 2007 level.¹⁹ For Donors Trust, contributions in 2010 totaled \$38 million, but \$61 million was nonetheless distributed in grants.²⁰ For some donor advisors, a DAF is also the ideal way to use their high-earning years to fund the charitable resource that will continue to grow and see them through their retirement. Arbitrary time limits on donor-advised funds would jeopardize the ability of these vehicles to sustain charities through bad times and enrich communities over many years. We should instead look to non-coercive ways to encourage increased distributions from DAFs in particular circumstances or to support specific initiatives, including matching grant offers from other donor advisors or from private foundations. In New York City, the Jessie Smith Noyes Foundation recently began to consult with DAF account holders and wealth advisors to accelerate more DAF grants to organizations aligned with Noyes's values of social justice and environmental sustainability.²¹

We don't need Congress to act when DAFs are limited by law to charitable purposes, when they are capturing non-cash resources for charity, when they provide a philanthropic cushion in hard times or when disaster strikes, when the industry's aggregate payout rate already exceeds 20 percent, and when we may be witnessing the start of a long-term breakthrough in the level of charitable giving in the United States.

But what about inactive donors? And how should succession be structured? These are reasonable questions, and ones the field should not ignore. Many sponsoring organizations have or are developing inactive donor policies which are leading to discussions of best practices around duration of inactivity and required distributions. I would argue that the development of voluntary policies around account activity and succession is preferable to mandated one-size-fits-all policies that would likely fail to reflect the values of particular sponsoring organizations. Donors Trust, for example, recommends a "sunset" approach to preserve donor intent: only the original donor can name successor advisors, and accounts are closed 20 years after a donor's death, with remaining assets going to a designated charity or charities. With their focus on long-term, place-based grantmaking, community foun-

¹⁹ Howard Husock, "Tax Season Good News: The Growth of Donor-Advised Funds," *Forbes*, April 13, 2015.

²⁰ Author obtained information through interviews for article, "Giving Made Easy," *supra* note 2.

²¹ Vic Deluca, "Give More Now: A Foundation's Campaign on Donor-Advised Funds," *Inside Philanthropy*, June 24, 2015.

dations may choose to allow two or three generations of donor advisors before a DAF account is distributed to a named organization or moved to a fund controlled by the community foundation's board.

We don't need Congress to act when sponsoring organizations are voluntarily evaluating and implementing policies regarding inactive accounts and succession, although consideration may be given to requiring disclosure of such policies.

2. ISSUES RAISED AROUND TRANSPARENCY AND ACCESS

Although critics have occasionally complained that donor anonymity has prevented nonprofits from accessing the resources of donor-advised funds, anonymous grants are the exception, rather than the rule. Fund directors with whom I spoke described the reasons donor advisors might choose anonymity; they include humility, off-mission grants, and grants that might be embarrassing or threatening. Very few donors choose to remain anonymous all the time at community foundations and the national funds – a number that seems to center at around 5-8 percent. Community foundations are quite intentional about bringing donors together with nonprofits, and conducting educational sessions for grant-seeking organizations. They typically advise charities to steward the donor relationship directly, as do the national funds. At Vanguard, some 94-95 percent of grant letters identify the donor advisor who recommended the grant with the donor's address. That number is about 95 percent at Fidelity, and as high as 97% at Schwab. Charities – large and small - that are alert to the rise of DAFs are developing fundraising techniques to integrate donor-advised funds into their prospect lists.

We don't need Congress to change the donor privacy rules around donor-advised funds when sponsoring organizations and most donors themselves are providing access to grant-seeking charities. We should respect the wishes of donors who choose anonymity.

3. ISSUES RAISED AROUND PRIVATE FOUNDATION USE OF DAFs

Professor Ray Madoff has questioned the use of donor-advised funds by private foundations. I can imagine a number of scenarios in which private foundations might utilize DAFs for their on-mission grantmaking: to sequester funds committed in a challenge or matching grant arrangement, to establish a separate pool of funds for training next generation board members, or to allow family members who are currently not serving on a family foundation board to participate in the family's philanthropy. It would also be helpful to make off-mission grants through a donor-advised fund to avoid confusion and inappropriate requests.

Should private foundation grants to DAFs be included in the 5 percent payout calculation? They are grants to public charities, of course, but in this case we may want to consider the spirit of the law. What is the extent of this practice? What are the various ways in which DAFs are being integrated into a private foundation's grantmaking? One private foundation executive with whom I spoke suggested a 990-PF "check-the-box" to identify grants to donor-advised funds or a requirement that expenditure responsibility be exercised on such grants.

We should be wary of "over-legislating" and banning this practice until we know more.

When the family of Gordon Rich responded to his unexpected death by creating their donor-advised funds, they received the very gift that has been at the heart of much of the DAF controversy – the gift of time. "When you're talking about philanthropy," they asked me, "why make it difficult?" Why indeed? No one denies the tax advantages that donors obtain when they establish DAFs, but as Fidelity's Amy Danforth has commented, "They stay in and grow their accounts because they love the giving experience." If anything is being "warehoused" in donor-advised funds, it is a legacy of generosity.