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IRS ISSUES

Intriguing Debate on Foundation Payout Rules

03.11.21 | Linda J. Rosenthal, JD

Well before the pandemic crashed into our national consciousness, there were murmurs and quiet discussions about the adequacy of the annual 5% (minimum) payout rule for America's private foundations that has been in place for many decades.

By the beginning of December 2020, these conversations had emerged from the shadowy edges of philanthropy thought leadership. They became part of a major announcement on Giving Tuesday – December 1, 2020 – by "a powerhouse coalition of philanthropists, foundations, and academic experts" for significant changes to rules on private foundations and donor-advised funds. This new " Initiative to Accelerate Charitable Giving" includes support for raising the 5% minimum payout figure.

In our reporting in late December 2020 on this bold new *Initiative*, we noted that "[s]o far, there has been lots of enthusiasm and praise for this critical undertaking, but there has been hesitation and criticism from certain quarters as well." Specifically, doubts had been expressed on behalf of the Philanthropy Roundtable, a "conservative nonprofit organization that advises conservative philanthropists" by its president and CEO, Elise Westhoff. See *The Left Wants a Philanthropy of the Few* (December 14, 2020), *The Wall Street Journal*. We promised to "follow these and other reactions as they develop."

By January 4, 2021, courtesy of the editors of the prestigious *Stanford Social Innovation Review,* a comprehensive debate forum on this important issue was published and available online. See *Up for Debate: Should Foundations Increase Their Payouts During Big Crises?* The essay that was the catalyst for this series was a thoughtful and significant push back against the proposal to raise the 5% minimum payout rule penned by Larry Kramer. See *Foundation Payout Policy in Economic Crises* (January 4, 2021). Mr. Kramer is the President of the William and Flora Hewlett Foundation and formerly professor of law and dean of Stanford Law School.

The SSIR editors followed up by soliciting responses to Larry Kramer's argument from selected thought leaders across the ideological spectrum. In the *Up for Debate* forum, they presented nine such essays, all dated January 4, 2021. The SSIR team also included Dean Kramer's gracious and considered rejoinder to his colleagues in *Further Reflections and Reactions on Foundation Payout Rates*.

Up for Debate Series

"The onset of COVID-19 has amplified discussions about philanthropic spending during an economic downturn," write the SSIR editors to introduce this compelling debate. They note that "…some observers [are] saying that a big crisis like the pandemic should compel funders to not just maintain their outlays, but to disburse more."

By contrast, Larry Kramer explains in his response why "a funder might credibly think it wiser not to increase payout during an economic downturn, even a severe one." He also writes that he "hopes to show that this is so not only because people might reasonably disagree about the right thing to do, but also because there might actually be more than one right thing to do. What is appropriate for one funder may not be appropriate for another, and what is apt for a funder at one time may not be fitting even for the same funder at a different time."

It would be presumptuous to try to summarize this compelling and thoughtful presentation by such a distinguished scholar and philanthropy leader. Suffice it to say that he strongly believes in what he describes as the critical role played by U.S. legacy foundations over many generations and as a force for good and for change. Among the strongest – but still respectfully presented – challenges to this tradition-based perspective are those by Professor Helmut K. Anheier and by Edgar Villanueva, author of *Decolonizing Wealth*.

Another interesting exchange is between Dean Kramer – who criticizes the plan adopted in mid-2020 by several major foundations to fund increased payouts to grantees by the mechanism of issuing bonds – and Darren Walker, president of the Ford Foundation, a leading supporter of (and participant in) it.

Response Essays

SSIR received the following responses from its carefully selected group of commentators:

- *The Case for Foundations to Do More in Times of Crisis*: John Palfrey, president of MacArthur Foundation, former professor and associate dean at Harvard Law School. "Spending more today will mean having less for the future, but the current crisis is unprecedented and the financial trade-off is very modest."
- *How Much We Give Is Important, But How We Give It Is Too*: Kathleen Enright, president and CEO of the Council on Foundations. "There is disagreement over how much foundations should pay out during this crisis, but there should be no disagreement over the need for all foundations to transform the way they give to help build more effective and sustainable nonprofit organizations."

- *Unprecedented Times Call for Foundations to Take Unprecedented Actions:* Darren Walker, president of the Ford Foundation. "During this historic disruption, foundations should not put their own survival above the survival of the civil society and nonprofits that they serve."
- *Now Is Not the Time for Foundations to Default to Minimum Payout*: Phil Buchanan, president of the Center for Effective Philanthropy. "Foundations should step up in a time of unparalleled crisis—and strong market returns have made it easier for them to do so."
- *Philanthropy Must Go Beyond Traditional Grantmaking*: Professor Helmut K. Anheier. "The COVID crisis has laid bare the limitations of conventional foundations and put a spotlight on alternative approaches to philanthropy and creating positive social change."
- *Retaining Future Spending Power Is the Wrong Priority*: Edgar Villanueva, principal at the Decolonizing Wealth Project & Liberated Capital. "By not spending more now, foundations are allowing social problems that have been exacerbated by COVID-19 to worsen in the future."
- *Focus on Outcomes, Not on Dollars*: Professor Diana Leat. "The important issue isn't the preservation of a large endowment, but how to exercise informed, imaginative, and sensitive judgment in pursuit of outcomes for the common good."
- *Foundations Are Risk Averse When It Comes to Spending*: Professor Rob Reich. "At a time when society is confronted with so many overlapping crises living donors in particular should increase their giving."
- *There Is No One Answer to How Much Foundations Should Pay Out:* Dan Cardinali, president and CEO of Independent Sector. "Larry Kramer's call for rigorous, evidence-based analysis on payout rates is responsible and leaves room for different approaches."

Kramer Rejoinder

In *Further Reflections and Reactions on Foundation Payout Rates*, the Hewlett Foundation's Kramer acknowledges the "thoughtful feedback" from his distinguished colleagues that has raised "more than a few points that have already prompted additional reflection" on his part and that he "failed fully to consider or explain." In this lengthy response, he goes through many – though not all (because of space constraints) – of them.

The bottom line, though, is his firm commitment to his original argument against legally mandating a higher annual foundation payout: "There will be future crises as compelling as the ones we are going through today, and philanthropy must be ready to respond."

Conclusion

Larry Kramer invites additional "debate and discussion among us and in the sector more broadly." This series, organized and presented by the editors at the *Stanford Social Innovation Review*, is certainly an important step forward in the consideration of this critical issue in philanthropy.

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