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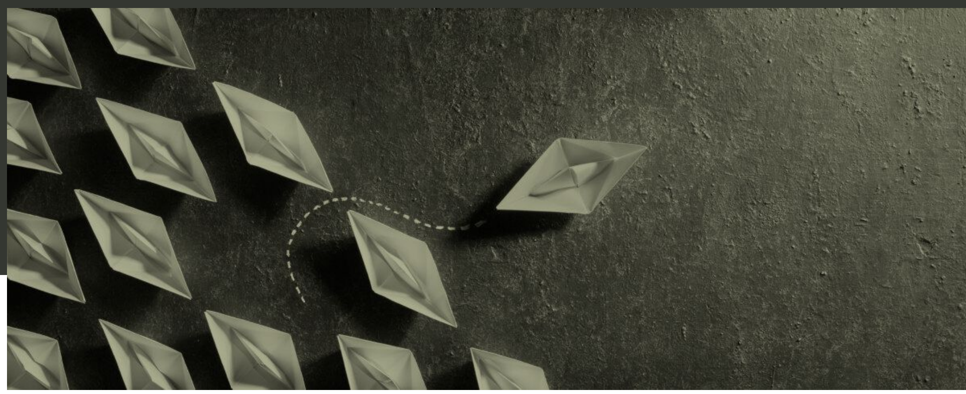
NONPROFITS: PRIVATE FOUNDATIONS

Philanthropy Thought Leaders: Foundations

11.11.20 | Linda J. Rosenthal, JD



With the COVID-19 pandemic swirling around us for many months, there have been repeated calls for America's private foundations to step up with bigger-than-usual payouts and simpler, more flexible, grant rules and procedures. To a large extent, they have responded quickly and generously since the earliest days of the crisis. This important assistance to the nation's nonprofits has been received with gratitude and broad approval.

But that doesn't mean that the many academics and other experts who have argued in recent years that there are deep structural problems with the private-foundation model have been idled or silenced. If anything, the breadth and depth of the economic and societal devastation brought on by the novel coronavirus has reinforced these thought leaders' beliefs that much more than temporary fixes are in order.

Government regulators also have concerns about alleged abuse of the private foundation structure by the nation's wealthiest individuals and families. See *Foundations: IRS Launches Review Project* (September 15, 2020).

The editors of Inside Philanthropy's *The Giving Review* have noticed "… an uptick recently in ideas, suggestions, recommendations, and proposals to reform philanthropy—not the practice of it, but its very underlying structure." They compiled an important and helpful collection of articles and books by distinguished philanthropy thought leaders with a broad range of viewpoints about the future of philanthropy, including private foundations. See *An updated collection of various recent ideas to reform philanthropy* (September 14, 2020, updated October 6, 2020). There seems to be consensus across this spectrum of opinion that at least some changes are in order and long overdue. Explaining the selection process for this collection, they add: "We fully realize there are deep historical antecedents to all of the ideas, of course, but cite only selected recent mentions of them."

Reconsidering the Model

Fifty years ago, in 1969, Congress was "…concerned that the likes of the Mellons, the Rockefellers, and the Fords were putting substantial wealth into foundations for huge tax breaks while continuing to control those funds for their own private ends." So federal lawmakers "revamped the tax rules to force charitable foundations created and controlled by the wealthy to pay out charitable dollars annually and avoid self-dealing."

According to Philip Hackney of the University of Pittsburgh School of Law, there continue to this day to be "concerns of similar misuse of philanthropic institutions to further wealthy interests…." In *The 1969 Tax Reform Act and Charities: Fifty Years Later*, Pittsburgh Tax Review, Vol. 17, page 235 (2020), [available online at SSRN: https://ssrn.com/abstract=3677437], Professor Hackney explains why the 1969 Tax Reform Act's private foundation statutes should be reconsidered, noting that the (full) "denial of tax-exempt status to those Internal Revenue Code section 501 organizations that are not public charities" may be in order.

Cap on Deductions for The Rich

The current charitable-contribution-deduction status quo is almost universally panned.

Much of the recent concern centers around the surprise measure in the Tax Cuts and Jobs Act of 2017 that substantially expanded the eligibility range of the standard deduction. That move effectively tossed many previous "itemizers" into the large pool of taxpayers that are *not* eligible for donation deductions. As predicted, this has resulted in a drop in donations by smaller donors. In response, the nonprofit community along with a bipartisan coalition of legislators has pushed for a change.

At the least, some experts want a limited-term expansion of "above-the-line" deductions for at least some or all of a taxpayer's annual charitable contributions. Others are pushing for a permanent, "universal" charitable deduction. [Note: The COVID-19 emergency pandemic legislation last spring includes a one-time expansion of the above-the-line charitable deduction of up to $300 ($600 for married couple) to all taxpayers but only for 2020.]

According to many commentators, what should be on the table as well is a cap at the *top end* of the donor class. This could effectively be an end-run way to discourage the use and abuse of the private foundation model by the highest net-worth individuals and families in the United States.

Among the intriguing entries on *The Giving Review's* compilation are:

- *Gilded Giving 2020: How Wealth Inequality Distorts Philanthropy and Imperils Democracy* (August 2020) Chuck Collins & Helen Flannery, Institute for Policy Studies [lifetime cap, suggested at $500 million, on charitable donations]
- *A conversation with First Things editor R. R. Reno (Part 2 of 2)* (December 12, 2019) *The Giving Review, Philanthropy Daily* [lifetime cap of $1 billion on charitable contributions; denial of charitable deduction for lifetime contributions beyond $1 billion to a singular or related charity]

Changes to Payout Rules

Well before the COVID-19 pandemic wreaked havoc on all parts of the American economy, there were calls to make changes to the current 5% annual payout requirement for private foundations.

The statute setting that amount was meant to be a *floor* for grant making, but many foundations have treated it as a *ceiling*. See our post from January 15, 2020: *A Plea For Higher Foundation-Payout Rules*.

The collection of articles from *The Giving Review* on the future of philanthropy includes many thoughtful entries on adjustment of the private-foundation payout rate. See, for instance:

- *Gilded Giving 2020: How Wealth Inequality Distorts Philanthropy and Imperils Democracy* Collins & Flannery [permanent increase in mandatory minimum annual private-foundation payout rate from 5% to between 7% and 10%]
- *Big Philanthropy Stopped Being Charitable, Here's How To Fix It* (August 5, 2020) Anonymous, *The American Conservative* [permanent increase in mandatory minimum annual private-foundation payout rate from 5% to 10%]
- More than five (April 27, 2020), *The Giving Review* Editors, *Philanthropy Daily* [voluntary increases]; see, particularly *Crisis Charitable Commitment*

Encouraging Foundation Sunsetting

Recently, we highlighted the growing acceptance of the idea that private foundations need not exist forever. Instead, they should seriously consider closing up shop in a set number of years. See *A Sunsetting Tale* (September 23, 2020).

The list of provocative articles includes several recommending mandatory sunsetting within a specified period of time – either after the foundation's creation or the death of the original donor:

- *Gilded Giving 2020: How Wealth Inequality Distorts Philanthropy and Imperils Democracy*, Collins & Flannery
- *A conversation with Carl Schramm (Part 2 of 2)* (August 15, 2019) *The Giving Review*, *Philanthropy Daily*
- Just Giving: Why Philanthropy is Failing Democracy and How It Can Do Better, 2018) Rob Reich, *amazon.com*

Conclusion

This important list includes many entries that address not just the private-foundation model but also the controversial relationships of private foundations to donor-advised funds. See, for instance, *Philanthropist Urges Congress to Force More Giving From Donor-Advised-Funds and Foundations* (October 1, 2020), Marc Gunther, *The Chronicle of Philanthropy*. There, Mr. Gunther discusses the highly anticipated publication soon of a proposal for significant DAF reform by billionaire philanthropist John Arnold and noted philanthropy expert Professor Ray Madoff of the Boston University School of Law.

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