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The Latest on Foundation and DAF Reform Proposals

01.10.22 | Linda J. Rosenthal, JD

It's been just over a year since the launch of the ambitious Initiative to Accelerate Charitable Giving (IACG). See *Important Charitable Giving Initiative Launched* (December 22, 2020).

According to the "powerhouse coalition of philanthropists, foundations, and academic experts" that are the sponsors of this bold proposal, "America's charities are in a state of crisis." Simply put, there is more than "$1 trillion parked in private foundations and $120 billion more stored away in donor-advised funds…."

The proposed solution is "a few common-sense reforms" in the decades-old federal tax laws, changes that "could significantly increase the flow of resources to working charities…." Generally:

- For private foundations, close loopholes to better ensure that distributions qualifying for the payout requirement are available for use by working charities; and incentivize greater payout through reforms to the excise tax.
- For donor-advised funds, adopt measures to make sure that DAF accounts are distributed to working charities within a reasonable period of time.
- For individuals, incentivize greater giving by expanding and extending the new non-itemizer charitable deduction in a cost-effective way.

This has been a contentious issue for some years. Some opponents to changes in the federal tax laws question the basic premise; that is, whether there is a problem in the current system. Others object to the scope and nature of the proposed solutions.

There have been some important developments in the last year. We've updated you twice already:

- *New Senate Bill on DAF Reform Sparks Fireworks* (June 29, 2021)
- *Payout Reform Bill Continues To Generate Heat* (September 30, 2021)

The question now – at the beginning of 2022 – is whether the nonprofit community is any closer to a consensus … or to any action at all.

The Initiative

The Initiative to Accelerate Charitable Giving , officially launched on Giving Tuesday 2020 (December 1st), proposes to address what the proponents describe as a significantly growing problem: too much money donated to benefit working charities, they say, is being warehoused by private philanthropic funders. In normal times, that is indefensible, they argue; in a crisis like the COVID-19 pandemic, it is unsustainable. See, for instance: *High-Powered Coalition Advances Plan to Reform Philanthropy* (December 2, 2020) Ruth McCambridge, *The Nonprofit Quarterly*. The major policy proposals are explained at the IACG's website.

Opponents voiced their objections right away: See, for example: *The Left Wants a Philanthropy of the Few* (December 14, 2020) Elise Westhoff, President & CEO of The Philanthropy Roundtable, *The Wall Street Journal*; *Conservative Groups Criticize Effort to Urge Higher Payout Rates From Foundations and Donor-Advised Funds* (January 27, 2021) Dan Parks, *The Chronicle of Philanthropy* ["leaders of 65 conservative-leaning philanthropy organizations sent letter to Congress urging legislators to reject" these proposals].

A *Legislative* Move

As the debate within the nonprofit community continued back and forth over the next several months, a new item was thrown into the mix. "In early June, "[t]wo key U.S. senators introduced legislation … designed to spur faster payouts from donor-advised funds and foundations, giving new momentum to an effort that has deeply divided philanthropy."

Senators Chuck Grassley (R-IA) and Angus King (I-ME, who caucuses with the Democrats, "have teamed up on legislation that closely tracks" the proposals of the Initiative to Accelerate Charitable Giving. See Senate Bill 1981, the Accelerating Charitable Efforts (ACE) Act.

What's in the proposed legislation? It would amend the Internal Revenue Code to "reform private foundations" and "ensure Donor-Advised Funds make resources available to working charities in [a] reasonable period of time." There would be new "mandates and restrictions…." See *Donor-Advised Fund Legislation Introduced*, (June 14, 2021) National Council of Nonprofits, *Nonprofit Advocacy Updates*.

More particularly, the ACE Act "would create two types of DAFs: (1) a 15-year DAF that would provide immediate deductibility of donations if all donated funds are spent within 15 years; and (2) a 50-year DAF that could take up to 50 years to spend down donations, but the donor would not get an immediate income tax deduction. The DAF provisions include a carveout for donations of less than $1 million to community foundations."

There are separate provisions in the legislation that would "prohibit private foundations from satisfying their 5% payout requirement by 'donating' to a DAF which is categorized as a public charity, or by paying salaries and travel expenses of family members of donors."

The fierce blowback came right away. Opponents in the philanthropic community sent a Letter to Congress countering this view, stating "there is no data to indicate whether these measures would propel more charitable giving." *Coalitions of Foundations and Donors Line Up to Oppose New Senate Measure to Speed Up Giving* (June 10, 2021) Dan Parks, *The Chronicle of Philanthropy*. The letter signers include: Community Foundation Public Awareness Initiative; Council on Foundations; Independent Sector; The Philanthropy Roundtable; and United Philanthropy Forum.

Of course, the IACG chimed in: *Statement on the Introduction of Bipartisan Bill to Accelerate Resources to America's Charities* (June 9, 2021).

Over the summer months, the "clamor" over new Senate Bill 1981 continued and grew "louder." Links to major additional statements of support or opposition are in our June 29th and September 30th posts.

There has been no movement at all on this legislation so far beyond the date it was introduced, June 9, 2021: "Read twice and referred to committee."

However, some observers believe that certain "portions of the bill could later be added to" other legislative proposals.

New Research

Also over last summer there was a significant development of a different kind: two newly published research studies appear to "poke some holes in the anti-SB 1981 camp's arguments that the proposed reforms are not needed."

- *More than One Billion Dollars In DAF Grants Went to Other Commercial DAFs in 2019* (August 19, 2021) Helen Flannery & Chuck Collins, Charity Reform Initiative, Institute for Policy Studies ["In 2019 alone, …at least one billion dollars in commercial DAF grants went to other commercial DAFs"; an enormous amount of money cycling between giving vehicles rather than being distributed outright to charity"].
- *Analysis of Donor Advised Funds from a Community Foundation Perspective*, A Study Commissioned by the Council of Michigan Foundations (June 2021) ["Core fact is damning"; "35% of DAFs sponsored by Michigan community foundations distributed no money in 2020, a year marked by enormous need because of the viral pandemic"]

Panel Debate

In mid-September 2021, The Chronicle of Philanthropy sponsored a debate that included, among others: a key drafter of the Initiative to Accelerate Charitable Giving, law professor Ray Madoff, and a major opponent, Kathleen Enright of the Council of Foundations.

We noted in the September 30th post that there is an excellent summary and analysis of this event and the points made; see *Accelerating Charitable Efforts Act* (September 18, 2021), Gene Takagi, Esq., *NEO Law Blog*. He points out specifically where supporters and opponents agree, and the two key points that remain in contention.

Talks Go On

Since our September 2021 post, the dialogue has continued.

Independent Sector hosted a series of "ACE Act Convenings," an "online special webinar series … designed to educate the sector, create a dialogue with experts, and hear from you about how the sector should approach these types of policies." See *What We've Heard at Our First Three ACE Act Convenings* (November 19, 2021) Emily Rogers, Independent Sector.

Ms. Rogers reported that "[w]hile support was split on [SB 1981], everyone agreed that these are conversations the sector should be having. Discussions of philanthropy reform are not going anywhere. We have an opportunity as a sector to engage in hard conversations about the future."

There was a fourth session, scheduled for December 1, 2021, the goal of which was to "focus on how nonprofits can navigate the tensions identified in the three previous convenings, including steps to help an organization decide whether or what position to take on the ACE Act and future philanthropy-reform proposals."

Separately, to mark this year's Giving Tuesday, the Chronicle of Philanthropy published an op-ed by the two prime movers of the Initiative to Accelerate Charitable Giving, philanthropist John Arnold and Professor Madoff. See *On GivingTuesday, a Plea for Congress to Pass Legislation That Would Make a Difference to Charities Nationwide* (November 30, 2021).

They urge Congress to reform the U.S. tax code to facilitate charitable giving that facilitates the movement of money to working charities. "While innovative charitable vehicles are very advantageous to donors to enable flexibility, when taxpayers are footing the bill, the benefits to society need to be secured as well."

Conclusion

In this new year, we'll see if, and how, this important discussion continues in the context of still-pending Senate Bill 1981 or perhaps relating to new piecemeal legislation.

At least the two sides agree that these are critical matters for the nonprofit community to consider and debate.

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