

Advocates Worry Donor Fund Proposal Could Chill Legit Use

By **David van den Berg**

Law360 (April 25, 2022, 8:10 PM EDT) -- The Biden administration's proposal to limit private foundations' use of donor-advised funds to meet their yearly charitable payout requirements has some in the nonprofit sector concerned that legitimate grant-making through these funds could be chilled.

The administration of President Joe Biden's fiscal 2023 budget proposes to impose a time limit on contributions private foundations make to donor-advised funds such that the payments would only count toward private foundations' charitable payout requirements if the donor-advised fund distributes the money by the end of the following taxable year. The foundation would also be required to keep records showing the donor-advised fund made a qualifying distribution within the required period.

Donor-advised funds are funds or accounts housed at Section 501(c)(3) sponsoring organizations that allow donors to keep advisory privileges over their contributions. Currently, there is no specific time requirement for any donor-advised fund to make charitable payouts, according to the U.S. Department of the Treasury's Green Book, which explains revenue proposals in the administration's budget.

However, some private foundations must distribute at least 5% of the total fair market value of their assets not used for charitable purposes every year, according to the Green Book. In explaining the rationale for the proposed policy, the Green Book says private foundations' use of donor-advised funds can undercut the purpose of requiring minimum distributions by the foundations. Foundations maintain advisory privileges for grants to such funds, while the funds are free from making minimum payouts, the Green Book said.

Some nonprofit stakeholders argue, however, that private foundations use donor-advised funds for legitimate reasons, and the proposal could hinder that.

"While discouraging alleged abuse, this policy would also discourage use of DAFs for legitimate reasons, such as to protect foundation staff and board members; to make off-mission grants; to collaborate with other foundations; and to work on long-term projects," said Sara Barba of Urban Swirski & Associates LLC, which calls itself an advocacy firm whose specialties include the charitable and nonprofit sector.

The administration's next-year distribution requirement could cause problems for foundation grant-making, said David Kass, vice president of government affairs with the Council on Foundations. Some projects could be more complicated and take longer, or might not happen at all, Kass said. He said private foundations use donor-advised funds for projects that are collaborative, take multiple years, or both.

"We agree that there should be a timeline on private foundation to DAF transfers," Kass said. That timeline, however, must be one that "allows for flexible, creative grant-making," he said.

A Council on Foundations working group released a recommendation in December calling for private foundation transfers to donor-advised funds to be distributed within five years.

A 2020 Minnesota Council of Nonprofits paper found that between 2010 and 2018, more than 2,200 private foundations made \$3 billion in grants to five of the largest donor-advised fund sponsoring organizations. A March report from the left-leaning Institute for Policy Studies found that grants from private foundations to the top 45 commercial donor-advised fund sponsors averaged \$737 million annually from 2016 to 2018.

According to the National Philanthropic Trust's 2021 DAF Report, there were more than 1 million donor-advised fund accounts in 2020. Donor-advised funds held about \$160 billion in charitable assets in 2020, the report said. The aggregate grant payout rate from donor-advised funds in 2020 was 23.8%, the highest since 2011, according to the report.

Apart from possible effects on grant-making, the budget proposal could place administrative burdens on foundations and funds, such as greater record-keeping requirements. Donor-advised funds would shoulder more of that burden than private foundations, said Thomas Blaney, director of the private foundation practice at PKF O'Connor Davies.

"A donor-advised fund that accepts contributions from a foundation or in some cases multiple foundations would be mandated to keep track and report back to each foundation the name of the grantee, date paid and possibly the purpose of the grant," he said. "This could take a significant amount of manpower from the perspective of the donor-advised fund. The private foundation would only have to take this report and input the data on its 990-PF."

The 990-PF is the Form 990 series information return private foundations file with the Internal Revenue Service.

Supporters of the budget proposal argue it will benefit the public. Chuck Collins of the Institute for Policy Studies, a co-author of the organization's March report, said that if enacted, the administration's proposal would discourage the warehousing of funds and increase the flow of money to charities.

"I think it'll foster an expectation that the purpose of a donor-advised fund is not to serve as ... sort of a longtime fund, but more of a revolving fund, you know, not a legacy institution," he said.

Roger Colinvaux of the Catholic University of America's Columbus School of Law said the purpose of the private foundation payout requirement is to ensure the public gets some minimum annual benefit from foundations.

"Payout to a DAF does not provide a public benefit, and so should not count toward a foundation's payout unless the funds are quickly released from the DAF," he said.

Some U.S. House tax writers, however, have pushed back against any changes to the rules surrounding donor-advised funds, raising a question about whether such proposals could gain traction on Capitol Hill.

In a "dear colleague" letter sent in March before the administration's budget was released, a bipartisan group of lawmakers on the Ways and Means Committee said donors and charities gave record amounts in response to the COVID-19 pandemic, a level of giving that wouldn't have happened without donor-advised funds. They also wrote that "activist groups" have started pressing Congress for changes to rules regarding donor-advised funds and family foundations. The letter urged Congress "not to consider any ill-informed or overly broad policy actions that could harm charitable giving and the philanthropic sector."

"Clearly, DAFs have become an incredibly important tool for charitable giving in communities large and small across the nation," the lawmakers wrote. "That's why it's important to make sure we protect this important form of philanthropy from some recent policy proposals that would put limits on how they're used."

Rep. Mike Kelly, R-Pa., one of the signatories of the letter, told Law360 in a statement that current rules regarding donor-advised funds should be maintained.

"It is important Congress retains this important tool of charitable giving by keeping the rules around donor-advised funds intact and to make it easier for more Americans to give to their local community and charity of choice," Kelly said.

--Editing by Aaron Pelc and Neil Cohen.