April 30, 2014

Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington D.C. 20044


Dear Sirs and Mesdames:

On behalf of the Charitable Planning and Organizations Group of the American Bar Association’s Section on Real Property, Trust and Estate Law (the “Section”), we are pleased to provide the following recommendations for inclusion on the 2014-2015 Priority Guidance Plan (the “Priority Guidance Plan”) issued by the Department of Treasury ("Treasury") and Internal Revenue Service ("IRS"). We have prepared these recommendations in response to the request for recommendations in IRS Notice 2014-18. These recommendations have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association. In addition, these recommendations do not represent the views or positions of the law firms, financial institutions, or universities of which the principal authors are shareholders, partners or employees.

These recommendations were prepared by members of the Charitable Planning and Organizations Group (the “Group”) of the Section. Carol G. Kroch, Supervisory Council Member of the Group, supervised the preparation of these recommendations and participated in their preparation. The principal drafting responsibility was exercised by Elaine Waterhouse Wilson, as Chair of the Group, with substantive contributions from Grace Allison, Christopher Hoyt, and Ray Prather. A schedule of contact information for the principal authors is attached to this letter. Finally, the recommendations were reviewed by Pam H. Schneider of the Section’s Committee on Trust and Estate Governmental Submissions.

Although members of the Section who participated in preparing these recommendations have clients who are affected by the federal tax principles addressed, or have advised clients on the application of such principles, no such member (or the firm or organization with which such member is affiliated) has been engaged by a client to make a governmental submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these recommendations.
Summary of Recommended Guidance

Exempt Organizations

- **Supporting Organizations.** Carry forward the projects in the 2013-2014 Priority Guidance Plan to issue additional guidance regarding Section 509(a)(3) supporting organizations\(^1\) We note that on December 28, 2012, the IRS issued final regulations on some supporting organization issues and issued proposed and temporary regulations on additional issues. In the preamble to the December 28, 2012 final regulations, Treasury notes that additional issues will be addressed in further guidance. We recommend that Treasury amend and finalize Prop. Reg. Section 1.509(a)-4(i)(5)(ii) (as published on December 28, 2012), regarding the mandatory payout for non-functionally integrated Type III supported organizations. **Priority: Very High**

- **Donor Advised Funds.** Carry forward the project in the 2013-4 Plan to issue proposed regulations regarding the new excise taxes on donor advised funds and fund management added by Section 1231 of the Pension Protection Act (“PPA”).\(^2\) In addition to general guidance regarding the scope and application of the PPA excise taxes, we recommend that the proposed regulations under these Sections provide specific guidance as follows:

  - Whether the fulfillment of a charitable pledge of a fund advisor by a donor advised fund is a “more than incidental benefit” under Section 4967(a)(1). **Priority: High**
  - Whether the payment of the charitable portion of a bifurcated gift by a donor advised fund is a “more than incidental benefit” under Section 4967(a)(1). **Priority: High**
  - Provide guidance regarding the application of the advisory committee requirements for scholarship funds in Section 4966(d)(2)(B)(ii)(II) when the donor to the scholarship fund is a non-charitable tax-exempt membership organization. **Priority: Medium**
  - Provide guidance regarding under what circumstances payments may be made “for the benefit of” a single named charitable beneficiary consistent with Section 4966(d)(2)(B)(i). **Priority: Medium**

\(^1\) 2013-2014 Priority Guidance Plan (hereinafter, “2013-4 Plan”), Exempt Organizations Item 5 (“Additional guidance on §509(a)(3) supporting organizations (SOs)”).

\(^2\) 2013-4 Plan, Exempt Organizations Item 8.
Gifts and Estates and Trusts

- **Gift Tax Reporting of Charitable Contributions.** We recommend new guidance eliminating the need to report certain charitable contributions for gift tax purposes if those same contributions were reported for income tax purposes. **Priority: Medium**

General Tax Issues

- **Qualified Appraisal Proposed Regulations.** Carry forward the project in the 2013-4 Plan to issue final regulations under Section 170 regarding charitable contributions, specifically including guidance regarding qualified appraisals. Proposed regulations were published on August 7, 2008. We recommend that the final regulations provide guidance in the following specific areas:
  - Further guidance regarding the definition of “generally accepted appraisal standards” under Section 1.170A-17(b)(2)(ii) of the Proposed Regulations. **Priority: High**
  - Further guidance regarding the definition of a “recognized professional appraiser organization” under Section 1.170A-17(b)(2)(iii) of the Proposed Regulations. **Priority: High**

- **Conservation Easements.** Under separate cover, the Group will provide specific recommendations regarding additional guidance on conservation easements under Section 170(h).

**Specific Comments on the Guidance Priority List Recommendations**

1. **Supporting Organizations.** The Exempt Organizations section of the 2013-4 Plan includes the issuance of additional guidance not covered by the Final Regulations issued on December 28, 2012. To the extent not complete by the end of the 2013-4 guidance year, the Group believes these items should be carried forward.

   By way of background, on January 3, 2008, the Section provided commentary regarding various supporting organization issues, as requested by the IRS in an Advanced Notice of Proposed Rulemaking dated August 2, 2007. The IRS issued its initial set of proposed

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regulations on September 24, 2009 (the “Initial Proposed Regulations”). On December 23, 2009, the Section submitted to the IRS extensive comments on the Initial Proposed Regulations. On December 28, 2012, the IRS finalized some of the Initial Proposed Regulations (the “Final Regulations”), revised a portion of the Initial Proposed Regulations and re-issued that portion as Temporary and Proposed Regulations (the “Temporary and Proposed Regulations”). On April 18, 2014, the Group submitted to the IRS comments on the issues reserved as Temporary and Proposed Regulations in the December 29, 2012 guidance (the “SO Proposed Regulation Comments.”)

We believe Treasury should address the issue of the alternative calculation of the mandatory payout for non-functionally integrated Type III supporting organizations based upon an organization’s adjusted net income when it finalizes the Temporary Regulations. We respectfully refer you to the SO Proposed Regulation Comments, in which we discuss our recommendation to eliminate the alternative calculation based upon 85% of an organization’s adjusted net income, thereby leaving the mandatory distribution amount at 3.5% of the supporting organization’s non-exempt use assets.

**Evaluation Criteria.** We believe this issue to be of paramount importance to all non-functionally integrated Type III organizations and the charities they support. Affected supporting organizations and their charitable beneficiaries will need to review their operations in order to comply with the final regulations. Regardless of what the mandatory final payout may be, affected organizations may need to adjust the investment of their funds, and the short-term and long-term operating budgets of their supported charities will need to be reviewed and possibly amended. Because of the significant impact these regulations will have on both supporting organizations and their supported charities, we strongly recommend that amending and finalizing the Temporary Regulations should have a Very High priority.

2. **Donor Advised Funds.** The Exempt Organizations section of the 2013-4 Priority Guidance Plan includes issuing proposed regulations regarding the new excise taxes on donor advised funds and fund management added by Section 1231 of the PPA. To the extent not complete by the end of the 2013-4 guidance year, this item should be carried forward. On April 9, 2007, individual members of the Group submitted comments on certain donor advised fund issues in response to a request for comments in IRS Notice 2007-21 (the “DAF Comments”). In addition to general guidance regarding the scope and application of the PPA excise taxes, the Group believes the following four specific areas should be addressed in proposed and final regulations, as follows:

a. **Payment of Charitable Pledges.** Section 4967 imposes an excise tax when a donor receives, directly or indirectly, a “more than incidental benefit” from a distribution from a donor advised fund. It is unclear whether payment of a donor’s legally binding charitable pledge would be a “more than incidental benefit” under Section 4967(a)(1).
**Evaluation Criteria.** The uncertainty in this area imposes a significant burden on all donor advised funds, their charitable beneficiaries, and their donors, as well as the IRS. Given the difficulty in administration and the potential for uneven results in the absence of further guidance as well as the widespread nature of the issue, we give this project **High priority.**

b. **Bifurcated Gifts.** Similarly, it is unclear whether payment by a donor advised fund of the charitable portion of a bifurcated gift would give rise to a “more than incidental benefit” under Section 4967(a)(1).

**Evaluation Criteria.** In the absence of further guidance, different donor advised funds are taking different approaches to these types of distributions. Guidance would promote uniformity among taxpayers. Given the widespread nature of the issue and the uneven manner in which it is currently addressed by donor advised funds, we give this project **High priority.**

c. **Scholarship Funds.** The scholarship fund exception from the definition of a “donor advised fund” requires, among other things, that “no combination of [donors or people appointed or designated by donors] (or persons related to such persons) control, directly or indirectly, such committee.” Section 4966(d)(2)(B)(ii)(II). The wording of this requirement is difficult to apply when the donor is a non-charitable exempt membership organization (such as a fraternal society, business league, or veterans’ post) that sponsors a scholarship fund.

**Evaluation Criteria.** We believe that additional clarifying guidance may encourage charitable giving by such membership organizations. The lack of guidance is burdensome on organizations that may wish to set up such funds, as the safest course in the absence of additional guidance is to select individuals otherwise unrelated to the organization to serve on scholarship advisory committees. We believe this project has a **Medium priority.**

d. **Payments for the Benefit of Single Charitable Beneficiaries.** The definition of a “donor advised fund” excludes “any fund or account which makes distributions only to a single identified organization or governmental entity.” Section 4966(d)(2)(B)(i) (emphasis added.) We request guidance with regard to whether payments may be made “for the benefit of” a single named beneficiary consistent with the statutory language of Section 4966(d)(2)(B)(i).

**Evaluation Criteria.** This recommended guidance would reduce the burdens on donor advised funds and the organizations they support. In the absence of additional guidance, the conservative course is to use a two-step process for distribution, which costs charitable organizations time and money. Because this
recommendation could simplify the administration of charitable organizations, we
give this project a **Medium priority**.

3. **Gift Tax Reporting of Charitable Contributions.** Under Section 6019, a donor is not required
to file a gift tax return when all the gifts made during a calendar year are one or more of the following:

   - Annual exclusion gifts under Code §2503(b);
   - Educational and medical expense gifts under Code §2503(e);
   - Gifts qualifying for marital deduction under Code §2523; and
   - Most gifts qualifying for the charitable deduction under Code §2522.

Donors must file a return in any year that a charitable gift has split interests (except
conservation easements). All other charitable gifts are reported only if the taxpayer is
required to file a return – usually for reasons unrelated to the charitable deduction. Treasury Regulation §25.6019-3 requires deductions claimed for gifts made during the
calendar year to be reported when a return is required. As a practical matter, many outright
charitable gifts are not reported on the Form 709 when it is filed to report non-charitable
gifts. These gifts are still subject to IRS review, however, because they are reported to the
IRS on the taxpayer’s personal Form 1040. The Group recommends Treasury and the IRS
provide guidance eliminating duplicative reporting for those charitable gifts that would not,
standing alone, trigger a gift tax return filing obligation. Such guidance should also consider
such related issues as the running of the statute of limitations and the standards for having
filed a complete tax return.

**Evaluation Criteria.** The Group believes that there is substantial non-compliance in the area
of gift tax reporting of outright charitable gifts on Forms 709 filed for non-charitable gifts. Taxpayers simply do not think to report these transfers, as they would not have had to
report the contributions had no taxable gifts been made and do not affect the amount of tax
due. Taxpayers that do comply with this requirement are faced with additional administrative burdens without generating additional revenue. To the extent the IRS needs
this information for compliance purposes, the Group believes that compliance issues would
arise in the income tax area and not the gift tax area (where a full gift tax deduction would
likely be allowed, regardless of the value ultimately assigned to a contribution). The Group
is concerned that high levels of non-compliance risk breeding disrespect for the tax system,
even where, as here, the non-compliance does not disadvantage tax collection. Because the
Group believes that addressing this issue will reduce non-compliance as well as the
administrative burden on taxpayers while protecting the IRS’s need to enforce the tax laws,
we give it a **Medium priority**.

4. **Qualified Appraisal Proposed Regulation.** The General Tax Issues section of the 2013-4 Plan
includes two projects regarding charitable contribution substantiation: final regulations
under Section 170 regarding charitable contributions and regulations under Section
170(f)(8) regarding donee substantiation of charitable contributions. Proposed regulations were published on August 7, 2008 regarding charitable contribution substantiation. To the extent not complete by the end of the 2013-4 guidance year these items should be carried forward. The Group recommends that two definitional issues be addressed in the final regulations regarding charitable contribution substantiation, as follows:

a. “Generally accepted appraisal standards.” The Treasury Regulations under Section 170 require a taxpayer to submit a “qualified appraisal” to support the charitable income tax deduction for certain types of charitable gifts. In order for an appraisal to be a “qualified appraisal,” current law requires that the appraisal comply with “generally accepted appraisal standards.” We recommend that Treasury and the IRS clarify further the definition of “generally accepted appraisal standards.”

Evaluation Criteria. This guidance would be of great assistance to all taxpayers that make charitable gifts that require the submission of a qualified appraisal. We believe that the definition contained in the Proposed Regulations is sufficiently vague as to be impossible to apply, unless one simply chooses to use the USPAP standards. The USPAP standards may not be appropriate or cost-effective in all circumstances. Because of the large number of taxpayers impacted and the mandatory nature of the qualified appraisal requirement, we give this project High priority.

b. “Recognized professional appraiser organization.” Similarly, a qualified appraisal must be performed by a “qualified appraiser.” One of the criteria for a “qualified appraiser” is that he or she must have a “recognized appraisal designation,” which is defined as “a designation awarded by a recognized professional appraiser organization on the basis of demonstrated competency.” Prop. Treas. Reg. Section 1.170A-17(b)(2)(iii). The Proposed Regulations give four examples of recognized appraisal designations: MAI, SRA, SREA, and SRPA. While these examples are helpful, all four designations relate to real estate and are awarded by a single entity, the Appraisal Institute. We recommend that the final regulations include additional guidance regarding the term “recognized professional appraiser organization.”

Evaluation Criteria. As with the discussion above regarding the definitions of “generally accepted appraisal standards”, this recommended guidance applies to all taxpayers making charitable gifts subject to the qualified appraisal requirement. The Proposed Regulations simply do not provide sufficient guidance to taxpayers attempting to comply with the requirements necessary to support a charitable income tax deduction for affected property. Given the burden placed on these taxpayers and the mandatory nature of the qualified appraisal requirement, we give this project High priority.
5. **Conservation Easements.** The Group recommends that the IRS and Treasury issue additional guidance in the area of conservation easements under Section 170(h). In a separate letter dated _____, the Group has provided its specific recommendations for the Priority Guidance Plan in this area.

Thank you for the opportunity to provide our thoughts regarding the Guidance Priority Plan. Should you have any further questions, please do not hesitate to contact any of the principal authors.

Sincerely,

Susan G. Talley, Chair
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