multilateralism, instead battling DSTs and refuting any non-toothless pillar 2 on either a unilateral or bilateral basis. This tack could reduce U.S. revenue by abandoning or liberalizing the TCJA's international provisions in ways that will encourage BEPS. If this is more than just the bluster of a negotiating tactic, it will result in a tax-and-trade brawl in which neither U.S. MNEs nor the U.S. fisc would be ultimate winners.[6]

Estes tops off his narrative by threatening to "revoke funding for the OECD" and then writing three sentences later that he believes "that the United States and the OECD can come to an agreement that treats the current U.S. tax code in a fair manner." My narrative top-off is a respectful request that any revocation and shake-hands be preceded, well before the TCJA trap fully closes with some severity in 2026, by recognition of the role of the TCJA itself in contributing to the need for the administration and the OECD to come to the aid of U.S. MNEs, the TCJA sponsors, and the U.S. fisc.

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May 8, 2023

[6]For the mess of a tax-and-trade brawl, see Stephen E. Shay, "Trade Enforcement Tools and International Taxation: A Digital Services Tax Case Study," SSRN (Mar. 3, 2023).

In Response to Zelinsky on DAFs

To the Editor:

As the leaders of three community foundations representing distinctly different geographic regions — a large metropolitan area, a midsize city, and a mostly rural area — we wanted to write in response to Edward Zelinsky's viewpoint article.[1]

Like several other critiques of donor-advised funds, this article makes false assumptions about how *donors* think and behave — including how they would likely respond to proposed changes in laws or regulations. It's also grounded in a false premise that flies in the face of readily available data.

The main thesis of Zelinsky's piece is that DAFs are "functional substitutes" for private foundations, and therefore the same tax rules (namely, the 5 percent fund-by-fund annual distribution requirement and the excise tax on investment gains) should apply to them. But this argument that DAFs are "substantively indistinguishable" from private foundations is simply not grounded in fact. It is an opinion the author does not back with any data or evidence.

Instead, Zelinsky's article cites several tax code sections, marketing materials produced by several national DAF sponsors, and the writings of other DAF critics sympathetic to his views. But does he offer *any* data on mean or median DAF sizes, or how they vary by sponsor type? Anything on payout rates and how they vary by fund size? Any data on inactivity and how often DAF advisers fail to make grants over a multiyear period, to assess how big the problem might be? Given his support for the proposal to severely restrict private foundation grants to DAFs, does he offer any statistics on how frequently these foundations make such grants and how long it takes for those funds to be distributed? No. Not a single statistic or data point.

Since his article may be read by policymakers or congressional committee staff, we wanted to offer a more nuanced view.

The vast majority of DAF donors are not setting up accounts as an alternative to creating a

[1]Edward A. Zelinsky, "The Biden Proposals on Private Foundations Should Go Further," *Tax Notes Federal*, Apr. 17, 2023, p. 441.

private foundation. Their resources are much more modest. Consider these statistics:

- The most recent DAF study by National Philanthropic Trust, which reviewed Form 990 data from 60 national charities, 607 community foundations, and 328 single-issue charities, found the average DAF size was $183,000 in 2021.[2]
- According to the most recent study of 13,000 DAFs at 21 sponsors by the DAF Research Collaborative, 89 percent of DAFs had less than $1 million in assets, and 56 percent were under $100,000 in assets.[3]
- At Fidelity Charitable Gift Fund, the largest DAF sponsor in the country with 185,640 separate DAF accounts at the end of 2022, 91 percent of the accounts held less than $250,000 in assets and 56 percent were under $25,000. The median account balance was $19,442.[4]

The pattern is similar at our community foundations.

Is it Zelinsky's genuine position that these donors — the more than 90 percent of individual DAF accounts with less than $1 million in assets — are using the DAF as a "functional substitute" for a private foundation? It's simply not credible or reasonable to think these donors would ever consider a private foundation. Only 2.7 percent of DAFs in the DAF Research Collaborative study have more than $5 million in assets, the level at which people might consider a private foundation as an alternative (and in our experience, even that asset level is low). Once you consider the accounts housed within large national DAF sponsors, the 2.7 percent figure is likely overstated.

Zelinsky's central premise falls apart right there. But it's important nevertheless to understand the implications of his proposed solution of a 5 percent minimum distribution requirement for all DAFs, regardless of size. This would be a horrible idea that would lead to billions of dollars less getting to end-use charities every year — exactly the opposite of what DAF reformers seek.

According to the same National Philanthropic Trust study cited above, the average DAF payout rate in 2022 was 27.3 percent, the highest on record. Annual DAF payout has remained above 20 percent for every year on record, reflecting the consistent charitable support that DAF donors provide. The 10-year average payout rate is 22.2 percent.

Some critics have taken aim at this high reported average payout rate and found faults in methodology. It's true that DAF sponsoring organizations may have different ways of calculating average payout. But many in our field are not opposed to reforms in this area. For example, the Council on Foundations suggests that all DAF sponsors have a 5 percent minimum payout measured by entity (not by fund) and that DAF-to-DAF transfers should not count toward the reported payout.[5] We agree with these reforms. But no matter the algebra of the payout calculation, it's still indisputable that the average DAF payout is several times that of private foundations, many of which manage their accounting very closely to give exactly the minimum required amount every year.

Zelinsky would argue average payout is unimportant and every individual DAF account should have a minimum payout every year because someone *can* open a DAF, get an immediate tax deduction, and not make grants. Critics don't offer data on how this occurs — and most large DAF sponsors have inactive fund policies to ensure it doesn't happen — yet that's what Zelinsky and other critics argue. We believe public policy should be based on what's happening in the real world, not on what *might* or *could* happen.

If Zelinsky and other critics get their wish, and every DAF has a 5 percent annual payout requirement, here is what would happen next: Hundreds of thousands of DAF donors who are currently advising grants from their fund of 20, 30, even 40 percent every year will start to give 5 percent because they will view the minimum as a

[2]National Philanthropic Trust, "The 2022 DAF Report" (2022).

[3]Danielle Vance-McMullen and H. Daniel Heist, "Donor-Advised Fund Account Patterns and Trends (2017-2020)," DAF Research Collaborative (2022).

[4]Fidelity Charitable, "Giving Report 2023" (2023).

[5]Council on Foundations, "Strengthening Community Philanthropy Ad Hoc Working Group Final Recommendations."

recommendation. Much as the private foundation minimum distribution from 1969 was meant to be a floor and today mostly operates as a ceiling, the same thing will happen to some DAFs. To be sure, not *every* donor will respond this way, but *some* will.

As a result, the very likely outcome will be that, to ensure no DAFs are inactive, average giving to end-use charities from DAFs declines significantly. That's less money in total getting out the door. Will reformers view this as a positive outcome?

We have mentioned this concern to some of the DAF reform advocates, and the response we generally hear is some version of, "We don't think that will happen." With respect to the critics, that's not a good enough answer to rewrite decades of tax law and upend an increasingly popular charitable vehicle that makes things easier for donors — and when giving is easy, people give more.

Donor-advised fund sponsors are ready to support reforms backed by data, and to close loopholes anywhere there is real evidence of abuse. In fact, community foundations have already offered several such reforms. But the ideas embodied in Zelinsky's piece — that all DAFs should be subject to a 5 percent annual payout because they are a substitute for private foundations in all circumstances — simply flies in the face of the evidence and our real-world experience. The inevitable result will be a decline in total giving at a time when people are looking to the nonprofit sector to do more.

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