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Feature

The Rise of Philanthropy LLCs

By Dana Brakman Reiser

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The for-profit limited liability company is poised to become the preferred vehicle for the nation's elite philanthropists. What it gives up in tax benefits it repays in flexibility, privacy, and control. Will the public gain from added investment in social good, or lose from ceding even more power to the wealthy?

The Rise of Philanthropy LLCs

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Illustration by Michael Waraksa

To mark the occasion of the birth of their first child, Facebook founder and CEO Mark Zuckerberg and his wife, Dr. Priscilla Chan, made a big announcement. In a December 1, 2015, Facebook post, the couple declared their intention to give 99 percent of their Facebook shares to "advance human potential and promote equality for all children in the next generation."[1]

But rather than establishing a tax-exempt private foundation to pursue these ambitious goals, they said they would promote their philanthropic agenda through a for-profit limited liability company (LLC). This coordinated venture can make charitable grants, manage a diverse portfolio of investments, and engage in political advocacy—all free of the limitations and disclosure obligations to which private foundations are subject.

The Chan Zuckerberg Initiative (CZI) swiftly established major initiatives in each of these areas. Just a year after its creation, it announced a $3 billion charitable grant to fund medical research over the next 10 years. It kicked off this effort by donating $600 million to create Biohub, a new medical research institution in the San Francisco area.[2] CZI's first widely publicized impact investment led the Series B round for Andela, an African company that trains talent across the continent for placement with major technology firms worldwide.[3] CZI also supports a range of immigration and criminal justice reform projects, with such policy and

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advocacy efforts led by David Plouffe, former senior White House advisor to President Barack Obama.

The massive size of Chan and Zuckerberg's pledge, valued at more than $45 billion when made and much more today, means that these programs will be only the tip of the iceberg. As they continue to roll out ideas and initiatives, CZI's LLC structure affords it optimal flexibility and the ability to work synergistically with Facebook, other for-profit and nonprofit partners, and political and advocacy groups.

Chan and Zuckerberg gave the philanthropy LLC its big reveal, but they did not originate the concept. Other Silicon Valley philanthropists broke that path more than a decade before. In 2004, Laurene Powell Jobs, the widow of Apple founder Steve Jobs, launched the Emerson Collective LLC, and eBay founder Pierre Omidyar and his wife, Pam, established the Omidyar Network, an umbrella organization with a nonprofit foundation and for-profit LLC.

Both organizations have not only distributed grants to a diverse range of charities, but also invested in numerous for-profit companies. Many of Omidyar's investees are focused on financial inclusion, such as Flutterwave, an African payment processing company, and Propel, which builds software to improve low-income Americans' experiences with the food stamp program. Emerson's investees range even more widely, from Neighborly, an online municipal bond broker, to the magazine *The Atlantic*. Both organizations also focus on enabling civic engagement, and Emerson has even taken a strong public position favoring immigration reform. These early adopters take great advantage of the versatility that their philanthropy LLCs afford them, using whichever tool fits the goal and partners in a particular project. They have done so, however, with little fanfare. Powell Jobs in particular is famously private.

By contrast, CZI took a decidedly different approach. Its initial public announcement, on the nation's largest social media platform, garnered the LLC structure widespread public exposure, and news media continue to report about the new programs it inaugurates. As awareness spreads, the growing ranks of high net worth and ultra-high net worth individuals are pondering whether to follow their lead.

Such reflections may lead to the LLC becoming the go-to legal structure for organizing large-scale philanthropic endeavors. It enables founders to avoid the substantial regulatory requirements that accompany tax-exempt status, while also maximizing their privacy and control. A philanthropy structured as an LLC secures these desirable features with relatively little increased tax burden, a tradeoff that many more high net worth individuals will likely find attractive as well.

THE VALUE PROPOSITION

A philanthropy LLC will strike those accustomed to equating philanthropic pursuits with tax exemption as bizarre. But there is method in this seeming madness. The gold standard tax-exempt philanthropic vehicle—the private foundation—is heavily regulated. The philanthropy LLC offers a path around this regulatory thicket. By operating outside the strictures of tax-exempt philanthropy, a for-profit LLC offers tremendous flexibility, provides its founders a protective shield of privacy, and enables them to retain complete control.

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The blanket of regulation that the philanthropy LLC casts off is imposed by a combination of state nonprofit law and federal tax law. The most significant components, however, originate in federal tax rules for "private foundations." The tax code divides the universe of § 501(c)(3) tax-exempt entities into public charities and private foundations, the latter of which are more heavily regulated. Private foundations are typically funded predominantly by a single or small set of donors and pursue their missions primarily by making grants to operating charities instead of running charitable programs of their own. Philanthropic entities funded by contributions from one individual, family, or corporation are thus almost always deemed private foundations, as CZI would have been, had it been formed as a nonprofit, tax-exempt entity.[4] This characterization would have restricted CZI's investment, spending, and operational prerogatives in the following ways.

Investment | Federal tax law penalizes private foundations that hold too large a stake in any business enterprise. The rules are complex but generally set the ceiling at holdings of more than 20 percent of a corporation's voting stock. There is a five-year grace period (which can be extended to 10 years) during which private foundations receiving these "excess business holdings" by gift or bequest can sell them. After that, they must dispose of the excess or face a confiscatory 200-percent tax on it. Donating 99 percent of Zuckerberg's Facebook stock would require Zuckerberg to give up his controlling stake in the company.[5] Had the recipient philanthropy been a private foundation, the excess business holdings regime would mandate a strict timeline for relinquishing this controlling position. For founders like Zuckerberg—still in his 30s and with no plans to pass the reins of Facebook anytime soon—triggering these rules would be a bitter pill indeed.

The excess business holdings rules can also impede particular investment strategies, even for philanthropists whose wealth is not largely bound up in a particular business enterprise. Many philanthropists today seek to incorporate impact investments into their efforts. For example, the Emerson Collective has often been a lead investor in startup funding rounds and sometimes purchases "significant minority" or even majority stakes.[6] The 20-percent ceiling can impose an undesirable constraint on structuring investments in for-profit entities designed to achieve a blend of financial and social returns. Using the LLC structure bypasses this barrier.

Federal tax law restricts not only the size of private foundation investment stakes but also the types of investments they can pur-

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sue. Excise taxes penalize a "private foundation [that] invests any amount in such a manner as to jeopardize the carrying out of any of its exempt purposes."[7] As interpreted, private foundation fiduciaries can avoid these penalties if they exercise ordinary business care and prudence, but this test is applied investment by investment with a preference for diversification. A portfolio highly concentrated in impact investments will lack diversification and may include many very risky individual investments, qualities that can trigger penalties under the jeopardizing investment regime. State law fiduciary obligations—which also require nonprofit charities to steward their investments as would a prudent person, prizing diversification—add another layer of concern.

Private foundations can reduce these risks, especially if individual impact investments can meet the demands of the program-related investment (PRI) exception. This exception excludes from the jeopardizing category those investments, "the primary purpose of which is to accomplish one or more [charitable purposes] and no significant purpose of which is the production of income or the appreciation of property."[8] In addition, federal tax law treats PRIs as part of the required 5 percent of assets that private foundations must pay out each year. The PRI exception can provide comfort to foundations considering concessionary investments or grants to for-profit entities. But the impact investment category can also include investments made at market or near-market rates of return, or with a significant purpose of producing income, or which attract market-rate as well as impact-oriented investors. Foundations will face difficulty shoehorning impact investments like these into the PRI exception.

Rather than grant-equivalent PRIs, private foundations will need to justify income-seeking impact investments as part of their overall portfolio. Recent IRS pronouncements accept that private foundation fiduciaries exercising ordinary care and prudence can "consider … the relationship between a particular investment and the foundation's charitable purposes" in selecting investments, and clarify that they need not select only the investments with "the highest rates of return, the lowest risks, or the greatest liquidity."[9] This guidance offers significant comfort. Indeed, the Ford Foundation cited it in its decision to allocate $1 billion of its endowment to impact investment over the next 10 years.[10] Updated uniform state laws on charitable investment similarly allow their fiduciaries to "consider the charitable purposes of the institution" in investment decisions.[11]

While these exceptions and new developments sanction impact investing, private foundations opting for this strategy will still be required to prove that their decisions fit within the limits of federal tax and state law. In contrast, a philanthropy LLC gives its founders and leaders carte blanche to make any investment decisions they wish. They are free to select the investees they consider optimal for reaching their financial and social goals, take stakes in these entities of any size they choose, and hold them for as long as they see fit.

Spending | The private foundation rules not only restrict investments, but also dictate how these entities spend their assets. Perhaps the best known of these regulations restricts political expenditures. All federally tax-exempt entities are precluded from engaging in political campaign activity and severely limited in the lobbying they can do. Breaching these limits risks loss of exemption. For private foundations, though, federal tax limits go further. They cannot engage in any lobbying or political campaign activity; doing so triggers steep tax penalties on the foundation and its managers.

Mark Zuckerberg and Priscilla Chan prepare to announce the Chan Zuckerberg Initiative's $600 million investment to create Biohub.

PHOTOGRAPH BY ASSOCIATED PRESS

Philanthropists who, like Chan and Zuckerberg, see policy and advocacy work as key to their objectives[12] can establish parallel organizations to pursue these activities. For example, a social welfare organization organized under Internal Revenue Code § 501(c)(4) is permitted (1) to engage in unlimited lobbying,[13] and (2) to participate in political campaigns, so long as political campaigning does not become the organization's "primary" activity.[14] These organizations cannot receive tax-deductible contributions and are taxed only on the lesser of their political expenditures or their investment income. They have become a favorite of donors seeking a combination of permissible political activity and privacy. With deliberate design and implementation, a philanthropist can engage in traditional charitable grantmaking through a private foundation and conduct substantial lobbying or political campaign activity via an affiliated social welfare organization. As long as the affairs and assets of the entities are not commingled, their affiliation need not violate private foundation rules.

Despite the potential workarounds, federal tax law's prohibition on private foundation lobbying and political campaign activity poses obstacles for donors seeking to combine philanthropy with advocacy in a single entity. Using an LLC, by contrast, offers a simple solution. A philanthropy structured as a for-profit LLC can engage in any lobbying and political activity it desires. It must, of course, comply with lobbying and campaign finance disclosure and other restrictions. But adopting the LLC structure removes the tax law constraint on a philanthropic venture's political activity.

The private foundation rules also impose affirmative spending mandates that a philanthropy LLC can ignore. As noted above, private foundations must pay out a portion of their assets annually. To avoid excise tax penalties, each must distribute at least 5 percent of its assets to appropriate recipients. Although PRIs will count toward this 5 percent, most qualifying recipients are tax-exempt public charities. The payout requirement compels private foundations to put at least a portion of their tax-privileged endowments to current use, rather than allowing them to accumulate perpetually. Philanthropists with aggressive spending plans might not find this payout requirement constraining. Still, it would require them to plan and track their expenditures to ensure they meet this externally imposed timeline for action. Using a philanthropy LLC removes these obligations entirely, affording founders and managers complete discretion over the mix and timing of grants and other expenditures.

Operations | The LLC structure also avoids the operational constraints that federal tax and state fiduciary law impose on traditionally organized philanthropies. These rules check the compensation practices of exempt philanthropies and can stymie transactions that bridge donors' philanthropic and private or business endeavors. They also impose transparency requirements that many philanthropists would prefer to avoid, and force them to give up significant control over the organizations they create.

Transactions. Yet another set of excise taxes penalizes "self-dealing" transactions between private foundations and their donors and affiliated entities, sometimes even when these transactions are priced at fair market value or better. These rules deem any "sale or exchange, or leasing, of property"[15] between a foundation and its directors, officers, substantial contributors, or entities they control as self-dealing. To avoid self-dealing, compensation to directors, officers, substantial contributors, or their relatives must be "reasonable and necessary to carrying out the exempt purpose of the private foundation" and "not excessive."[16] Excise taxes charge foundations and their managers a portion of self-dealing transactions, and require them to be undone to avoid confiscatory penalties. The most recent excise tax in this area—enacted as part of the Tax Cuts and Jobs Act of 2017—imposes a 21 percent excise tax on any compensation over $1 million paid by a tax-exempt organization. Moreover, all of these penalties apply in addition to the basic rule, applicable to every entity qualifying under § 501(c)(3), that disallows exemption for organizations whose net earnings inure to their insiders or that bestow a substantial private benefit on a third party.

State fiduciary law generates further risks and burdens for the operations of nonprofit philanthropies. The duty of loyalty prohibits some self-dealing transactions by charitable entities, and requires all of them to (at least) be fair.[17] Fiduciaries who participate in transactions that violate these mandates risk personal liability. The limits of permissible transactions vary somewhat depending on whether an organization is subject to the often more stringent rules of charitable trust law or the more tolerant nonprofit corporate regime. In either case, to ensure compliance, fiduciaries of traditional philanthropies are well advised to vet and document any transactions with fiduciaries, including compensation.

Laurene Powell Jobs (left) launched the Emerson Collective as an LLC to organize her philanthropy. Pierre and Pam Omidyar structured the Omidyar Network as an umbrella organization with a for-profit LLC arm.

LEFT: PHOTOGRAPH BY STEVE JENNINGS; RIGHT: PHOTOGRAPH BY STEVE MACK

By organizing a philanthropy LLC, philanthropists can disregard these operational limitations. They can design compensation to entice the best talent to join their organization, rather than to meet the requirements or best practices of federal tax and state fiduciary law. For example, if a potential officer qualified to help advance CZI's goal to "cure all disease" has significant compensation requirements, it need not worry about paying penalty taxes should compensation exceed the reasonableness threshold or the million-dollar cap. In addition, LLC founders can integrate their philanthropic operations with those of the other entities they helm, including harnessing their companies' power and platforms.

Transparency requirements. Unlike a private foundation, which must disclose compensation and other self-dealing transactions to regulators and the public, a philanthropy LLC can make all of these decisions completely confidential. The LLC's operational flexibility complements the discretion it provides for investment and spending, and does so outside of the public eye. By protecting privacy, the philanthropy LLC offers adopters tremendous value.

Tax-exempt entities are subject to substantial disclosure requirements, primarily through the required federal tax Form 990. These informational returns, available to the public online at GuideStar .org, describe a filer's leadership and activities, listing by name its fiduciaries, top employees, and—in the case of private foundations—substantial contributors. Many states add their own reporting mandates to these federal disclosure obligations. Complying with these requirements can result in substantial administrative costs, but for wealthy donors who jealously guard their private lives, the privacy costs of these regimes may be even more distressing.

There can be tax costs to using an LLC structure, but they are not nearly as significant as one might surmise.

Loss of control. Finally, philanthropists who organize in the traditional way must yield a great deal of control over the entities they establish. A tax-exempt nonprofit organization must be managed by a board of directors or one or more charitable trustees. These fiduciaries are subject to legal obligations to the organization—not its donors. They make the ultimate decisions about managing the philanthropy's assets, which are irrevocably transferred to the charity and cannot be recovered in a case of donor's remorse. Once donated, charitable assets are subject to a nondistribution constraint 18 and cannot be returned to private use.

Conversely, a philanthropy LLC structure offers donors unparalleled control. They are contractual entities, whose owners may design and govern them in almost any way they wish. They can grant their managers and themselves broader freedom to act than in virtually any other legal form of organization. Perhaps most striking in the philanthropy context is founders' ability to exit. Assets given to a philanthropy LLC are not locked in place. If and when an LLC's owners decide its assets would be more productively deployed elsewhere—whether to "advance[e] human potential and promote equality for all children in the next generation"[19] or to build another technology empire—they may simply close the doors and take the assets with them.

To be clear, the public pronouncements of Chan, Zuckerberg, and other philanthropy pioneers suggest no desire to recapture the assets they have transferred to their philanthropy LLCs, and I ascribe no such motives to these particular individuals. The point is only that no law prevents LLC owners from pursuing this option down the line.

TAX BURDENS

It would be reasonable to expect philanthropists adopting the LLC structure to pay a price for these many advantages, and that the tax man would be the one collecting. But the surprises continue here. The relative tax burden of a philanthropy LLC need not be very high at all, and a donor need not occupy the stratosphere of wealth that Silicon Valley billionaires inhabit to be able to shoulder it.

The federal income, gift, and estate tax systems offer benefits for taxpayer contributions to charity. Donations to a for-profit philanthropy LLC will not qualify for such preferential treatment, but much of its value can be preserved through careful planning.

Income taxation | Two different kinds of advantages flow to philanthropic entities under federal income tax law: deductible contributions and organizational exemption. The first accrues not to the charities themselves, but to their donors. When a philanthropist contributes cash or other assets to a qualifying tax-exempt charity, she may be able to deduct the amount of her contribution from her income in determining her annual tax liability.

Deductible contributions. The value of a charitable deduction to a particular donor depends on a series of factors. Like all tax deductions, its value increases along with a taxpayer's marginal tax rate. Donors in a higher tax bracket will save more tax by deducting a contribution of the same size than those in a lower one. Further, tax-deductible contributions are relevant only for taxpayers who itemize their taxes—taking individual permissible deductions for a variety of expenditures rather than relying on the single standard deduction that the government allows. For donors who do not itemize, charitable contribution deductions generate no tax benefits, and the 2017 tax law increased the standard deduction by a factor of two. This change is expected to reduce the number of itemizers by more than 27 million.20

In addition, the contribution amount qualifying for a charitable deduction will depend on the donor's income, the recipient charity, and the type of asset donated.[21] All charitable deductions are limited to a percentage of the taxpayer's income, so even the most generous donor cannot use a charitable contribution to offset her entire income and reduce her tax liability to zero. Gifts of cash to tax-exempt public charities can be deducted in an amount up to 60 percent of a taxpayer's annual income, and gifts of appreciated property up to a ceiling of 30 percent. For contributions to private foundations, deduction limits of 30 percent for cash contributions and 20 percent for appreciated property apply.

Further, when donated to a private foundation, a contribution of appreciated property will generate a deduction for only its unappreciated value, while the same contribution to a public charity can be deducted at its full market value. This benefit, too, has a limit; it applies only to gifts of appreciated stock of up to 10 percent in any single corporation. These factors will combine to reduce the value of the charitable-contribution deduction for many philanthropists, especially if they are donating to private foundations, have already or nearly reached their percentage limits, or desire to donate large blocks of appreciated stock.

Donations to a philanthropy LLC, of course, do not qualify for any income tax deduction whatsoever. Charitable contributions are deductible only if made to a tax-exempt entity, which for-profit LLCs are decidedly not. But there is less to this ineligibility than might first appear. A donor's $1 million contribution to a philanthropy LLC will not generate an income tax deduction immediately, but its owners can deduct the portion of that $1 million that the LLC ultimately donates to a tax-exempt entity. This is because federal income tax law taxes the income of LLCs not as organizational income, but only as part of the individual income of the LLC's owners, who report it on their personal returns.[22] Owners of LLC interests can likewise write off an LLC's charitable contributions and other deductible expenditures against their individual income. Thus, to the extent that a philanthropy LLC makes charitable grants, its owners will be able to deduct these contributions just as they would a direct charitable gift.

Time is money, of course, so there is a cost to the LLC structure. In this instance, though, the cost of using an LLC need only be the deferral of a tax benefit, not its forfeiture. For a donor whose income is not high enough to offset the full extent of a charitable-contribution deduction in light of the percentage limitations, the LLC can also be used to receive a large donation and then to parcel out contributions to recipient charities at times that are advantageous for the donor's deductions.

Organizational exemption. The income of tax-exempt entities like private foundations is also exempt from taxation, while the income generated by for-profit LLCs is not. If CZI sells shares of Facebook, or makes a return on other investments, this income will be taxed to its owners at their individual rates. Again, though, the necessary tax costs can be minimized through careful planning. Philanthropy LLCs designed to make risky impact investments, donate to charities, and fund political activities may not generate significant income to be attributed to owners for income tax purposes. Taxable income can be further diminished by funding a philanthropy LLC's operations on an as-needed basis. Assets that flow in just as they are required to be given away will generate minimal income subject to taxation, as well as providing staged charitable contribution deductions more likely to fit within a donor's percentage limitations.

Gift and estate taxation. Income tax advantages, though, are just part of the tax-benefit package of traditional philanthropic structures. Contributions to tax-exempt private foundations and public charities also elude gift and estate taxes. These levies of up to 40 percent apply to gratuitous transfers made during life and at death, respectively.[23] They are subject to numerous deductions, as well as a unified lifetime credit now shielding transfers of more than $10 million in assets ($20 million for married couples), thanks to amendments roughly doubling the credit adopted as part of the 2017 tax legislation. This enormous buffer against taxation means that only a tiny number of individuals with extremely large fortunes to transfer will ever pay these taxes. For major philanthropists considering the LLC structure, though, transfer taxes can still remain a relevant concern.

The gift and estate tax rules provide extremely generous deductions for contributions to tax-exempt charities. In contrast to the approach under the income tax, these deductions are subject to no percentage ceilings or other restrictions. So long as a contribution is made to a qualifying charity, its amount is entirely exempt from gift and estate taxation. A philanthropy LLC does not qualify, so donors might reasonably worry about the application of the high gift and estate tax rates to their transfers to such entities. But preparation can sharply reduce the tax hit that donors will take for adopting this structure.

Gift tax concerns may be the easiest to shrug off. Gift taxation applies only to transfers by donors who receive no consideration in return. Asset transfers to a philanthropy LLC, however, can be structured to provide significant return benefits to donors. At its founding, philanthropists who transfer assets to an LLC receive ownership interests in it, which in turn entitle them to governance rights over the entity and the potential to retake the assets from the LLC on dissolution. Future cash infusions can provide additional membership or governance rights as well. Such transfers made quid pro quo are simply not gifts at all and therefore will not trigger the gift tax.

Without the immunity of the charitable deduction, though, a donor's interests in a philanthropy LLC will be a part of her taxable estate at death. Estate planning, however, provides an easy escape route: A donor must simply put in place an estate plan that transfers her interests in her philanthropy LLC to a tax-exempt charity on her death. Married donors can also take advantage of the estate tax's unlimited marital deduction by transferring their philanthropy LLC interests to the surviving spouse upon death and arranging for the surviving spouse to transfer the LLC interest on death to a tax-exempt charity. Philanthropists inspired to follow Chan and Zuckerberg's lead can readily adjust their estate plans to eliminate estate tax concerns.

This workaround does not mean that philanthropy LLCs can outlive their founders and avoid taxation—a trick that tax-exempt foundations achieve handily. This drawback should be noted by anyone considering a philanthropy LLC structure. For the many modern donors who prefer spending down their charitable assets to building a future endowment, though, it will present only a minor hurdle.

There can be tax costs to using an LLC structure, but they are not nearly as significant as one might surmise. By providing a framework for staging contributions, the LLC structure can sometimes even confer a tax benefit. After taking into account its advantages in flexibility, privacy, and control, many philanthropists will find the LLC extremely attractive.

THE UPSHOT

The surprising appeal of the philanthropy LLC takes on even greater significance when one considers the swelling ranks of millionaires and billionaires today. A 2017 global report found more than 225,000 individuals with at least $30 million in investable assets, and more than 73,000 of them live in the United States.[24]

These wealthy individuals and their advisors already face a philanthropic field in which choices of form have begun to proliferate. For example, the donor-advised fund operates much like a private foundation, but at a lower cost and with reduced regulation. Donors to these vehicles sponsored by (sometimes for-profit affiliated) public charities can take immediate income tax deductions and advise on the use of the donated assets over the long term. Donor-advised funds cannot be used for political activity and cannot become standalone institutions, but the more than $85 billion in assets they have attracted to date proves their allure.[25] The LLC's great advantages and manageable costs will allow it to compete with donor-advised funds, private foundations, and other alternatives for managing philanthropic assets. It also meshes easily with the popular "family office" model, where an entity—often an LLC—is created to manage the business, investment, and philanthropic needs of wealthy families.[26]

Even if the philanthropy LLC does not achieve dominance, its entry into the field as a significant alternative has important policy implications. The LLC structure offers the potential boon of an influx of capital to combat society's problems. This infusion of funding is an enticing prospect, especially as it can be deployed nimbly and strategically, so long as it results in a net gain in assets deployed for social good. Whether it will is an empirical question that will require time and study to resolve. At present, there remains room for cautious optimism that—rather than crowding out traditional charities—the philanthropy LLC structure will unleash additional assets to pursue prosocial efforts.

There is, however, the very real concern that growth in LLC structures will magnify philanthropy's already problematic elitist nature. Critical work by Stanford University political scientist Rob Reich and philanthropy researcher and journalist David Callahan points out that private foundations are subject to only limited transparency and public accountability in exchange for their tax benefits.[27] Yet these traditional philanthropies empower the wealthiest individuals and families—or those of decades or centuries past—with considerable control over the social agenda of our nation.

Private foundations are hardly democratic paragons, but the for-profit LLC structure guarantees the public even less ability to examine, understand, and influence a philanthropy's activities. The restrictions on private foundations are imposed to curb and channel the influence of their rich and powerful donors. By freeing the wealthy from these limitations, LLC structures pose the risk of amplifying the antidemocratic elements of elite philanthropy and their consequences for society.

That said, the LLC is not going anywhere, and it will be very difficult to clamp down on its use in philanthropy without a more wide-ranging progressive tax reform—an unlikely prospect in today's political environment. For now, the response of donors, rather than lawmakers, will determine the balance of promise and peril in the philanthropy LLC. As philanthropists consider the ever-expanding range of options for pursuing their charitable objectives, they should consider how choosing an LLC's flexibility, transparency, and control aligns with their broader social goals.

The creation of the Chan-Zuckerberg Initiative launched the philanthropy LLC structure into the public eye. Avoiding the regulatory web that surrounds private foundations will have obvious appeal for philanthropists seeking maximal flexibility to pursue social good. But for the public, the ability to avoid scrutiny that LLCs bestow upon the nation's wealthiest takes a darker cast. The regulation that philanthropy LLCs avoid valuably channels elite philanthropy, and forces its purveyors to reveal themselves and some of their activities to the public. Whether philanthropy LLCs can increase financial support for social good enough to outweigh the costs of establishing a more powerful and less public breed of philanthropy remains to be seen. ■

NOTES

1 Mark Zuckerberg and Priscilla Chan, "A Letter to Our Daughter," Facebook post, December 1, 2015.

2 Katie Benner, "Not Thinking Small for $3 Billion Investment," *New York Times*, September 22, 2016.

3 Steve Lohr, "A Tech Talent Pipeline from Africa," *New York Times*, October 11, 2017.

4 The Chan Zuckerberg Foundation predated CZI's creation, and CZI uses it to make grants to public charities. Since its inception, CZI has transferred more than $1 billion to the Foundation, which has in turn reported grants to two public charities: $20 million to the Biohub project and approximately $1 million to The Primary School, an education and health-care nonprofit founded by Priscilla Chan. See Chan Zuckerberg Foundation Form 990-PF (2016).

5 Soon after CZI's creation, Facebook's board of directors approved a plan put forward by Zuckerberg to reclassify Facebook's stock and create a new, nonvoting class. Shares of this class would be available for donation to CZI, while Zuckerberg would retain control over the company through his super-voting shares. See the plan's announcement on Facebook by General Counsel Colin Stretch titled "Preserving Founder-Led Structure to Focus on the Long Term" (April 27, 2016). Shareholders sued, and the plan was ultimately abandoned. See Vice Chancellor J. Travis Laster, "Stipulation and Order Dismissing Action as Moot and Retaining Jurisdiction to Determine Plaintiffs' Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses," Delaware Court of Chancery, September 26, 2017.

6 In "Laurene Powell Jobs Goes Hollywood, Buys Minority Stake in 'Spotlight' Producer Anonymous Content" (*Hollywood Reporter*, September 30, 2016), Matthew Belloni reports that Emerson's 2016 acquisition of "a significant minority stake in Anonymous Content, the production and management company behind the Oscar-winning film *Spotlight*," sought to harness "the power of storytelling to shape our culture and improve lives." See also Gillian B. White, "Emerson Collective Acquires Majority Stake in The Atlantic," *The Atlantic*, July 28, 2017.

7 IRC § 4944(c).

8 Treasury Regulation § 54.4944-3(b).

9 Internal Revenue Service, Notice 2015-62, Investments Made for Charitable Purposes.

10 Darren Walker, "Unleashing the Power of Endowments: The Next Great Challenge for Philanthropy," FordFoundation.org, April 5, 2017.

11 Uniform Prudent Management of Institutional Funds Act (UPMIFA) §§ 3(a), (e)(1)(H).

12 In "A Letter to Our Daughter," Zuckerberg writes, "*We must participate in policy and advocacy to shape debates*. Many institutions are unwilling to do this, but progress must be supported by movements to be sustainable." (Emphasis in original.)

13 See Treas. Reg. § 501(c)(4)-1(a)(2)(ii), which provides that an organization "may qualify [for exemption] under section 501(c)(4) even though it is an action organization." (An "action organization" engages in substantial lobbying or any political campaign activity.)

14 See IRS Rev. Rul. 81-95. Business leagues exempt under § 501(c)(4) are subject to similar treatment. See Rev. Rul. 61-177, which states that an organization may be exempt under section 501(c)(6) "even though its sole activity is directed to the influencing of legislation which is germane to such common business interest." Also see G.C.M. 34, 233 (December 3, 1969), which addresses political campaign activity by § 501(c)(6) business leagues.

15 I.R.C. § 4941(d)(1)(A).

16 I.R.C. § 4941(d)(1)(D) and (2)(E).

17 Marion Fremont-Smith, *Governing Nonprofit Organizations*, Cambridge, MA: Harvard University Press, 2004, pp. 195-197, 215-225.

18 The term was coined by Henry B. Hansmann in "Reforming Nonprofit Corporation Law," *University of Pennsylvania Law Review*, 129, No. 3, 1981, pp. 497, 501.

19 Zuckerberg, "A Letter to Our Daughter," *supra* note 1.

20 The Tax Policy Center, Model Estimates, "T18-0001—Impact on the Number of Itemizers of H.R.1, The Tax Cuts and Jobs Act (TCJA), By Expanded Cash Income Level, 2018."

21 IRC § 170(b), (d), (e).

22 Not all LLCs elect to be governed by pass-through taxation, as this regime is commonly known, but they typically do so.

23 I.R.C. § 2001.

24 Wealth X, *The World Ultra Wealth Report 2017*, p. 1.

25 The most recent report of the National Philanthropic Trust, *2017 Donor-Advised Fund Report*, reports this figure as the value of all assets under management by donor-advised funds at the end of 2016. As contributions to donor-advised funds have continued to grow strongly, as have most investment returns, the value today is almost sure to be considerably higher.

26 EY, *EY Family Office Guide*, 2016, p. 5. The guide describes the family office phenomenon and indicates that "at least 10,000 single family offices [are] in existence globally and at least half of these were set up in the last 15 years."

27 Rob Reich, "On the Role of Foundations in Democracies," in Rob Reich, Chiara Cordelli, and Lucy Bernholz, eds., *Philanthropy in Democratic Societies: History, Institutions, Values*, Chicago: University of Chicago Press, 2016, pp. 64-65; David Callahan, *The Givers: Wealth, Power, and Philanthropy in a New Gilded Age*, New York: Alfred A. Knopf, 2017.