23 August 2011

Mr Chris Leggett
Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Chris,

Re: Public Ancillary Fund Guidelines, Revised Draft

Suite 6
19–35 Gertrude Street
Fitzroy
Victoria 3065
Australia

T. +61 3 9412 0412
F. +61 3 9415 7429

E. admin@communityfoundation.org.au
W. www.communityfoundation.org.au

ABN 57 967 620 066

Thank you very much for the opportunity to comment on the revised draft Guidelines for Public Ancillary Funds, issued 14 July 2011. On behalf of the Board of Australian Communities Foundation (formerly Melbourne Community Foundation) I would also like to thank you and your team for being so open with the sector and for being so responsive to feedback and discussion on the proposed Guidelines. It is very much appreciated.

We repeat our support of the Guidelines' spirit and direction, and are pleased to take this opportunity to add some refinement and detail to the revised draft.

There are four areas where we would like to make comment and suggested changes, particularly from the Community Foundation's context and perspective.

Clause 19: Minimum Annual Distribution

The requirement to distribute 4% of the market value of the fund's net assets is appropriate.

19.1 Rather than stipulate a minimum dollar distribution or the 4% of net assets, it would be better to leave the requirement at 4%. Requiring smaller public ancillary funds, such as many of the rural and regional Community Foundations, to distribute a minimum dollar amount does not reflect the ability of their community to build the fund quickly; nor does it recognise the significant other work and benefits provided to the community by the Foundation. As these Community Foundations are responding to grass roots community needs and building a culture of giving and engagement, whilst also trying to ensure their sustainability, having a single requirement of 4% of net assets is appropriate.

19.2 Allowing a four year accumulation period for newly established public ancillary funds is absolutely appropriate for Community Foundations setting up. However, for those public ancillary funds which are established with a significant corpus or which grow quickly, they may not need this length of time before making a distribution. Setting a corpus level above which the 4% distribution needs to be made, regardless of time since establishment, would be logical (for example as soon as the fund reaches $220,000 it needs to make the 4% distribution in the subsequent financial year).

It should also be noted that existing Private Ancillary Funds (PAFs) or sub-funds which are transferred under clause 50 are not eligible for this accumulation period and need to meet standard distribution requirements.

It is also suggested that a public ancillary fund can apply to the Commissioner to approve a non distribution period of up to two years where a compelling case is provided (e.g. to fund a major capital project).

Clauses 40: The fund must not carry on a business.

We suggest the wording be revised slightly to "The fund must not carry on an unrelated business".

Clause 40.2 should also be amended to include any activities in relation to fundraising (not just public appeals).

The wording of this clause has been taken from the PAF guidelines and is not entirely appropriate for public ancillary funds. Public ancillary funds are concerned with encouraging the public to become involved in philanthropy and in giving for the community benefit.

Many Community Foundations provide additional services for which they receive income. For example, they generate fee for service consulting income from government and other organisations in return for providing specialist advice or undertaking research. This is part of a Community Foundation's remit and also essential in proving additional income on which they survive.

Clauses 36 & 42: Benefits to Founder / Donor

Whilst this clause makes sense for PAFs, it will cause negative unintended consequences for public ancillary funds. For example, it could prevent a Community Foundation from establishing a disaster relief fund (an item 1 DGR) in response to a local disaster and making grants to that disaster relief fund.

To avoid such confusion we suggest the clause is modified to exclude "distributions to eligible recipients".

Clause 42 should also specify donors separately and use the requirements in the tax ruling on gifts TR 2005/13, that no material benefit or advantage can be provided to a donor.

Founders and associates should be covered in the uncommercial transactions provisions.

Clause 50: Portability

Portability within the sector is very welcome.

Portability needs to be both ways (so equally, from a PAF to a sub-fund of a public ancillary fund). Whilst we understand that these Guidelines only refer to public ancillary funds, the PAF Guidelines also need to be amended to include the provision for the transfer of capital and assets to a public ancillary fund (and / or an existing or new sub-fund of a public ancillary fund).

Our related submission on the Exposure Draft noted that the section of the legislation relating to trustees' governance duties and capital distribution needs to allow such transfer of assets, and should apply to the transfer of assets to and from both forms of ancillary fund (private and public).

An unintended consequence of allowing provision for portability in the Guidelines and related legislation, is that the Trustees Duties regarding objects and purposes and distribution rules also need to make such a provision, in order for the Trustees to be able to approve such a transfer. Therefore amendment to Trust Deeds may be required to allow such a transfer of assets to an item 2 DGR.

Finally, although the implementation date for the Guidelines is 1 January 2012, all other dates in the Guidelines should apply for a financial year time periods (such as clause 54). It would also be extremely helpful for the ATO to develop and make available a model Trust Deed for a public ancillary fund.

Please contact me if you have any queries or would like to discuss, and thank you again for the opportunity to continue to have an input.

Yours sincerely,

Sarah Davies
Chief Executive Officer