



Create a Jewish Legacy Leadership Gathering

# Increasing Donor Options Without Increasing Liability: A How to (and When to) Guide to Gift Acceptance Policies

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The Jewish Federations  
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## **Increasing Donor Options Without Increasing Liability A How to (and When to) Guide to Gift Acceptance Policies**

Gift acceptance policies serve several critical roles. First, they expand donor gift options, increasing the range of gifts they can make. Second, they create discipline in gift acceptance, allowing careful consideration of an established set of factors that include the marketability of the proposed gift, the cost associated with acceptance, and the appropriateness of the asset for the purpose. Finally, the very process of adopting the policies educates the Board and expands their thinking about gift options in their personal giving as well as in conversations with prospects. In this session you'll not only receive a sample set of policies, but walk through the review and adoption of those policies with an expert who has guided many nonprofits through the process.

Nonprofit organizations of all types have one thing in common: they accept charitable contributions. In this economy, donors are increasingly considering non-cash gifts for charitable donations for several reasons:

- 1) Individuals are conserving cash for critical needs;
- 2) Non-cash gifts held for longer than 12 months provide the donor with an additional tax benefit of avoiding tax on the gain in the contributed assets (in most cases<sup>1</sup>);
- 3) Using non-cash assets allows donors to select from assets that may not be generating income; and
- 4) Considering non-cash gifts may create opportunities to make larger gifts than when the decision is limited to the donor's checking account balance.

This interest in gift planning - and choosing the asset that best fits the donor's needs - requires that charities are prepared to effectively manage the acceptance of those gifts.

Gift acceptance policies are rarely adopted at the inception of a public charity's fundraising program. Early development activities usually focus on cash, and occasionally marketable securities. There is little discussion of, or involvement with, other gift forms. Gift acceptance policies are a product of capital campaigns or planned giving campaigns in which planned giving concepts, such as gifts made from assets, split interest gifts, and deferred gifts, are introduced. Once gift acceptance policies are in place, however, they tend to drift to the back of the policy manual where they age unnoticed and no longer provide the intended safeguard. This analysis is designed to help you gain a greater understanding of the details, draft a set of policies, and make better decisions about gift acceptance.

### **I. Developing a Perspective**

#### **A. Personal Observations**

Most of my work involves reviewing nonprofit development programs to help the charity in starting a planned giving program, building a planned giving program, creating an endowment, or positioning that endowment with the public and with donors. In every case I conduct an audit of the development program that includes policies and procedures. Here's what I find:

- There are no gift acceptance policies addressing non-marketable assets.
- There are some bare bones policies (sometimes elaborate policies) but no one uses them.
- There are no standards to provide consistency in evaluation of risky assets.

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<sup>1</sup> This applies primarily to donations to public charities. Donors to private foundations may deduct the market value of gifts of publicly traded stock held more than twelve months, but gifts of other appreciated assets such as privately held stock or real estate are limited to the donor's tax basis.

- Sometimes there is awareness of the need for policies because there is a history of “bad” gifts. They just don’t know how to start.
- More often, the organization has no clue about potential issues and has either decided not to accept any non-marketable gifts or has never been offered a non-marketable gift.
- There is tension between the finance office and the development office.

These observations are as applicable to charities with \$1 billion annual budgets as those with \$2 million budgets. It is rare when I find a charity with up-to-date, effective gift acceptance policies that uses them.

## **B. Who’s Involved in Adopting Gift Acceptance Policies**

Gift acceptance policies are board policies, but are generally developed and largely managed by staff. There are generally two sets of internal interests when discussing gift acceptance policies: the development staff and the finance staff. These groups have very different perspectives and interests.

### **1. The Development Staff**

The development staff’s role is to develop gifts for the nonprofit. The key interests of the development staff in gift acceptance policies are:

- Expanding gift options for donors.
- Streamlining the process to make it easy for donors (and complete the gift so that the development staff gets credit for the completed gift)
- Getting good execution from the finance staff
- Getting good feedback for donors to keep those donors happy

It is frustrating for the development staff to have an uncertain acceptance and approval process because they are likely to spin their wheels in long meetings with donors to get the list of approved information only to find that someone has simply said “no” to the gift. It wastes time, makes the donor angry, and often results in the loss of any future gift from the donor.

### **2. The Finance Staff**

The finance staff’s primary role is to manage the assets of the nonprofit and to protect it from liability. Their key interests are:

- Removing uncertainty from the acceptance and use of the gift
- Managing liability
- Managing staff time wisely

Most finance staff members have had no interaction with donors. They feel donors get a big tax benefit from giving and should be flexible. I’ve heard comments from the finance staff such as:

- “We don’t want real estate – just give us cash.”
- “Why don’t you just sell the asset and give us the cash.”
- “We just don’t take personal tangible property.”
- “Why would we ever get involved in offering charitable gift annuities if we have to register and file reports?”

### **3. Addressing Both Needs – And the Board**

You will have a far more visible and effective role if you can first address the concerns of the finance staff and development staff, bringing them together on common ground. You are then set to address the board, where the introduction of the policies can serve to create new energy and gifts from the board.

#### **C. A Diagnostic Checklist**

I generally start with the diagnostic questions provided below to determine where the charity is on that spectrum. Do you have a current set of gift acceptance policies?

##### **1. If “yes”:**

- When were those policies adopted?
- How often do you review them and make changes?
- Legislation over the last two years has dramatically changed rules for some types of non-marketable gifts. I’ll be happy to review those policies for you and identify any areas that might need change or expansion.

##### **2. If “no”:**

- Does this create any issues for you in timely review and acceptance of gifts?
  - Have you had to turn away gifts because you did not have policies?
  - Have you accepted any gifts that created problems for you because there was not a set of screening standards?
2. Have you ever had to decline a gift because of a lack of policies?
  3. Have you ever accepted a gift and later realized it would have been a better idea to decline it? Or, the donor was unhappy because of unanticipated tax consequences?
  4. Do you have any limitations on the types of gifts you will accept?
  5. Who on staff makes the ultimate decision on gift acceptance in your organization?
  6. Which board committee has responsibility for gift acceptance/gift acceptance policies?
  7. Is there any tension between the finance office and the development office when non-marketable gifts are accepted?

#### **D. The Purpose and Role of Gift Acceptance Policies**

Gift acceptance policies provide discipline for the nonprofit development program in several ways. First, the policies define the types of assets that are acceptable. Second, policies establish the gift forms that are acceptable. And finally, gift policies define the organization’s role in gift administration.

The primary benefit of gift acceptance policies is to maintain discipline in gift acceptance and administration. Discipline prevents the acceptance of gifts that will cost the nonprofit organization time, money, and possibly its reputation, by reminding the organization when to say “No.”

Policies also serve to educate the nonprofit organization’s staff and board about critical issues triggered by certain gifts. It is difficult to absorb and appreciate the practical issues associated with

acceptance of certain gift forms without working through them and making choices about how to handle them.

The process of adopting the gift administration policy allows the staff and the board to work through the practical issues, such as costs associated with certain gifts, and is a far more valuable educational tool than a seminar or article on the subject. New board members, or those who have never evaluated potential gifts, may at first see the offer of a large boat as an exciting possibility. After a discussion of carrying costs, such as insurance, transport, storage, maintenance and expenses related to its sale, they will better understand the gift evaluation process.

The process of creating gift policies helps focus and strengthen the gift administration program. Regular review ensures that the development staff and the board bring up and answer questions critical to the planned gift program's integrity. It ensures that legal counsel is sought prior to the emergence of legal issues and that professional assistance is identified as a resource prior to the attempted resolution of problems.

The adoption process is also a good way to introduce planning ideas to board members who have not been receptive to brochures or other attempts at education. A better understanding of the gift acceptance process frequently produces new gifts. Rarely do board members go through the process without generating questions relating to their personal assets and opportunities. Invariably, there is a new gift of an asset not previously considered, or a gift in a form not previously understood.

And finally, the process gives the board a chance to make decisions about policy without the distraction of a pending gift to blind its collective judgment. Experience shows that it is hard for a planned giving officer or board to form the word "no" once the gift – however unattractive – is sitting on the table.

To be effective, policies must be in place before the organization begins to consider acceptance of specific gifts. Some organizations prefer to the "make-policy-as-needed" approach because the decision-makers believe that it preserves flexibility and discretion in policy making. More often this approach leads to poor decisions for several reasons.

First, decisions based on case-by-case scenarios breed inconsistency. The results reflect the personal opinions of board members, not consistent policy. Nonprofit boards change annually. While some board members remain from year to year, the full group always changes over a three- to five-year period. Since each of us brings different personal experience and attitudes to the table when making decisions, judgments change as the committee changes.

Second, the glittering appeal of the potential gift obfuscates good judgement. It is difficult to make a list of potential problems and issues while you stare at the gift. The tendency of the planned giving or development officer is to do everything possible to accept the asset.

Third, without established policy a nonprofit may send mixed signals to potential donors. Suppose the planned giving officer receives what can only be described as a wretched gift, and thanks the donor profusely. Later, after sorting through the issues, he finds that the gift must be rejected. The donor is left to wonder why the initial excitement changed to a disapproving "no." A better way to handle gift acceptance is to tell a donor the organization appreciates the gift, but its policies require a review of certain assets to ensure proper handling. A timely review, even with a resulting "no" is easier to understand.

It is important to note that a good set of policies and checklists will also prevent donors from making mistakes. Too often a donor's accountant or attorney is not familiar with details such as the related use rules, the valuation requirements, or pre-arranged sale issues. Raising questions in the gift

acceptance process may save a donor from disappointment when the time comes to file his or her income tax return.

## **E. Drafting and Adopting Gift Policies**

Developing gift acceptance policies should be a collaborative process involving the consultant, the planned giving staff, the organization's director or president, the CFO, legal counsel, the board's committee responsible for oversight, and the professional advisory committee or advisor. The combined insight of this group provides the broadest perspective and guidance on the issues. Simply adopting another institution's gift policies, without understanding the issues and without tailoring them to fit your organization, will not provide protection.

I generally recommend a Task Force Group with representatives from each of the key areas to prepare a draft that then goes to the Development Committee and ultimately to the Board for adoption.

After adoption, the gift acceptance policies should be reviewed annually. This review is an important process in which the policies are dusted off and reread, and forgotten items reinstated in memory. Review also allows fine-tuning or amendment to the policies in the event that changed circumstances allow the organization to accept new gifts, or to restrict or expand the manner in which current gift forms are handled. This is a great way for you to remain involved, creating a tickler to make contact with your client and encourage and lead that review.

All of that said, policies should provide for a way to make exceptions to the rules, although such exceptions should be rare. Design a review process for deviation that requires the approval of the planned giving director, the Executive Committee and the agency Executive Director. Make sure that any action that runs counter to the gift policy is well supported and well reasoned.

In addition to drafting policy, the nonprofit must ensure that it has the expertise available to follow through in critical areas. Real estate appraisers, environmental analysts, property brokers, and legal advisors must be identified before the need arises. Only then can the nonprofit engage professional advice quickly to make a timely analysis without leaving the donor waiting for an answer.

## **II. The Critical Elements of the Policies**

Take a look at the sample policy in Appendix A as we work through each section. Some policy elements are straightforward and simply provide the context for making decisions. Other areas, such as acceptance of non-marketable gifts, create more liability and will be discussed in greater detail. Throughout the discussion reference is made to the gift acceptance committee. This term is used generically to denote the board committee responsible for acceptance of gifts. In some organizations this responsibility lies with the executive committee, while in others it may be the finance committee, development committee, or planned giving committee.

Key policy segments include the following:

- ***Mission and Purpose*** – The organization's mission and purpose should be a part of every document generated by and for the nonprofit. It is important to keep the organization's goals in mind when drafting and using the policy. Place the mission statement prominently at the top of the document to remind everyone of the vital role the organization serves.
- ***Purpose of Policies and Guidelines*** – The purpose of the gift acceptance policies should be clearly stated. In most instances, the purpose is to govern acceptance of gifts and to provide guidance to donors and their professional advisors in completing gifts. Purposes may include more elaborate language related to discharging fiduciary responsibility,

protecting the board from third party liability and IRS sanctions, and protecting the nonprofit from unanticipated costs and negative publicity.

- **Use of Legal Counsel** – The policy should clearly state that the nonprofit will seek the advice of legal counsel when appropriate. The purpose of legal counsel is to provide protection. Legal counsel generally represents an unbudgeted expense, and both the planned giving officer and the gift acceptance committee are generally reluctant to suggest adding expense to the transaction. By stating that counsel will be engaged when appropriate, the policy provides a platform for the use of counsel, while leaving discretion on the final decision to the gift acceptance committee. It is helpful to list the circumstances under which counsel will be engaged, including:
  - The review of certain gifts, such as closely held stock, or closely held stock subject to buy-sell agreements or other restrictions.
  - The review of all transactions governed by contracts or legal documents. This would include bargain sales, trusts naming the nonprofit as trustee, or any document obligating the trustee to take action.
  - The review of all transactions with potential conflicts of interest. This may include use of board members as sales agents in transactions, leases of gift property to staff or board, etc.
  - Other circumstances in which the committee or board members believe that use of counsel is appropriate.

The detail is not meant to restrict or force the board to use counsel, but rather to provide some guidance when the advice of an attorney might be prudent. Most committee members making decisions about acceptance of closely held stock, for example, are not likely to be familiar with the *Ferguson*<sup>2</sup> case, liquidity issues, or other dangers of restrictive or prearranged transfers.

- **Donor Conflict of Interest** – The policies should make it clear that the nonprofit will strongly urge and advise the donor to seek independent professional counsel prior to giving a gift. It is appropriate here to incorporate the National Committee on Planned Giving (NCPG)'s Model Standards of Practice for the Charitable Gift Planner. Also include as references the Association of Fundraising Professionals (AFP) Donor Bill of Rights, and any other document recognizing the importance of independent advice for the donor, and “truth in advertising” in communicating with the donor. Conflicts with donors most often arise when the donor and charity have a long-term, strong relationship rather than when the relationship is new.

Discuss donor-conflict issues with the board. Board members may be quick to question the donor’s need for outside counsel, and eager to offer documents, advice, and other encouragement to complete the gift. The board will have a better understanding of the issues once those points are explained.

Board and staff conflict of interest issues should also be addressed. Board members may be eager to get involved in fundraising ideas that involve sales of products or services to the organization’s donors. Appendix C provides a sample conflict of interest statement that is recommended as a model or template for a statement signed when beginning board or staff service.

- **Restrictions on Gifts** – Gift policies are an excellent place to explain the organization’s attitude towards restricted gifts. All organizations prefer unrestricted gifts. However, planned

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<sup>2</sup> *Ferguson v. Commissioner*, 108 T.C. 244 (1997).

giving donors who have a long-term relationship with and an understanding of the role the organization fills generally have a specific purpose in mind for the gift.

The nonprofit should determine the types of restrictions that can be placed on gifts. These options will range from a rigid policy prohibiting restrictions, to endowment pools for specific purposes, to a broad policy stating that all gifts that fit the organization's mission and purpose will be accepted. All policies, however, should state that gifts which are counter to or beyond the scope of the nonprofit's mission and purpose will be turned down.

It may also be appropriate to include language about specific endowments, chairs or other naming opportunities, and set out the dollar limits, pledge restrictions, and other governing principles. Large schools and universities should have more extensive policies to ensure proper communication and consistency. Smaller organizations may be able to manage with a less detailed policy.

It is best to designate a committee to decide whether the restricted gift meets the criteria set forth in the organization's gift policy. A committee can act faster than the full board to either accept, reject, or negotiate the purposes of a gift. Ideally this group will be the designated gift acceptance committee – a group with knowledge of both the organization and its gift acceptance policies.

- **The Gift Acceptance Committee** – The committee set up to review gifts or in some cases to make recommendations on acceptance to the Board, must be made up of individuals who know the nonprofit's mission and operation well and have the expertise and experience to make decisions. This committee should be small enough to respond quickly to unusual gift offers and to make timely decisions. The structure suggested in the example policy (Section V, Appendix A) is most appropriate for large institutions. Smaller charities may prefer to delegate this job to the development committee, the finance committee, or even the executive committee.
- **Types of Gifts** – A list of the types of planned gifts appears in Section VI of Appendix A and requires careful attention. Most nonprofits, especially those just embarking on a planned gift program, will not be able to accept all types of gifts because they lack the expertise or the resources to manage the gift or gift form. Look at each gift form as part of the evaluation process, and when you write your nonprofit's gift policy, state clearly the types of gifts that are appropriate for your organization and the types of gifts that are not appropriate. The most common gift forms include:
  - **Cash** – It is difficult to find a downside with cash. And since the NCPG's 1993 Survey of Donors indicated that the majority of bequests were funded with cash, the category should be on the list.
  - **Tangible Personal Property** - Tangible personal property includes art, furniture, coin and stamp collections, livestock, jewelry, equipment, cars, boats, clothes, and any other personal property item owned by a donor. The nonprofit must be extremely careful about the receipt of personal property, especially when such property is received in exchange for a gift annuity. The charity will have an obligation to pay an income stream based upon the gift's value on the date of gift. The charity must be able to determine the gift's value and marketability before accepting it or run the risk of creating a negative cash flow transaction (instead of a gift).

The nonprofit's gift acceptance policy must address issues related to the types of property that will be accepted. The review function is best performed by a committee



(the less visible the committee, the better) that asks and answers the following questions:

- Does the property fulfill the mission of the nonprofit (related use)?
- Is the property marketable?
- Are there any undue restrictions on the use, display, or sale of the property?
- Are there any carrying costs for the property (insurance, lease space, maintenance to preserve value, appraisal for sale purposes)?

Be sensitive to the special tax issues affecting the donor. A tax deduction for the market value of the gift is allowed when the organization will use the gift (related use). Determine whether the gift will be used by the nonprofit, or sold. Gifts donated for auction are considered to be unrelated use items since the gifts are sold and are not used by the nonprofit. The deduction for personal property contributed to a charitable remainder trust or a pooled income fund is limited to cost basis. Personal property that is contributed to a charitable remainder trust or a pooled income fund will not be deductible as long as the donor or a donor's family members receive income from the trust.

- **Marketable Securities** - There are only a few dangers in acceptance of marketable securities, all of which relate to timing. To the extent possible, the following issues should be addressed in the gift policy or on a checklist attached to it.

1. **Timing of the gift** – The donor runs the risk of assignment of income (capital gains) if the gift is made after a commitment to sell, or in the case of an outstanding tender, if the gift is made after the time at which the tender is fixed. The *Ferguson*<sup>3</sup> case produced a negative result for the taxpayer who began the gifting process early in the tender, but completed it after the tender trigger was reached. While the case provided a look at what didn't work, it provided little guidance on how to avoid the assignment of income problem.

2. **Timing of the transfer** – Donors may face difficulties on timely transfer of securities. Planned giving officers should take the time to identify where and when the transfer will occur. Donors and PGO's can improve the timeliness of the transfer with active involvement by securities firms. Nonprofits can also make transfer easier by maintaining "house" accounts with the major securities firms so that donors can make a intra-firm account transfer without having to transfer the gift from firm to firm.

3. **Timing of the sale** – Gift acceptance policies should state that marketable securities are sold upon acceptance. Too often policies say that the investment committee will make a decision on sale, or the board will consider that issue. Neither the board nor the investment committee are professional managers. The board's role is to manage the investment process by providing direction and oversight. If money management is assigned to a professional manager, gifts should be reduced to cash and transferred to the manager for investment as quickly as possible. The transaction cost of the sale is small compared to the loss that can be experienced with delay in sale.

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<sup>3</sup> *Ibid.*

- **Closely held securities** –Closely held securities are generally defined as securities that are not broadly or publicly traded and include not only debt and equity issues of C and S corporations, but also LLCs and LLPs. The definition of “publicly” traded relates to the ability to establish a proven market in which a “willing buyer and a willing seller” set a price or value for the security. The lack of a market to determine what a willing buyer would pay a willing seller affects valuation and liquidity upon receipt. Policies should address how value and marketability are determined prior to acceptance, how restrictions are examined and resolved, and when legal counsel is required prior to acceptance of the gift. The nonprofit should conduct an adequate review (either internal or external) to determine that:
  - **The security is not restricted.** There may be restrictions noted on the face of the certificate indicating that the security is subject to a buy-back agreement at a set price, or that it must first be offered to a specific group at a set price before being offered on the open market.
  - **The security is marketable.** This means there is evidence of interest and some trading in the security. Often this trading occurs at the company as stock is purchased by the board or company employees.
  - **The security will not generate undesirable tax consequences for the nonprofit.** Certain interests, such as Sub-S stock and certain partnerships or LLC’s, generate unrelated taxable business income. While most organizations will be willing to pay the tax in order to take the gift, the consequences of the gift should be understood in advance.
- **Real estate** – Real estate gifts are some of the most dangerous gifts for charity. Not only are there a series of liability issues associated with acceptance, but real estate is also one of the most commonly owned assets. It is a likely gift.

There are two big issues related to the nonprofit acceptance of real estate: environmental liability and practical issues related to disposition of the property.

**1. Environmental Liability:** One of the greatest risks facing owners of real property is environmental liability. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), enacted in December 1980, created a merciless liability structure for “responsible parties” in the chain of title to an environmentally damaged property. The liability for clean up exists without regard to the actual knowledge of the owner or the material participation of the owner. Costs for removal of the hazardous materials and restoration of the property, including clean up of soil and ground water, can easily run into millions of dollars and far exceed the value of the property involved.

Charities are not immune from the environmental protection laws. The nonprofit organization should have detailed policies that require the environmental review of all anticipated gifts of real property. Sample environmental review forms are attached to this chapter as Appendix B. Use this or a similar environmental review process to protect your organization.

The nonprofit must also be cautious when serving as trustee of a charitable remainder trust or charitable lead trust, because exposure may extend beyond the assets of the trust. The few decisions that have been rendered relating to fiduciary responsibility in instances in which the nonprofit might serve as trustee have dictated tough results. The second decision in *City*

of *Phoenix v. Garbage Services*<sup>4</sup> provided some insight into the liability for a fiduciary. In that decision, the court held that:

1. Fiduciary liability is limited to the value of the contaminated asset when the contamination occurred prior to the time of the trustee's ownership, or when the trustee owned the property during the time of contamination but had no control and did not knowingly allow the contamination to happen.
2. Fiduciary liability extends to the fiduciary's own assets when the trustee not only owned the property at the time of contamination, but also controlled the use of the property and knowingly allowed the contamination.

Recent legislation addressed this liability issue. H.R 3610 contained the "Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996" which amended CERCLA to provide that:

*"The liability of a fiduciary under any provisions and this Act (CERCLA) for the release or threatened release of a hazardous substance at, from or in connection with a vessel or facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity."*<sup>5</sup>

However, this protection is not available where the fiduciary's conduct was negligent or created responsibility for the contamination.<sup>6</sup> In essence, the decision in *Phoenix* was codified.

**Practical issues related to receipt of real property.** Experience has shown that most development officers or executive directors will want to find a way to accept a gift of real property. However, sometimes the gift is not appropriate because it will create a problem or will divert the focus of the nonprofit. And sometimes the gift is not appropriate for the purpose for which it is given. Additionally, as detailed above, sometimes the gift is costly.

A practical review of the property begins with an analysis by a real estate committee or gift acceptance committee that considers the following issues:

- Is the property useful for the purposes of the nonprofit?
- Is the property marketable?
- Are there any restrictions, reservations, easements, or other limitations associated with the property?
- Are there carrying costs, such as insurance, property taxes, mortgages, or notes, etc., associated with the property?
- Does the environmental audit show that the property is clean for environmental purposes?

If the responses to these questions are positive, the nonprofit must then examine the form of the charitable gift and ask additional questions detailed below.

**Gift of real estate to charitable remainder trusts (CRT).** Many issues should be considered by both the donor and charity before funding a CRT with real property. Questions to raise are:

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<sup>4</sup> *City of Phoenix v. Garbage Services*, 827 F. Supp. 600(D. Ariz. 1993)

<sup>5</sup> CERCLA, Sec. 107(n)(1)

<sup>6</sup> CERCLA, Sec. 107(n)(3)

1. ***Is this an annuity trust or a unitrust?*** If the trust is an annuity trust, the trust will have difficulty in meeting the income obligation. If the property is not sold before the first payment is due, an “in kind” distribution must be made that is equal in value to the income distribution required, which further complicates the ultimate sale of the property. The annuity trust also faces a valuation dilemma. When a property is gifted with a value of \$1,000,000, but sold for \$800,000, the trust must still distribute an annuity amount based upon the original value.
2. ***If the trust is a unitrust, does it have a flip provision?*** The ability to begin the trust as a net income unitrust, and then “flip” to a standard unitrust, provides flexibility for the sale of real estate. A unitrust provides protection for the valuation issue because if the property is sold for less than the contributed value, or property related expenses reduce its value, the annual distribution is reduced as well.
3. ***Is the property mortgaged?*** Mortgaged property must not be contributed to a CRT. (More on this in the CRT section.)
4. ***Is the property the donor’s home?*** Be careful in the event that the donor places his or her residence in the CRT. While there is no prohibition on the contribution of a residence, the donor may not continue to enjoy the use of the property after the date of contribution.

***Pooled income funds:*** Real estate is generally a poor choice for funding a pooled income fund. The pooled income fund distributes net income to the donors who hold units. Real estate is generally non-income producing and may incur expenses (charged to income) prior to sale. Therefore, a gift of real estate is likely to reduce the income stream for all participants. Many organizations have policies that prevent the contribution of a gift of real estate to a pooled income fund.

***Charitable gift annuities:*** If real property is contributed in exchange for a gift annuity, and the property does not produce income or produces insufficient income, the receiving organization must have the resources to pay the income stream in the period before the property is sold. And it must be certain that the value on which the annuity is based is fair and reasonable. If a nonprofit accepts a gift of real property for a gift annuity, it must be certain it can sell the property quickly for the established value. Many organizations will not accept real property in exchange for charitable gift annuities because of these uncertainties.

***Deferred charitable gift annuities:*** The analysis is somewhat different when real property is contributed in exchange for a deferred gift annuity. A deferred gift annuity generates payments at some point in the future, meaning that the nonprofit will have some time to sell the property in order to make those payments. However, the nonprofit should still make sure the property can be sold without much delay, and that the value used to establish the annuity is fair and reasonable.

- ***Remainder interests in property*** – The issues related to remainder interests in property relate to economic responsibilities during the term of the life interest, as well as review of

conduct and control of the property during the term of the life interest. In some instances the charity may not know of the remainder interest gift. In others, the charity will be actively involved in the solicitation. When involved, the charity should ensure maximum protection from environmental liability by remaining continuously in touch with the donor and the condition of the property throughout the life term.

- ***Oil, Gas, and Mineral Interests*** – Organizations located in active mineral interest states such as Texas may encounter opportunities for gifts of oil, gas, or mineral interests. Severed interests can be represented by surface rights, or the interest in the minerals alone. These interests are generally owned as working interests or as fractional partnerships. They are difficult to sell and unpredictable in income generation.

If your organization is unfamiliar with these interests you may not choose to get involved in accepting this gift form. If you do have the expertise to manage or sell these gifts, consider setting minimum gift sizes so that your administrative office is not burdened with a paper chase that generates minimum income.

Have the form of the interest reviewed to insure that you are not accepting unrelated business taxable income property, which is generated by some forms of oil, gas, and mineral ownership. In addition there are special issues with oil and gas that relate to valuation and whether such interests are a form of non-qualified partial interest property. The IRS published a private letter ruling in 1984 that approved a charitable deduction of an oil and gas interest. (Private letter rulings can not be relied upon, but indicate attitude of the IRS.)

- ***Bargain Sales*** – A bargain sale can be an effective gift tool in some circumstances. The bargain sale most often involves gifts of real property, meaning that the policies should reflect that bargain sales of real estate undergo the same evaluation required for outright gifts. In most instances, the final decision on a bargain sale should be made by the gift acceptance committee since acceptance should depend on whether the bargain sale is in the best interest of the organization. Factors for consideration include:
  - Will the nonprofit use the property or sell it?
  - The results of the environmental review
  - The condition of the property
  - The ratio of debt to equity, if a mortgage is assumed
  - The ability to cash flow the debt, if a mortgage is assumed
  - The ability to cash flow the carrying costs of the property including taxes, insurance, and maintenance of the property
  - Are there unrelated business tax issues associated with the sale of the property/ mortgage?

Remember that the bargain sale has a special impact on the donor as well since it triggers special rules applicable to basis. These rules require the donor to allocate the basis in the property in a pro rata fashion between the gift and sale portions of the transactions.

- ***Life Insurance*** - Life insurance can be a valuable part of a planned giving program because of the special donor niches it can reach. There are two ways that outright gifts of life insurance are used in planned giving: the transfer to charity of an older policy which the donor no longer needs, or the transfer of funds to charity to purchase a policy on the life of the donor. In the first instance the policy represents a non-income producing item that makes an excellent gift because it does not impact the donor's lifestyle. In the second instance, the life insurance policy represents a way to leverage the value of the gift to charity. A series of

small premium payments can create a large endowment gift at death. This section of the policy deals solely with the irrevocable transfer of an existing insurance policy.

The nonprofit must have guidelines that spell out action to take on the receipt of an insurance policy. If the policy is a term policy and premium payments must be made to keep the policy in place, the nonprofit must have the cash flow to make those payments. There are few circumstances in which nonprofits should accept term policies.

If the policy is a whole life policy, premium payments may also be due. Is it in the best interest of the nonprofit to make those payments? Experience shows that there is not a standard answer to those questions. Rather, the nonprofit should have a committee or group that reviews the policy and makes a decision on a case-by-case basis. Alternatives include:

- **Continuing to make the premium payments.** This course of action must be based on economic/investment judgement. Is it a good investment for the nonprofit? Can the nonprofit afford the cash flow?
  - **Conversion of the policy to a paid up policy.** Conversion will reduce the face value of the policy, but will capture the value of the policy on its date of gift.
  - **Exchange of the policy for its cash value.** Exchange of the policy for its cash value is another way to realize or capture the value the policy on its date of gift.
  - **Sale of the policy to a viatical company.** There are companies now that buy policies when the insured is age 65 and older. These companies may pay more than the cash surrender value.
- **Intellectual Property** – Intellectual property – which includes patents, royalties, licenses, copyrights, or similar contract interests – may be an excellent gift opportunity for universities, organizations involved in research, or professional associations for doctors, dentists, and scientists. Recent changes in the law make gift of intellectual property less attractive because a donor may no longer claim a current deduction for the estimated future revenues generated by the gift. Rather, in the first year the donor may deduct the asset's cost basis and any revenue generated to the charity in that year and deduct actual revenue generated to the charity over the subsequent ten years. Intellectual property gifts may be difficult to manage as well. The charity must not only wait to receive the revenue and revenue tax information (sometimes causing problems or delays for the Form 990), must know how to maximize use of the interest, and in the case of a copyright or patent, may be called to defend the interest with legal action. For that reason, the following questions are recommended before acceptance:
- Is the intellectual property right related to the mission of ABC?
  - Can the ownership of the intellectual property right be clearly transferred or assigned to ABC?
  - Is the intellectual property right a full or fractional interest? If fractional, who are the other owners of the property and percentage interests? Is the gift deductible to the donor under the IRS partial interest gift rules?
  - Does the right in the intellectual property generate, or have the potential to generate, at least \$5,000 or more each year?
  - Is there a market for the sale or licensing of the intellectual property right?
  - Are there any costs associated with acceptance of the intellectual property right? (i.e., is the gift a patent application that will require further action to secure, are there any claims,

liens or other contests associated with the property, or are there likely to be costs associated with defending the intellectual property right?)

- Are there any restrictions on the retention or use of the property?
  - What agreements or other legal documents would ABC be required to execute in order to obtain patents, market the property and grant licenses in the name of ABC?
- **Charitable Gift Annuities** – Charitable gift annuities require the most thought of all. The organization must clearly understand the liability created in issuing the annuity. The nonprofit must register in states where gift annuities are offered and disclose the appropriate financial information. And the organization must invest the assets in accordance with the laws, to cash flow the annuity payments and to protect the nonprofit from negative cash flow over the life of the annuitant.

The gift acceptance policy will include:

- Minimum and maximum size of the charitable gift annuity issued by the nonprofit
  - Minimum and maximum ages of charitable gift annuitants
  - The types of property accepted in exchange for charitable gift annuities, making distinctions, if appropriate, between current annuities and deferred annuities
  - The states in which donors may execute charitable gift annuities
  - The manner in which the charitable gift annuities will be managed for investment and administration purposes
- **Trustee Appointments** - While organizations may choose to accept charitable remainder trusts, they may choose not to serve as trustee. Where charities do serve as trustee, they should ensure that:
- State law allows the charity to serve as a fiduciary
  - The charity understands the fiduciary obligations of serving as fiduciary
  - The charity is careful to avoid unnecessary exposure to liability by serving as trustee for other organizations. Some nonprofits serve only where the charity is the sole, irrevocable beneficiary of a charitable remainder trust. Others are willing to serve so long as the nonprofit is the irrevocable beneficiary of 50% or more of the remainder.
  - The charity sets minimum non-charitable beneficiary ages, maximum number of lives, and maximum distribution amounts in the document.

As a general rule, the charity should not accept appointment as the trustee of a charitable lead trust. In every instance, there is a non-charitable beneficiary at the end of term who may or may not be appreciative of the investment management role and investment decisions made during the trust term.

- **Pooled income funds** are not specifically included on this list. Organizations that maintain pooled income funds should specify initial minimum gift sizes, minimum gift sizes for additions, and restrictions on the type of property that may be contributed. Tax exempt bonds are prohibited by statute. It is generally appropriate to restrict gifts to cash and taxable securities.
- **Retirement Plan Beneficiary Designations, Bequests, and Life Insurance Beneficiary Designations** – Donors should be encouraged to name your nonprofit as beneficiary of retirement plan designations, life insurance designations, and estate bequests. Educate your donors about how to properly name your organization and encourage them to work with you to plan gifts for special purposes. There is little that your gift acceptance policies can regulate

on these forms of gifts since these gifts do not require the approval of or acceptance of the charity.

- **Weird Charitable Gifts** – Consider some of the more unusual charitable gifts your clients may be offered.
  - **Cows:** Cows (and other livestock, thoroughbreds and breeding stocks) are generally considered to be gifts of tangible personal property. If the livestock is personal property, the donor is limited to basis since the cow will probably not fit the related use rules. However, if the livestock is a gift from a farmer, it may not be considered personal property but may be a long-term capital gain asset. If so, the donor must think about how to measure gain on the gift. Is the holding period measured by the herd, or by the individual cow? (Think of calves...) And finally, consider the fact that when cows are long-term capital gain property, they can be depreciated.
  - **Farm equipment:** Gifts of farm equipment and grain can be made to charity or to a charitable remainder trust. These assets, almost always heavily depreciated and having a low tax basis, may have the greatest impact when contributed to a charitable remainder trust. This is because the recognition of income and tax on the sale of the asset may be avoided by using the charitable remainder trust. Think of retiring farmers. The downside to this gift is that it is difficult to value and these assets may be difficult to sell within the trust.
  - **Frequent flyer miles:** Frequent flyer miles are often solicited by charity. However, the miles may generate no deduction at all since they appear to be ordinary income property and the deduction is limited to basis. However, the miles have no basis since they are free rather than purchased. Consult a qualified accountant before soliciting these miles as a gift so that donors fully understand the value of the contribution.
  - **Gold coins:** Some coins are personal property, while others are not. See PLR 9225036 which cites Rev. Ruling 69-63 in support of the conclusion that Krugerrands (also Maple Leafs) are not considered personal property but are considered currency.<sup>7</sup> Gold bullion, on the other hand, likely requires an appraisal from a commodities broker or other such dealer since the units are not standardized. Note it is also unlikely that gold bullion would have a use related to the charity's business so that the deduction would be limited to non-use deduction limits.
  - **Leased property:** The character of the gift of a leased building depends on the lease. If the lease is a straight lease, it is probably passive income and will not trigger the unrelated business income tax (UBIT) rules. If the lease is keyed to the success of the business (the higher the business income, the higher the lease payment) then the payments may be business income and therefore UBIT. Have the lease reviewed by legal counsel before acceptance.
  - **Partnership interests, limited:** Be leery of real estate limited partnerships. Many report large income amounts, but disburse only enough cash for taxes. In other words, there are terrible cash flow problems. Is this good for charity? Likely not. Also watch out for unrelated business income problems.

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<sup>7</sup> Coins represent a gray area. These are private letter rulings, which are only applicable to the individual seeking the ruling and other rulings indicate these assets might be personal property.



- **Partnership interests, general:** General partnership interests represent a real danger to nonprofits, since the general partner can be held fully liable for the acts of the partnership. Avoid general partnership interests unless there is some assurance that the nonprofit can avoid this liability. Have all partnership interests reviewed by counsel before acceptance.
  - **Patents:** Patents produce royalty income that is excluded from unrelated business taxable income under section 512(b)(2).
  - **Savings Bonds:** Donors can not transfer ownership of savings bonds during life without triggering the income tax due on those bonds because savings bonds have restricted transfer requirements. A donor who wishes to transfer savings bonds should transfer them by specific bequest of the bonds to charity under will. A specific bequest of the bonds will shift the built-in income to charity (with no adverse tax result). Be careful, however. Bonds that are registered jointly will pass to the survivor and will not be subject to the terms of the will.<sup>8</sup>
  - **Time Share Interests:** Time sharing ownership interests abound and are often not worth what the purchaser anticipated. When the reality of the time share arrangement sets in, and the glow of the arrangement dims, many individuals look for ways to escape the annual fees and to get their money back. Also be aware that time shares may be fractional interests in real estate. Valuation, sale, and environmental liability are concerns.
- **Appraisals:** The policy should state clearly who is responsible for appraisals required for the donor's tax return (the donor), and when, if ever, exceptions to this policy can be made. Policies should also list situations in which the charity will obtain an independent appraisal. Some charities also require that the donor pay for the charity's confirming appraisal.
  - **Legal Fees and Professional Fees:** Legal fees for completion of the gift are the responsibility of the donor; it is helpful to have this statement incorporated in the gift acceptance policy. In the event that the nonprofit provides for an exception, the exception rules should address the conditions under which the nonprofit will pay those fees, how the conflict of interest issues will be avoided and how the payment of fees will be reported for tax purposes.
  - **Valuation of Gifts on the Nonprofit Books:** There are three points at which gift valuation is important. The first is the valuation of the gift for tax purposes. These rules are clearly established in the Internal Revenue Code. The second is the valuation of the gift for gift credit purposes. Some gifts are recorded at the donor's date of gift value, while others are recorded net of sales costs. The third is the value of the gift on the organization's books, governed in most instances by the Financial Accounting Standards Board (FASB) rules. The most important point is that the valuation on the nonprofit development records and books should be consistently calculated. Discuss these issues at the outset so that records reflect "apples to apples" results over time.
  - **Filing of IRS Forms on Sale:** Few organizations focus on the filing requirements for Forms 8282 and 8283. It is helpful to include a statement delegating this duty to a particular office or individual by title and to include copies of the forms and instructions as an attachment to the policy.

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<sup>8</sup> See PLR 8010082 (December 13, 1979) for further info on EE/H bonds.

- **Acknowledgement of gifts:** Provide the names of the individuals responsible for acknowledgement, and set a standard for the time in which acknowledgement is to be completed.
- **Changes to policies:** Changes to the policy should be adopted by the governing body of the nonprofit. However, the policy should anticipate change and provide a process for amendment.
- **Attachments and Resources** – Attachments providing detail and guidance to the development office are extremely helpful and serve as a guide to procedure. Attachments that are most valuable include:
  - **The Real Estate Environmental Management Policies** – These policies, described in the section above, should be attached if adopted for the acceptance of real estate.<sup>9</sup>
  - **IRS Form 8283 and Instructions** – This form must be filed by the donor when non-marketable gifts of greater than \$500 are involved.
  - **IRS Form 8282 and Instructions** – This form must be filed by the charity upon the sale or disposition (within three years of receipt) of non-marketable gifts greater than \$5,000 upon receipt.
  - **IRS Publication 526 Charitable Contributions** – This IRS publication is simply a good reference. It is sometimes attached to policies for shops that are new and need to insure quick access to the rules.
  - **IRS Publication 561 Determining The Value of Donated Property** – This is an easy to use guide on valuation issues, valuation requirements, and filing requirements.

### III. Cautionary Tales: Stories of Disaster

Review of gift acceptance policies is always a tedious process. Invariably, the committee working to draft the policies loses its focus by the second or third reading and begins to wonder of the need for such painstaking detail.

At this point, a cautionary tale or two generally provides the incentive to keep moving. Sometimes experience is the best teacher, and learning from the mistakes of others is always less expensive and less painful. There are many cautionary tales to learn from, but the following stories address the need for policies.

#### A. Very Bad Personal Property Gifts

Examples of bad personal property gifts are easy to find. Consider the following gifts.

- A long-term donor to a college, and a personal friend of the President of the college, contributed a large, orange, clay vessel gift purchased on a trip to South America. The gift was presented with the restriction that it be displayed in the organization's lobby (perhaps to address the related use rules?) Although the gift was accepted, the school eventually was forced to go back to the donor to

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<sup>9</sup> Attached as Appendix B.

rescind the display agreement. There was no market for the pot, which now sits in a storage closet. The donor has discontinued support of the school.

- A high profile alumnus of a Southeastern preparatory school made a gift of a 53-foot Hatteras, delivered via deed of gift and docked in Fort Lauderdale at Pier 77. The prep-school began to receive the harbormaster's bills the next month, which included dockage (by the foot), connection fees, and maintenance. In addition, the school was forced to insure the boat (replacement and liability). The sale took two and a half years and netted roughly half of the anticipated value (which was then reduced by the out of pocket costs for the two and a half years).
- A long-term donor funded an arts organization campaign pledge (for a named room in the new building) with the gift of a 40-carat emerald ring. Although the appraised cost of the gem was \$43,000, the charity received only \$19,000 after the out of pocket costs to insure, transport, and market the jewel in the wholesale market in New York. Should the room still be named for the donor? Should the donor be asked to contributed the balance?

## **B. Potentially Worse Gifts of Real Estate**

There are more true tales of woe resulting from gifts of real estate than any single asset. Consider these gifts.

- A well-known Midwestern charity received a gift of not one, but two, paint factories in the early 1980's. These gifts soon matured into Environmental Protection Agency Superfund sites. It cost the charity roughly \$1 million over the value of the property to settle the joint and several liability imposed by CERCLA to extricate itself from the first gift, and somewhat more than that to settle the second gift.
- A school foundation received a \$50,000 gift of real estate (house and lot) from a new donor to the institution. The property remained on the market for two years, but failed to sell, even after a reduction in price to \$25,000, because of a squatter on the property. The property was eventually transferred to the church next door as a gift.
- A hospital foundation accepted a \$40,000 gift of real estate, non-income producing, in exchange for a gift annuity. At the donor's request, the nonprofit agreed that it would not sell the property for two years. In reviewing this transaction, the first phrase that comes to mind is "tax fraud." The second phrase that comes to mind is "cash flow." The third phrase might be "Directors and Officers Insurance."

## **C. The Ungrateful (Shall We Say Angry?) Donors**

Donors can become angry about gift transactions when the tax result is different than anticipated. Consider these examples.

- A donor contributed a painting, valued at \$35,000 with a basis of \$2,500, to a performing arts organization. The charity intended to sell the painting upon receipt, but did not discuss this with the donor. The painting was sold within three months. Although the donor's accountant was aware of the gift, the accountant was not familiar with the related use rules and did not ask whether the painting would be used as a part of the organization's nonprofit operations. The donor's \$35,000 deduction withered to \$2,500.

- A donor, who made significant annual mutual funds gifts to a charity each December, called on December 1 to inform the charity of the current year gift. Shortly thereafter, the mutual fund company sent the planned giving officer some forms needed to open the nonprofit's account. The PGO placed the forms in her "to do" box, and finally completed them on December 30, making personal delivery to the broker representing the fund. The PGO made an entry for the gift on the December gift log, and did not think about the gift again until February, when she received a mutual fund statement showing a transfer of the mutual fund on January 15. Imagine the discussion with the donor.

#### **IV. Ongoing Review**

Once you have policies in place, review them regularly. Associate the review with the first meeting of the gift acceptance committee, professional advisory committee, or development committee each year.

Use the review as an opportunity to educate, to preach, and to probe for potential gift opportunities. Involve the committee and board through cautionary tales or solicitation of experiences with other organizations that could have been avoided. Treat them as your most valuable insurance policy.

Do not be afraid to make changes where the current policy failed to adequately address an issue or provide the framework you needed to consider a gift. Every organization is different. Draft your policies to meet your needs, address your problems, and reflect your values.

## **APPENDIX A SAMPLE GIFT ACCEPTANCE POLICIES FOR ABC CHARITY**

ABC Charity, a nonprofit organization headquartered in Atlanta, Georgia, encourages the solicitation and acceptance of gifts to ABC Charity (hereinafter referred to as ABC) for purposes that will help ABC further and fulfill its mission. The following policies and guidelines govern acceptance of gifts made to ABC or for the benefit of any of its endowment or any of its programs.

### **I. Purpose of Policies and Procedures**

The purpose of this document is to set forth the criteria that ABC and its Gift Exceptions Committee use to determine that a proposed gift is acceptable and to inform prospective donors and their advisors of the types of gifts ABC accepts. While these guidelines establish best practices, they are designed to provide flexibility as directed by the Gift Exceptions committee.

### **II. Use of Legal Counsel**

ABC seeks the advice of outside legal counsel as appropriate on matters relating to acceptance of gifts. Review by legal counsel is usually sought in connection with:

- a. Closely held stock transfers that are subject to restrictions or buy-sell agreements
- b. Documents naming ABC as Trustee
- c. Gifts involving contracts, such as bargain sales or other documents requiring ABC to assume a legal obligation
- d. Gifts of patents and intellectual property
- e. Transactions with potential conflict of interest that may invoke IRS sanctions
- f. Other instances in which use of counsel is deemed appropriate by ABC's Board of Directors or Gift Exceptions Committee.

### **III. Communications with Donors**

ABC holds all communications with donors and information concerning donors and prospective donors in strict confidence, subject to legally authorized and enforceable requests for information by government agencies and courts. All other requests for or releases of information concerning a donor or a prospective donor will be granted only if permission is first obtained from the donor.

### **IV. Conflict of Interest**

ABC does not provide personal legal, financial or other professional advice to donors or prospective donors. Donors and prospective donors are strongly urged to seek the assistance of their own professional advisors in matters relating to their gifts and the resulting tax and estate planning consequences. ABC endorses the Model Standards of Practice of the Charitable Gift Planner promulgated by the National Committee on Planned Giving (attached as Appendix A) and the Donor Bill of Rights promulgated by the Association of Fundraising Professionals) (attached as Appendix B).

### **V. Restrictions on Gifts**

Unrestricted gifts and gifts for specific programs and purposes may be accepted, provided they are consistent with ABC's mission, purposes and priorities. ABC will not accept gifts that are inconsistent with its mission, purposes or priorities or are judged too difficult to administer.

## VI. The Gift Exceptions Committee of ABC

The Gift Exceptions Committee will review all non-marketable gifts to ABC, and those gifts referred to it by the Director of Development. The Gift Exceptions Committee consists of the following individuals:

[need to determine – should include legal counsel, finance, development, board representative]

The Gift Exceptions Committee is responsible for regularly reporting its decisions on gift acceptance to the Board of Directors. The Committee is also responsible for reviewing these Policies and Procedures at least annually or more often as needed to ensure that they remain consistent with applicable laws and the programs of ABC.

## VII. Types of Gifts

A. The following gifts may be considered for acceptance by ABC:

1. Cash
2. Tangible personal property, including in-kind gifts
3. Securities
4. Real estate
5. Remainder interests in property
6. Oil, gas, and mineral interests
7. Bargain sales
8. Life insurance
9. Charitable gift annuities
10. Charitable remainder trusts
11. Revocable trust agreements
12. Charitable lead trusts
13. Retirement plan beneficiary designations
14. Bequests
15. Life insurance beneficiary designations
16. Intellectual property rights

B. The following criteria apply to the acceptance of gifts in these categories.

1. Cash: Cash may be accepted in any negotiable form. Checks must be made payable to ABC and should be delivered to \_\_\_\_\_ at ABC's administrative offices.

2. Tangible Personal Property: ABC will accept tangible personal property gifts valued at \$10,000 or greater if the gift will generate adequate revenue for the organization, and meet the purposes for which the gift is intended. In assessing the appropriateness of the gift, ABC should address the following questions:

- Is the property marketable? What is the market for and costs of transportation to market and sale?
- Are there any undue restrictions on the use, display, or sale of the property?
- Are there any carrying costs (insurance, storage, ongoing maintenance) for the property?

3. Securities: ABC can accept both publicly traded securities and closely held securities.

Publicly Traded Securities: Marketable securities will be transferred to an account maintained at one or more brokerage firms or delivered physically with the transferor's signature or stock power attached. As a general rule, all marketable securities will be sold upon receipt unless otherwise directed by the Budget & Finance Committee of ABC. In some cases marketable securities may be restricted by applicable securities laws; in such instance the final determination on the acceptance of the restricted securities may be made by the Gift Exceptions Committee of ABC.

Options and Other Rights in Securities: The following questions apply to acceptance of warrants, stock options and stock appreciation rights:

- Is ABC required to advance funds upon exercise of the gift? If so, does ABC have the required funds?
- Is ABC at risk of loss of funds in accepting the gift?
- Are the rights restricted? And if so, does the restriction affect the ability of ABC to dispose of the asset? Does the restriction materially impact the value of the gift to ABC?
- Will acceptance of the gift and/or exercise of the option trigger any tax consequences to the donor?

Closely Held Securities: Proposed gifts of closely held securities, which include not only debt and equity positions in non-publicly traded companies but also interests in LLPs and LLCs or other ownership forms, will be reviewed by addressing the following questions:

- What type of entity is represented by the gift? (For example, C Corporation, S Corporation, LLC, LLP.)
- Will the security generate unrelated business taxable income to ABC? If so, does ABC have the funds to pay this tax?
- Will the gift trigger any negative tax consequences to the donor? If the donor is unsure, please advise him to talk with his accountant.
- Are there restrictions on the security that would prevent ABC from ultimately converting those assets to cash?
- How does the company operate? Does its operation of the gift interest create liability for ABC?
- Is the security marketable? If so, what is the market for sale, and estimated time required for sale?

If potential problems arise on initial review of the security, further review and recommendations may be sought from an outside professional before making a decision whether to accept the gift. Every effort will be made to sell non-marketable securities as quickly as possible.

4. Real Estate: ABC will consider real property gifts with a market value of \$50,000 or greater. Gifts of real estate may include developed property, undeveloped property, or gifts subject to a prior life interest. Prior to acceptance of real estate, ABC requires an initial environmental review of the property to ensure that the property is free of environmental damage. In the event that the initial inspection reveals a potential problem, ABC may retain a qualified inspection firm to conduct an environmental audit. The prospective donor must bear the cost of the initial environmental review and any subsequent environmental audit. When appropriate, a title binder shall be obtained by ABC prior to the acceptance of the real property gift. The cost of the title binder will be borne by the donor.

The following criteria applies to gifts of real estate:

- Is the property useful for the purposes of ABC?
- Is the property marketable?
- Are there any restrictions, reservations, easements, or other limitations associated with the property?
- Are there carrying costs, which may include insurance, property taxes, mortgages, or notes, etc., associated with the property?
- Does the audit reflect that the property is free of environmental damage?

5. Remainder Interests In Property: ABC may accept a remainder interest in a personal residence, farm, or vacation property subject to the provisions of paragraph (4). At the death of the life tenants, ABC may use the property or reduce it to cash. Where ABC receives a gift of a remainder interest, expenses for maintenance, real estate taxes, and any property indebtedness will be paid by the donor and/or primary beneficiary.

6. Oil, Gas, and Mineral Interests: ABC may accept oil, gas, or mineral interests, when appropriate. In accepting oil, gas or mineral interests, ABC will determine whether the following criteria have been met:

- Gifts of surface rights should have a value of \$20,000 or greater.
- Gifts of oil, gas, and mineral interests should generate at least \$3,000 per year in royalties or other income (as determined by the average of the three years prior to the gift).
- The property should not have extended liabilities or other considerations that make receipt of the gift inappropriate.
- A working interest is rarely accepted. A working interest may only be accepted when there is a plan to minimize potential liability and tax consequences.
- The property must undergo an environmental review to ensure that ABC has no current or potential exposure to environmental liability. The cost of the environmental review must be borne by the donor.

7. Bargain Sales: ABC may enter into a bargain sale arrangement in instances where the bargain sale furthers the mission and purposes of ABC. All bargain sales must be reviewed and recommended by the Gift Exceptions Committee of ABC. In determining the appropriateness of the transaction, ABC will consider whether:

- The value of the property has been substantiated by an independent appraisal.
- Any debt ration assumed with the property is less than 50% of the appraised market value.
- ABC will use the property, or there is a market for sale of the property allowing sale within 12 months of receipt.
- The costs to safeguard, insure, and expense the property (including property tax, if applicable) during the holding period have been determined

8. Life Insurance: ABC must be named as both beneficiary and irrevocable owner of an insurance policy before a life insurance policy can be recorded as a gift. If the donor contributes future premium payments, ABC will include the entire amount of the additional premium payment as a gift in the year that it is made.



If the donor does not elect to continue to make gifts to cover premium payments on the life insurance policy, ABC may:

- continue to pay the premiums,
- convert the policy to paid up insurance, or
- surrender the policy for its current cash value

Once the policy is accepted, life insurance holdings will be reviewed annually to determine whether it is best to continue to pay the premiums, convert the policy to paid up insurance, surrender the policy for its current cash value, or change the underlying investment structure.

9. Charitable Gift Annuities: ABC offers both current and deferred charitable gift annuities to its donors. The minimum funding amount is \$10,000. ABC adheres to the rates set by the American Council on Gift Annuities. The minimum age for current life income beneficiaries of a gift annuity shall be 65, and the minimum age for a deferred charitable gift annuity is age 55. No more than two life income beneficiaries will be permitted for any gift annuity.

Annuity payments may be made on a quarterly, semi-annual, or annual schedule. ABC will accept only cash or marketable securities for current annuities, and will consider real estate or closely held stock for deferred gift annuities with a deferral period of five years or more, with the approval of the Gift Exceptions Committee.

10. Charitable Remainder Trusts: ABC encourages its donors to name the organization as a remainder beneficiary of a charitable remainder trust and will work with its donors to structure such agreements. However, ABC will not serve as trustee of a charitable remainder trust and will instead encourage the donor to use a professional fiduciary.

11. Revocable Trust Agreements: ABC encourages its donors to name the organization as a beneficiary of all or a portion of a revocable trust agreement. However, ABC will not serve as trustee of a revocable trust agreement and will instead encourage the donor to use a professional fiduciary.

12. Charitable Lead Trusts: ABC may accept a designation as income beneficiary of a charitable lead trust. ABC will not accept an appointment as Trustee of a charitable lead trust.

13. Retirement Plan Beneficiary Designations: Donors and supporters of ABC will be encouraged to name ABC as beneficiary of their retirement plans. Such designations will not be recorded as gifts to ABC until such time as the gift is irrevocable.

14. Bequests: Donors and supporters of ABC will be encouraged to make bequests to ABC under their wills and trusts. Such bequests will not be recorded as gifts to ABC until such time as the gift is irrevocable.

15. Life Insurance Beneficiary Designations: Donors and supporters of ABC will be encouraged to name ABC as beneficiary or contingent beneficiary of their life insurance policies. Such designations shall not be recorded as gifts to ABC until such time as the gift is irrevocable.

16. Intellectual Property Rights: Intellectual property rights, which include royalties, patents, copyrights, contract rights or other similar interests, will be examined in light of the following criteria:

- Is the intellectual property right related to the mission of ABC?
- Can the ownership of the intellectual property right be clearly transferred or assigned to ABC?
- Is the intellectual property right a full or fractional interest? If fractional, who are the other owners of the property and percentage interests? Is the gift deductible to the donor under the IRS partial interest gift rules?
- Does the right in the intellectual property generate, or have the potential to generate, at least \$5,000 or more each year?
- Is there a market for the sale or licensing of the intellectual property right?
- Are there any costs associated with acceptance of the intellectual property right? (i.e., is the gift a patent application that will require further action to secure, are there any claims, liens or other contests associated with the property, or are there likely to be costs associated with defending the intellectual property right?)
- Are there any restrictions on the retention or use of the property?
- What agreements or other legal documents would ABC be required to execute in order to obtain patents, market the property and grant licenses in the name of ABC?

#### **VIII. Miscellaneous**

- A. *Securing appraisals and legal fees for gifts to ABC*: It will be the responsibility of the donor to secure an appraisal (where required) and the advice of independent legal, financial or other professional advisers as needed for all gifts made to ABC.
- B. *Valuation of gifts for development purposes*: ABC will record a gift received by ABC at its valuation for gift purposes on the date of gift.
- C. *Responsibility for IRS Filings upon sale of gift items*: The Treasurer's office is responsible for filing IRS Form 8282 upon the sale or disposition of any non-marketable asset sold within three years of receipt by ABC when the charitable deduction value of the item is more than \$5,000. ABC must file this form within 125 days of the date of sale or disposition of the asset. Form 8282 with Filing Instructions is attached as an appendix to these policies.
- D. *Acknowledgement of all gifts made to ABC and compliance with the current IRS requirements in acknowledgement of such gifts is the responsibility of the Secretary/ General Counsel of ABC or his/her designee*. IRS Publication 561 Determining the Value of Donated Property and IRS Publication 526 Charitable Contributions provide excellent guidance and can be downloaded from [www.irs.gov](http://www.irs.gov).
- E. *Disclosure provided for pooled funds*. ABC will provide all appropriate disclosures as required by the Philanthropy Protection Act of 1995 for gifts contributed to pooled funds.

Adopted by : \_\_\_\_\_ on \_\_\_\_\_.

## ATTACHMENT B

### MODEL STANDARDS OF PRACTICE FOR THE CHARITABLE GIFT PLANNER

#### **PREAMBLE**

The purpose of this statement is to encourage responsible gift planning by urging the adoption of the following Standards of Practice by all individuals who work in the charitable gift planning process, gift planning officers, fund raising consultants, attorneys, accountants, financial planners, life insurance agents and other financial services professionals (collectively referred to hereafter as "Gift Planners"), and by the institutions that these persons represent.

This statement recognizes that the solicitation, planning and administration of a charitable gift is a complex process involving philanthropic, personal, financial, and tax considerations, and as such often involves professionals from various disciplines whose goals should include working together to structure a gift that achieves a fair and proper balance between the interests of the donor and the purposes of the charitable institution.

#### **I. PRIMACY OF PHILANTHROPIC MOTIVATION**

The principal basis for making a charitable gift should be a desire on the part of the donor to support the work of charitable institutions.

#### **II. EXPLANATION OF TAX IMPLICATIONS**

Congress has provided tax incentives for charitable giving, and the emphasis in this statement on philanthropic motivation in no way minimizes the necessity and appropriateness of a full and accurate explanation by the Gift Planner of those incentives and their implications.

#### **III. FULL DISCLOSURE**

It is essential to the gift planning process that the role and relationships of all parties involved, including how and by whom each is compensated, be fully disclosed to the donor. A Gift Planner shall not act or purport to act as a representative of any charity without the express knowledge and approval of the charity, and shall not, while employed by the charity, act or purport to act as a representative of the donor, without the express consent of both the charity and the donor.

#### **IV. COMPENSATION**

Compensation paid to Gift Planners shall be reasonable and proportionate to the services provided. Payment of finders fees, commissions or other fees by a donee organization to an independent Gift Planner as a condition for the delivery of a gift are never appropriate. Such payments lead to abusive practices and may violate certain state and federal regulations. Likewise, commission-based compensation for Gift Planners who are employed by a charitable institution is never appropriate.

#### **V. COMPETENCE AND PROFESSIONALISM**

The Gift Planner should strive to achieve and maintain a high degree of competence in his or her chosen area, and shall advise donors only in areas in which he or she is professionally qualified. It is a hallmark of professionalism for Gift Planners that they realize when they have reached the limits of their knowledge and expertise, and as a result, should include other professionals in the process. Such relationships should be characterized by courtesy, tact and mutual respect.

#### **VI. CONSULTATION WITH INDEPENDENT ADVISORS**

A Gift Planner acting on behalf of a charity shall in all cases strongly encourage the donor to discuss the proposed gift with competent independent legal and tax advisors of the donor's choice.

#### **VII. CONSULTATION WITH CHARITIES**

Although Gift Planners frequently and properly counsel donors concerning specific charitable gifts without the prior knowledge or approval of the donee organization, the Gift Planners, in order to insure that the gift will accomplish the donor's objectives, should encourage the donor, early in the gift planning process, to discuss the proposed gift with the charity to whom the gift is to be made. In cases where the donor

desires anonymity, the Gift Planners shall endeavor, on behalf of the undisclosed donor, to obtain the charity's input in the gift planning process.

#### **VIII. DESCRIPTION AND REPRESENTATION OF GIFT**

The Gift Planner shall make every effort to assure that the donor receives a full description and an accurate representation of all aspects of any proposed charitable gift plan. The consequences for the charity, the donor and, where applicable, the donor's family, should be apparent, and the assumptions underlying any financial illustrations should be realistic.

#### **IX. FULL COMPLIANCE**

A Gift Planner shall fully comply with and shall encourage other parties in the gift planning process to fully comply with both the letter and spirit of all applicable federal and state laws and regulations.

#### **X. PUBLIC TRUST**

Gift Planners shall, in all dealings with donors, institutions and other professionals, act with fairness, honesty, integrity and openness. Except for compensation received for services, the terms of which have been disclosed to the donor, they shall have no vested interest that could result in personal gain.

*Adopted and subscribed to by the National Committee on Planned Giving and the American Council on Gift Annuities, May 7, 1991. Revised April 1999.*

## **ATTACHMENT C DONOR BILL OF RIGHTS**

*The Donor Bill of Rights was created by the American Association of Fund Raising Counsel (AAFRC), Association for Healthcare Philanthropy (AHP), the Association of Fundraising Professionals (AFP), and the Council for Advancement and Support of Education (CASE). It has been endorsed by numerous organizations.*

### **The Donor Bill of Rights**

Philanthropy is based on voluntary action for the common good. It is a tradition of giving and sharing that is primary to the quality of life. To ensure that philanthropy merits the respect and trust of the general public, and that donors and prospective donors can have full confidence in the nonprofit organizations and causes they are asked to support, we declare that all donors have these rights:

- I. To be informed of the organization's mission, of the way the organization intends to use donated resources, and of its capacity to use donations effectively for their intended purposes.
- II. To be informed of the identity of those serving on the organization's governing board, and to expect the board to exercise prudent judgment in its stewardship responsibilities.
- III. To have access to the organization's most recent financial statements.
- IV. To be assured their gifts will be used for the purposes for which they were given.
- V. To receive appropriate acknowledgement and recognition.
- VI. To be assured that information about their donation is handled with respect and with confidentiality to the extent provided by law.
- VII. To expect that all relationships with individuals representing organizations of interest to the donor will be professional in nature.
- VIII. To be informed whether those seeking donations are volunteers, employees of the organization or hired solicitors.
- IX. To have the opportunity for their names to be deleted from mailing lists that an organization may intend to share.
- X. To feel free to ask questions when making a donation and to receive prompt, truthful and forthright answers.

**APPENDIX D  
ENVIRONMENTAL INTERVIEW**

**This interview is designed for use with current and/or prior owners or managers of the property.**

Date of Interview _____	Interviewer _____
Person Interviewed _____	Relation to Property _____
Property Description _____	

Type of Property	Agricultural _____	Timber _____	
	Commercial _____	Manufacturing _____	
	Age of Buildings _____	Undeveloped Land _____	
	Residential _____	Other _____	

1. Indicate prior uses of property. \_\_\_\_\_
2. Are you aware of any environmentally sensitive situations on the property?  
Describe: \_\_\_\_\_
3. For uses identified in question 1, has an environmental license or permit ever been issued? \_\_\_\_  
No \_\_\_\_ Yes
4. Are there any oil, fuel or chemical storage tanks on the property located above or below ground?  
\_\_\_\_ No \_\_\_\_ Yes
5. Has an environmental assessment been previously conducted? \_\_\_\_ No  
\_\_\_\_ Yes. If yes, provide a copy of the report.
6. If available, attach maps or surveys that describe the property to this questionnaire. \_\_\_\_  
attached \_\_\_\_ none available
7. If you are unable to furnish the information requested above, please advise us if there is a reliable source that may be able to furnish this information.

**PROPERTY INSPECTION CHECKLIST FOR CURRENT ENVIRONMENTAL CONDITIONS**

Name of Inspector _____	Date of Inspection _____
Owner of Property _____	Estimated Size _____
Location of Property _____	Current Use _____
Number of years the current use has been in effect _____	
Brief history of property use (list past use and former tenants, and source of information)	
_____	
_____	
_____	

**ENVIRONMENTAL SITE INSPECTION CHECKLIST**

I.	An on-site inspection revealed the following:	<b>Yes</b>	<b>No</b>	
	A. Stressed or denuded vegetation or unusual barren areas	___	___	
	B. Discoloration, oil sheens or foul/unusual odors in water	___	___	C.
Dump site		___	___	
	D. Tire/battery/chemical storage or disposal	___	___	
	E. Storage drums	___	___	
	F. Above or below ground storage tanks, vent or filler pipes	___	___	
	G. Evidence of petroleum or oil products	___	___	
	H. Evidence of PCBs (electrical transformers, capacitors)	___	___	
	I. Subject or adjoining property used for industrial purposes	___	___	
	J. Existing structures: If yes, indicate if there is:	___	___	
	1. Evidence of chemical spills/leaks	___	___	
	2. Evidence of asbestos	___	___	
	3. Any source of air emission	___	___	
	K. Does property appear on National/State Hazardous Site list?	___	___	
	L. If "yes" to any of the above, describe: _____			
	_____			
	_____			

II. ( ) Based on the evaluation of known, discovered or observed environmental factors, there is no evidence of environmental contamination on this or neighboring properties, and no further action is recommended.

( ) Based on the evaluation of known, discovered or observed environmental factors, there is evidence of possible environmental contamination on this or neighboring properties and further investigation is recommended. ***(Complete "Evaluation of Known Environmental Factors Form" if this block is checked.)***

Person Completing Form	Title	Date
Acceptance of Form Approved By	Title	Date

## EVALUATION OF KNOWN ENVIRONMENTAL FACTORS

Check the appropriate response to each statement based on all sources of information, including the Environmental Site Inspection Checklist.

	Yes	No
A. This property (or adjacent property) appears on federal, state or other environmental agency list of sites identified for environmental investigation or cleanup.	___	___
B. This property is developed and used for an industrial or manufacturing purpose.	___	___
C. This property is undeveloped land used for landfill or waste dump purpose.	___	___
D. The prior, current or proposed use of this property involves the generation, storage, treatment or disposal of any potentially hazardous materials, oil/petroleum products or other substances regulated by environmental laws and agencies. Specify: _____	___	___
E. Activities on adjacent properties may have contributed to the environmental contamination of the subject property.	___	___
F. This property is near a flood plain, wetland or ecologically sensitive area.	___	___
G. The Environmental Site Inspection revealed evidence of possible environmental contamination.	___	___
H. The donor has revealed potential sources or causes of environmental contamination.	___	___
I. This property is used for agricultural purposes.	___	___
( ) Based on the evaluation of known environmental factors, there is no evidence of possible environmental contamination on this or neighboring properties and no further action is recommended.		
( ) Based on the evaluation of known environmental factors, there is evidence of possible environmental contamination on this or neighboring properties and further investigation is recommended.		

Recommendations: \_\_\_\_\_

Person Completing Form	Title	Date
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Acceptance of Form Approved By	Title	Date
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**APPENDIX E**  
**SAMPLE CONFLICT OF INTEREST STATEMENT**

*Note: Conflict of interest policies should be drafted to address the particular needs of the nonprofit institution. The officers, staff and board members of the organization should adopt those policies. It is perhaps most appropriate for Board members who have a fiduciary duty to the organization.*

As a member of the Board of Directors of **XYZ Charity**, I, \_\_\_\_\_, am committed to **XYZ Charity's** goal to establish and maintain the highest level of public confidence in its accountability. I have personally committed to follow the standards set out below, which are a part of **XYZ Charity's** conflict of interest policies:

- I will conduct my activities with the Board of Directors of **XYZ Charity** so that I do not advance or protect my own interests, or the private interests of others with whom I have a relationship, in a way that is detrimental to the interests of or to the fundamental mission of **XYZ Charity**.
- In every instance in which I represent the **XYZ Charity**, I will conduct my activities in a manner to best promote the interests of **XYZ Charity**.
- In all matters that come before the Board of Directors for a vote that may favorably impact my own financial interests, or the private interests of others with whom I have a financial relationship, I will reveal that relationship and abstain from a vote in the matter.
- When a conflict of interest arises, or when a potential conflict of interest emerges, I will disclose that conflict or potential conflict to the Director of **XYZ Charity** or to the Chairman of its Board of Directors and seek a resolution of that issue.

Entered into on this the \_\_\_\_\_ day of \_\_\_\_\_, 2011.