

Gift Acceptance Policies and Donor Agreements: An Integrated Approach

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Overview of Presentation

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A. Introduction

- Important for charities to have gift acceptance policies for the acceptance and receipting of gifts
- Such gift acceptance policies serve to support charities' effective gifting and planned giving programs
- However, gift acceptance policies on their own are often not enough
- This is because another key component of any good charitable gifting program is having template gift agreements of various types available for use with donors.
- An integrated approach is recommended for charities so that gift acceptance policies and template gift agreements work together "hand in glove" for charities

B. What is a Gift Acceptance Policy and Why is It Important?

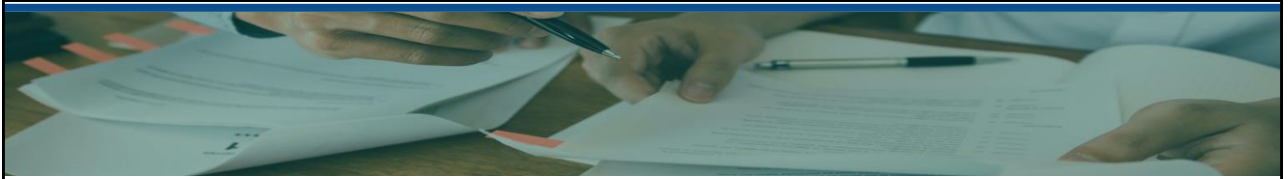
- Facilitates gift solicitation and management
 - When and how to accept and receipt various types of gifts
 - Enables charities to keep up with the development of new and hot gifts in the sector (e.g. gifts of cryptocurrencies) and be ready to respond to donors
 - How to track and manage gifts and gift restrictions
 - When and how to decline a gift
- Ensures legal compliance and risk management
 - Enables compliance with the law in Canada, including case law and the requirements of the *Income Tax Act* (Canada)
 - Evidences due diligence as a defence in the event of litigation
 - Avoids unexpected surprises and costs



- Manages donor relations
 - Enables transparency of process and policy
 - Ensures compliance with donor restrictions
 - Assures donors of sound management of their gifts
 - Avoids misunderstanding with donors
 - Manages donor expectations
 - Facilitates having answers “ready” to respond to donor’s enquiries
- Effective operational management
 - Ensures consistent administration of policies and procedures
 - Avoids case-by-case subjective scenarios
 - Assists staff and volunteer training
 - Sets out code of conduct for staff and volunteers
 - Promotes credibility of the charity
 - Manages expectations of directors, staff and volunteers

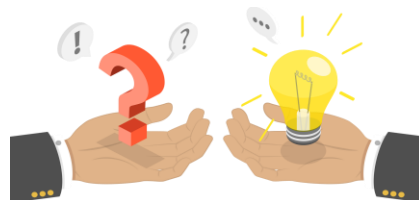


- Considerations in developing a gift acceptance policy
 - Review the charity’s current planned giving program
 - Review the charity’s current procedures for gift acceptance
 - Review the charity’s planned giving goals
 - Review the charity’s future gift planning objectives
 - Undertake staff consultation
 - Seek legal advice
 - Circulate draft policy to staff for comments and inputs
 - Review current legal requirements relating to gift acceptance, for example
 - When is a gift not a gift?
 - How to properly document a gift?
- Other considerations to include in a gift acceptance policy
 - Sponsorship, i.e., when it differs from a gift and how it is to be treated
 - When and who will obtain an appraisal (one or more) in the case of a gift-in-kind
 - Naming rights that will be provided in return for a gift



- Review current legal requirements relating to gift management because these may affect how gifts are to be accepted and managed, for example:
 - Effective tracking of restricted gifts and compliance with the gift restrictions
 - No comingling of restricted funds with unrestricted/general funds
 - Investments must comply with provincial *Trustee Act* requirements
 - Tracking gift restrictions that are either impossible or impractical and what to do with them
 - Determining whether total return investment strategy may be used when investing endowed gifts
 - How to deal with donors' advice and amendments of gift agreements

- Develop a written policy, instead of tradition or practice
- Key drafting issues
 - Organize the policy into sections by topics
 - Outline step-by-step process for staff and volunteers to follow
 - Develop templates for bequest language and gift agreements to be attached to the policy or as a schedule
 - Use user-friendly and practical language
 - Develop a detailed version for use in-house
 - Develop a user-friendly high-level version for public communications (such as website and donor communications)



- Need to ensure gift acceptance policy is coordinated with other policies of the charity to ensure consistency of management, for example:
 - Investment policy
 - Privacy policy
 - Fundraising policy
 - Social media policy
 - Naming policies and procedures
 - Sponsorship policy



C. What are Donor Agreements and Why are They Important?

1. First Principles – What is a Gift?

- A gift in law is “a voluntary transfer of property to another made gratuitously and without consideration”
- For a gift to be voluntary, a donor must have intent to make the gift and capacity to do so, i.e. not under duress or mentally incapable
- Property to be gifted must be transferred/delivered to intended donee with evidence of their acceptance
- No consideration back to the donor for making the gift - donor cannot retain control over the gifted property and must fully divest all rights to the donated property
- Excessive on-going control by donor over the gifted property may defeat or negate the gift

2. Importance of a Gift Agreement

- A gift agreement is not legally required to make a gift
- However, it will show that there has been a gratuitous transfer of property to a charity intended as a gift
- A gift agreement will also help to evidence what the gift's terms were – this can be helpful in ensuring a charity legally complied with those terms
- While sometimes used interchangeably with the term “gift agreement”, a “pledge agreement” is different:
 - It is generally not enforceable at law
 - However, it could be enforceable if there is consideration given to the donor or detrimental reliance by the charity can be shown



3. Unrestricted vs. Restricted Gifts

- Unrestricted gifts are used for a charity's charitable purposes without restriction
 - Board decides how to apply the gift but use cannot be beyond the purposes
 - Options: (1) Spend the gift; (2) Invest and use income; or (3) Internally restrict for specific purpose
- Restricted gifts must be used for donor-imposed restrictions
 - This constrain how charity holds, manages and/or uses the gift
 - Results in separate restricted charitable purpose trusts – “a charity within a charity”
 - Failure to fulfil restricted purposes will be a breach of trust
- Charity with restricted gifts must know: (1) what the donor restrictions are; (2) their legal implications; and (3) need to comply



4. Types of Restricted Charitable Gifts

- Time restrictions?
 - Endowments – capital held permanently
 - Long Term – capital held for a set time period
 - Income used for general charitable purposes or donor-restricted purpose
- Use restrictions?
 - Capital and/or income used for restricted use purpose
 - Restricted use must fall within charity's purposes and not offside public policy
 - If no time restriction, expend as soon as possible
- Often donors impose both time and use restrictions
- Other types of gifts possible – Conditional gifts, testamentary gifts (with or without restrictions), precatory (non-binding) gifts, donor advised gifts and restricted gifts between charities

D. Key Issues to Address in Gift Acceptance Policies

- Outline duties of the directors regarding charitable gifts
- Explain basic rules that apply to receipting for reference by staff and volunteers
- Explain difference between gifts of cash and gifts-in-kind and where appraisals may be necessary
- Explain the nature of restrictions that may be imposed by donors on gifts and the implications arising from those restrictions
- Explain endowment and long term funds and donor advised funds
- Explain policies for various types of gifts
- Special issues (see slide 18)
- Gift agreements, gift acknowledgement, and other donor related issues
- Declining and returning a gift
- Outline the role of parallel foundation (if applicable)

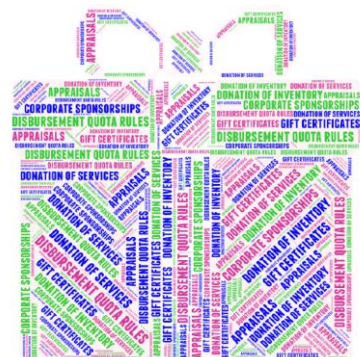
- Explaining Basic Rules that Apply to Receipting for Reference by Staff and Volunteers
 - Split-receipting rules
 - *De minimis* rule on receipting
 - Intention to donate
 - How to establish fair market value
 - When and how to obtain appraisals
 - Deeming of fair market value under the *Income Tax Act* (Canada) for certain types of gifts
 - Due diligence in determining the eligible amount of a gift



- Onus is on the charity to get it right!
- Receipts must comply with *Income Tax Act* (ITA) and Regulations, and Canada Revenue Agency's (CRA) policies
- If a receipt includes incorrect information
 - Penalty of 5% of the eligible amount on the receipt
 - Penalty of 10% for a repeat infraction within 5 years
- If a receipt includes false information
 - Penalty of 125% of eligible amount on receipt
 - If penalty is greater than \$25,000, charity is liable to suspension of tax-receipting privileges
- Registered charity status may also be revoked

- Explain Policies for Various Types of Gifts
 - For each type of gift, set out the charity’s policy on
 - Gift acceptance requirements
 - Gift processing and management
 - Donor acknowledgment
 - Receipting
 - Set out the types of gifts the charity is not prepared to accept
 - Gifts that involve special gifting considerations and new types of gifts that may come up from time to time
 - Need to decide whether the charity would like to accept them and the acceptance process and issues
 - E.g., cryptocurrencies, airline points, etc.

- Special Issues
 - Disbursement quota rules
 - Gifts from other registered charities
 - Corporate sponsorships
 - Donation of inventory by businesses
 - Gift certificates – CRA’s policies
 - Donation of services
 - Donation tax shelters
 - Appraisals



E. Key Components of Gift Agreements

1. Description of Restricted Purposes

- If endowed, is it permissible to encroach on capital and for what reasons?
- Can the charity vary any restricted use purpose?

2. Naming Rights

- Are naming rights in favour of the donor to be provided?
- If so, how long are the naming rights to be in place and can they be terminated?

3. Donor Advised Provisions

- Any ability for donor advice to be provided?
- Imperative to avoid too much control by donor over the gift once it is made

4. Investment and Disbursement

- How will capital be invested? *Trustee Act* vs. charity's investment policy
- If no time restriction, then the gift is to be expended in timely manner
- With a time restriction, is all income to be expended or does a portion have to be added to capital?
- How to calculate income? Classic vs. total return approaches

5. Administrative Fee?

- Okay to charge?
- If so, how much and how is the fee determined?
 - Set amount in the agreement
 - Or evergreen through policy as amended from time to time



6. Variation of Terms of Restricted Gift

- Does the gift agreement allow the charity to vary restricted terms?
- Agreement could require charity to consult with the donor on any change but donor must not have decision making authority in this area

7. Other Issues

- Is a change of trustee possible?
- How to deal with any return of the gift?
- Are administrative amendments possible?
- Confirmation of independent legal advice for donor



• Simple One-Time Gift



• Directions for Additional Contributions

• Endowment Fund



Types of Gift Agreements



• Donor Advised Fund

• Long Term Fund



• Gifts in Kind

• Flow Through Fund



• Template Bequest Clauses

• Restricted Use/Expendable Fund



• Internal Terms of Reference for Board-Established Restricted Funds

F. Key Takeaways



Charities should have both good acceptance gift policies and template gift agreements in place, which need to coordinate well with one another



These documents, working together, help charities facilitate good gift solicitation and management



They also ensure legal compliance and allow charities to effectively manage their donor relations



Charities should consistently utilize both documents to enhance effective operational management



Both are “living” documents that need to be constantly reviewed and updated

G. Resources

- “*Gift Acceptance Policies*” by Terrance S. Carter and Theresa L.M. Man on November 26, 2019, <https://afptoronto.org/wp-content/uploads/2021/10/R-13-AFP-Congress-2019-Gift-Acceptance-Policies-Handout-TSC-TLM-FINAL-2019-11-12-00424935xE0E23-Terrance-Carter.pdf>
- “*The ABCs of Gift Agreements*” by Jacqueline M. Demczur on November 10, 2022, <https://www.carters.ca/pub/seminar/charity/2022/cnfp/The-ABCs-of-Gift-Agreements-JDemczur.pdf>



[Jacqueline M. Demczur](#), B.A., LL.B. – A partner with the firm, Ms. Demczur practices in charity and not-for-profit law, including incorporation, corporate restructuring, and legal risk management reviews. Ms. Demczur has been recognized as a leading expert in charity and not-for-profit law by *Lexpert*, *The Best Lawyers in Canada*, and *Chambers and Partners*. She is a contributing author to Industry Canada’s *Primer for Directors of Not-For-Profit Corporations* and has written numerous articles on charity and not-for-profit issues for the *Lawyers Weekly*, *The Philanthropist* and *Charity & NFP Law Bulletin*, among others. Ms. Demczur is also a regular speaker at the annual *Charity & Not-for-Profit Law Seminars*

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