

Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies

Thursday, November 14, 2013, 12:30 p.m. – 2:00 p.m. ET

Venable LLP, Washington, DC

Moderator:

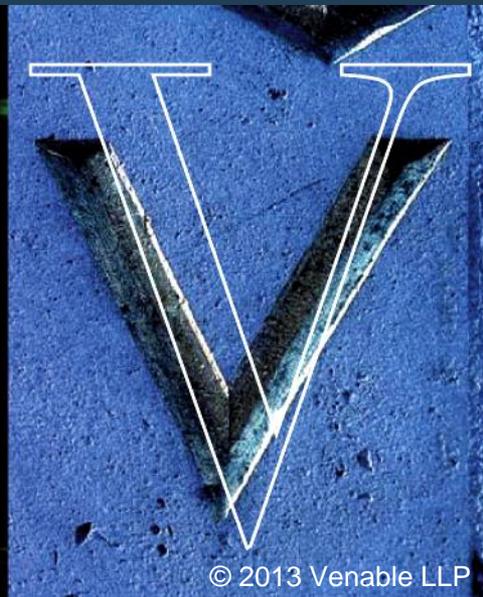
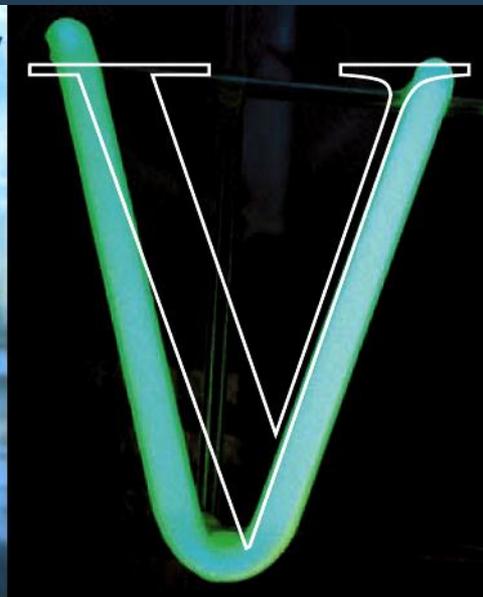
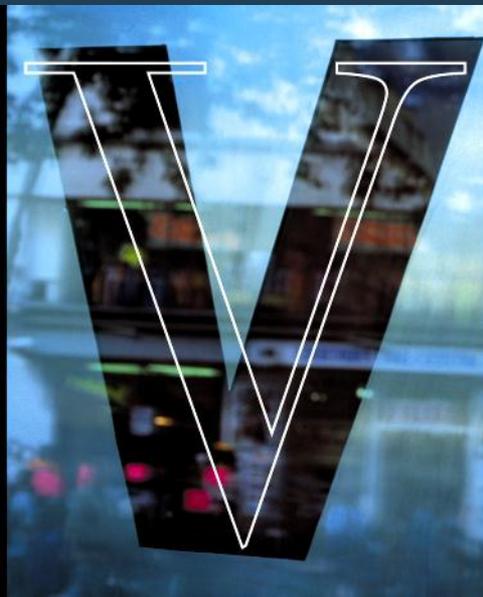
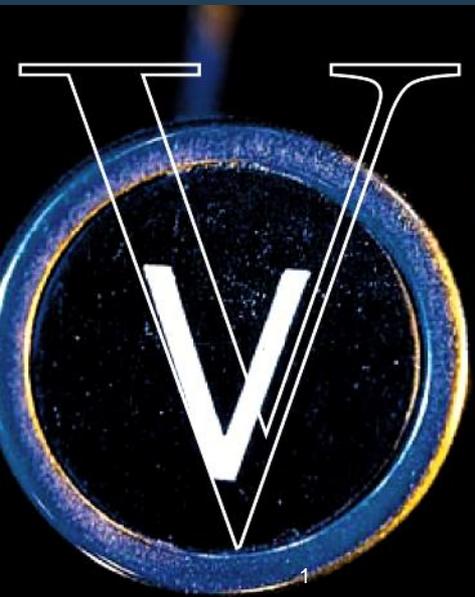
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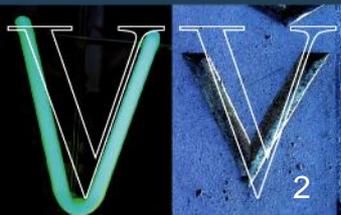
Yosef Ziffer, Esq., Venable LLP



Upcoming Venable Nonprofit Legal Events

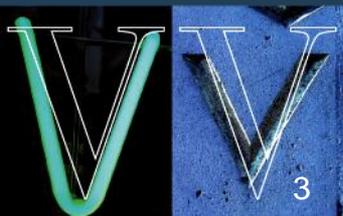
December 5, 2013 – [Work & Family: What Nonprofit Employers Should Know about Family-Oriented Employment Laws](#)

January 15, 2014 – [Protecting Your Nonprofit from Fraud and Embezzlement: Best Practices, Common Pitfalls, and Practical Tips and Strategies](#)



Agenda

- Complying With (or Deviating From) Donor Intent: Recent Developments for Nonprofits
- Donor Restrictions on Contributions
- Factors to be Considered in Deciding Whether a Gift or Pledge Subject to Donor Stipulations is Conditional or Restricted
- Gift Acceptance Policies
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 - Internal Governance Issues
 - Specific Types of Gifted Property

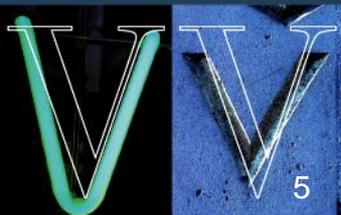




Complying With (or Deviating From) Donor Intent: Recent Developments for Nonprofits

Common Gift Restrictions

- Restricted purpose of gift
- Investment restrictions
- Holding period: Ability to sell or transfer gift
- Endowment : Invasion of principal
- Naming



Some Basic Concerns

- Availability of charitable deduction if restrictions are too severe
- Accounting issues
- Impact of restriction on tax-exempt status
- Getting “sideways” with the donor
- Potential embarrassment associated with restriction



Recent Donor Intent Cases



- Princeton sued for misusing gift to prepare graduate students for careers in foreign service
- JHU dispute over development of farm property
- Ipswich public schools: Sale of property in deviation from terms of a 350 year-old charitable trust that provided “for euer . . . sayd land not to bee sould nor wasted.”
- New Jersey animal shelter case: Deviating from the stated purpose of a gift



Uniform Prudent Management of Institutional Funds Act (UPMIFA)

- UPMIFA permits deviation (in management, investment or purpose)
 - With Donor consent
 - With court and Attorney General approval
 - UPMIFA permits prudent “appropriation” of an Endowment Fund



Lessons Learned

- Gift agreements should be clear and specific
- Leave room for flexibility
- Consider the possibility for changed circumstances





Donor Restrictions on Contributions

Donor Restrictions on Contributions

The existence of donor restrictions on contributions is one of the main reasons why accounting for contributions received (as originally set forth in FASB Statement 116, now codified in Accounting Standards Codification Topic 958-605, and further discussed in Chapter 5 of the AICPA audit guide for nonprofits) is one of the most complex areas in all of accounting - not just 'nonprofit' accounting, but all accounting. Distinguishing between donor restrictions and donor conditions is especially challenging.



General Rules

Applicable to All Types of Contributions

- Timing of revenue recognition
 - Unconditional gift or pledge – when made (communicated to donee)
 - Conditional gift or pledge – when condition is substantially met
- Valuation – Fair value at date of gift (can be challenging for some non-cash gifts)
- Contribution is never recorded as deferred income, except:
 - Conditional gift already paid (refundable advance)
 - Pooled income fund (a type of split interest)



General Rules (cont'd.)

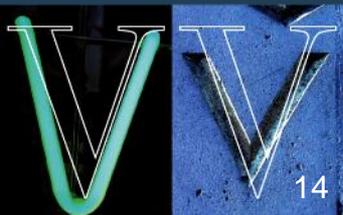
Applicable to All Types of Contributions

- Reported in class according to any donor restrictions:
 - Unrestricted; temporarily restricted; permanently restricted *[Note - FASB is currently considering revisions to this class structure. They have tentatively decided to collapse the two restricted classes into one for reporting purposes.]*
 - If temporarily restrictions are met in same period as received, may report as unrestricted
 - If this is done, must be consistent for all such contributions and investment income
 - Note that these rules apply only to revenue with restrictions imposed by the donor of a gift, not to legal restrictions imposed by contract or by law.
 - Generally, restrictions apply only to net assets. Sometimes a donor will restrict specific assets.



Judgments Often Encountered with Contributions

- Is it a contribution or an exchange?
- Is it to or for the benefit of this organization?
- Is it a promise or just an intention?
- Is it conditional or unconditional?
 - Is there an *uncertain future event* which must occur before gift becomes final?
 - How uncertain does it have to be? Judgment



Judgments Often Encountered with Contributions (cont'd.)

- Is it restricted or unrestricted?
 - Only the *donor of a gift* can place a legally binding restriction
 - Board designated amounts are not restricted
 - Because board can undesignate as it wishes
- When has the restriction been met?
- Does the volunteer work require specialized skills?
- Would the recipient otherwise have to purchase the volunteers' services?



Judgments Often Encountered with Contributions (cont'd.)

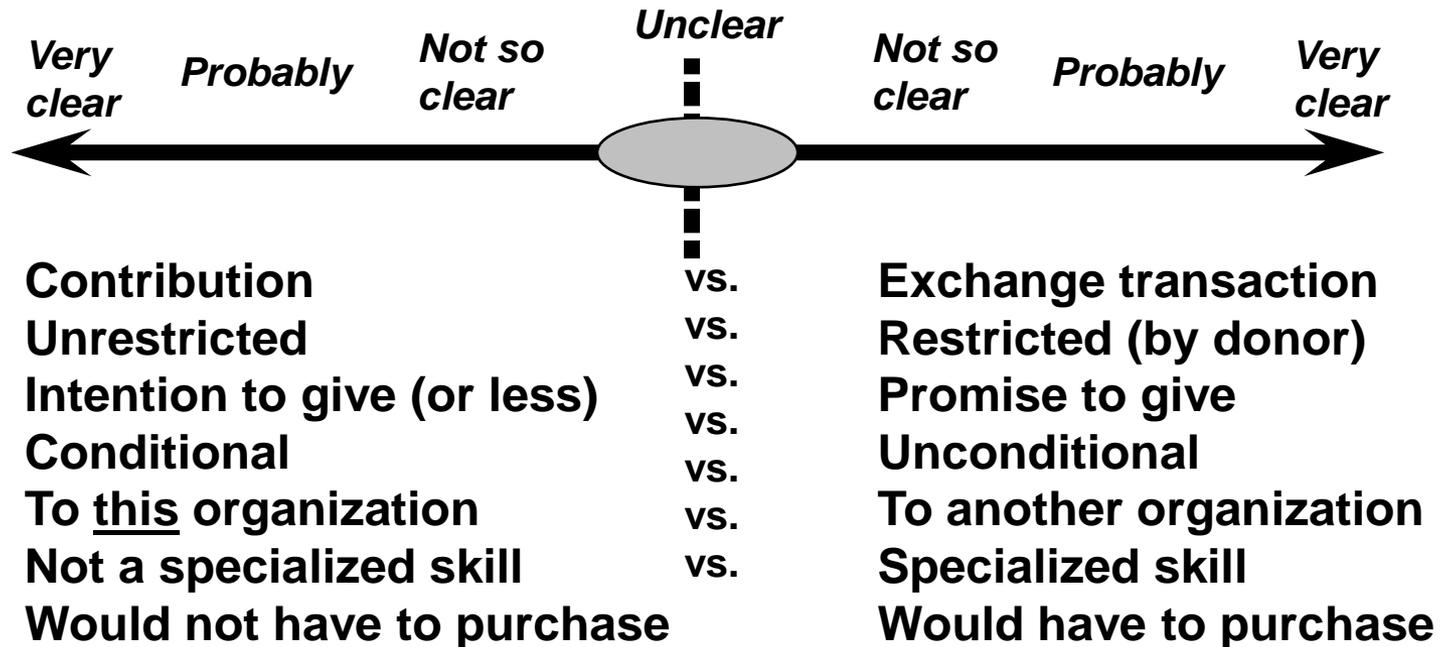
Note that 'judgments' as used here (qualitative) differ from 'estimates' (quantitative).

For some of these, the accountant needs to try to get inside the donor's head and understand his/her real intentions. Donor communications can be maddeningly vague. When in doubt, ask the donor if possible, or consult an attorney - this is basically a legal determination.

There are special rules regarding 'pass-through' gifts (from A to B for the benefit of C), donated services of volunteers, split-interests (gift annuities, remainder trusts, etc.), and gifts of museum collection items.



THE ACCOUNTING CONTINUUM





**Factors to be Considered in Deciding
Whether a Gift or Pledge Subject to
Donor Stipulations is
Conditional or Restricted
(as discussed in SFAS #116/ASC 958-605)**

Donor Stipulations

- Donors place many different kinds of stipulations on pledges and other gifts. Some stipulations create legal restrictions which limit the way in which the donee may use the gift. Other stipulations create conditions which must be fulfilled before a donee is entitled to receive (or keep) a gift.



Donor Stipulations (cont'd.)

In SFAS 116, FASB defines a condition as an uncertain future event which must occur before a promise based on that event becomes binding on the promisor. In some cases, it is not immediately clear whether a particular stipulation creates a condition or a restriction. (Some gifts are both conditional and restricted.) Since accounting for the two forms of gift is quite different, it is important that the nature of a stipulation be properly identified so that the gift is properly reported as to time and class of net assets.



Factors for Consideration

- Following is a list of factors to be considered by:
 - Recipients (and donors) of gifts, in deciding whether a pledge or other gift which includes donor stipulations is conditional or restricted; and
 - Auditors, in assessing the appropriateness of the client's decision.
- In many cases, no one of these factors will be determinative by itself; all applicable factors should be considered together.



Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be conditional

Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be restricted

Factors related to the terms of the gift/pledge:

1. The document uses words such as:
 If; *
 Subject to; *
 When;
 Revocable. (D)

The document uses words such as:
 Must;
 For;
 Purpose;
 Irrevocable.

2. Neither the ultimate amount nor the timing of payment of the gift are clearly determinable in advance of payment.

At least one of the amount and/or timing are clearly specified.

3. The pledge is stated to extend for a very long period of time (over, say, 10 years) or is open-ended. (Often found with pledges to support a needy child overseas, or a missionary in the field)

The time is short and/or specific as to its end.



Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be conditional

Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be restricted

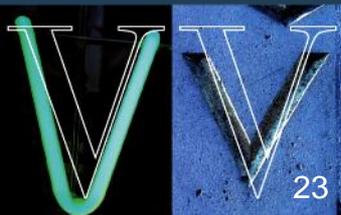
Factors related to the terms of the gift/pledge:

4. The donor stipulations in the document refer to outcomes expected as a result of the activity (with the implication that if the outcomes are not achieved, the donor will expect the gift to be refunded, or will cancel future installments of a multi-period pledge.^{1a) *}
(Such gifts are likely also restricted.)

The donor stipulations focus on the activities to be conducted. Although hoped-for outcomes may be implicit or explicit, there is not an implication that achievement of particular outcomes is a requirement.^{1b) *}

5. There is an explicit requirement that amounts not expended by a specified date must be returned to the donor.

There is no such refund provision, or any refund is required only if money is left after completion of the specified activities.



Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be conditional

Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be restricted

Factors related to the terms of the gift/pledge:

6. The gift is in the form of a pledge.

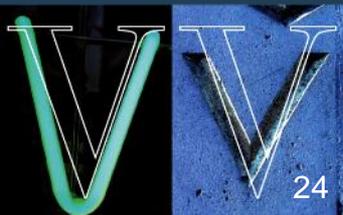
The gift is a transfer of cash or other non-cash assets.

7. Payment of amounts pledged will be made only on a cost-reimbursement basis. (D)

Payment of the gift will be made up front, or according to a payment schedule, without the necessity for the donee to have yet incurred specific expenses.

8. The gift has an explicit matching requirement (D), or additional funding beyond that already available will be required to complete the activity.

Factor not present.



Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be conditional

Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be restricted

Factors relating to the circumstances surrounding the gift:

9. The action or event described in the donor's stipulations is largely outside the control of the management or governing board of the donee. ^{2a} *

The action or event is largely within the donee's control. ^{2b} *

10. The activity contemplated by the gift is one which the donee has not yet decided to do; it is not certain whether the activity will actually be conducted. *

The donee is already conducting the activity, or it is fairly certain that the activity will be conducted. *

11. There is a lower probability that the donor stipulations will eventually be met.

There is a higher probability.



Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be conditional

Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be restricted

Factors relating to the circumstances surrounding the gift:

12. The activities to be conducted with the gift money are similar to activities normally conducted on a for-profit basis by the donee or by other organizations.

The activities are not similar.

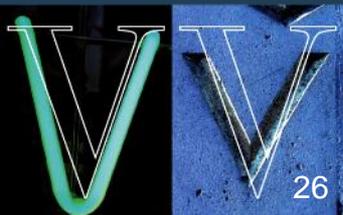
13. As to any tangible or intangible outcomes which are to be produced as a result of the activities, these products will be under the control of the donor. (In such cases, the payment may not be a gift at all; rather it may be a payment for goods or services.)

Any outcomes will be under the control of the donee, or will be in the public domain.

Notes:

D - Presence of this factor would normally be considered determinative. Absence of the factor is not necessarily determinative.

* - Factors which would generally be considered more important.



Notes

1a. Examples of outcomes contemplated by this factor include:

- Successful creation of a new vaccine;
- Production of a new television program;
- Commissioning a new musical composition;
- Establishing a named professorship;
- Reduction in the teenage pregnancy rate in a community;
- Construction of a new building;
- Mounting a new museum exhibit.

1b. Examples of activities contemplated by this factor include (but see Factor 10^{**}):

- Conduct of scientific or medical research;
- Broadcasting a specified television program;
- Performing a particular piece of music;
- Paying the salary of a named professor;
- Counseling teenagers judged at risk of becoming pregnant;
- Operating a certain facility;
- Providing disaster relief.

2a. Examples of events contemplated by this factor include:

- Actions of uncontrolled third parties, e.g.:
 - other donors making contributions to enable the donee to meet a matching requirement of this gift;
 - a government granting approval to conduct an activity (e.g., awarding a building or land use permit, or a permit to operate a medical facility);
 - an owner of other property required for the activity making the property available to the organization (by sale or lease);
- Natural and manmade disasters;
- Future action of this donor (such as agreeing to renew a multi-period pledge in subsequent periods);
- The future willingness and ability of a donor of personal services to continue to provide those services (see SFAS 116, par. 70, third sentence).

2b. Examples of events contemplated by this factor include (but see Factor 10^{**}):

- Eventual use of the gift for the specified purpose (e.g. those listed in Note 1b above), or retention of the gift as restricted endowment;
- Naming a building for a specified person;
- Filing with the donor routine financial or operating performance reports on the activities being conducted.

^{**} - There is a presumption here that the right column of Factor 10 applies.

Events outside of the donee's control, but which are virtually assured of happening anyway at a known time and place (e.g., astronomical or normal meteorological events), and the mere passage of time, are not conditions.





Gift Acceptance Policies

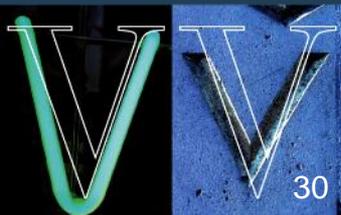
Topics for Discussion

- Gift acceptance policies
- Internal governance issues
- Specific types of gifted property



Gift Acceptance Policies

- Establish prospectively to guide the organization in soliciting, procuring, and “closing” gifts
- Policy should govern both acceptance and disposition of gifted property
 - In many instances, the true “value” of a gift is in the proceeds that arise upon disposition



General Comments

- No specific rules or laws directly on point
- Gift policies are not required. Rather, part of “best practices.”
- Policy should “fit” the organization and reflect a workable and helpful process



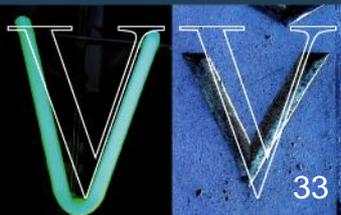
Sample Structure of Gift Policy

- Statement of mission, values, guiding principles, and organizational priorities
- Overview of different types of gifts and criteria for acceptance and disposition
- Procedural and administrative matters



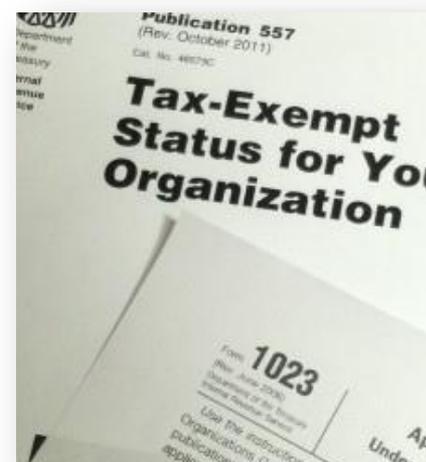
Internal Governance

- Gift Acceptance Committee
 - Composition: Just directors, or other professionals and volunteers too?
 - Authority: Able to take action on behalf of the organization, or in an advisory capacity to the Board?
 - Ensure consistency with organization's bylaws
 - Signature authority?



Internal Governance (cont'd.)

- Tax considerations:
 - Any effect on Section 501(c)(3) status?
 - Private foundations: Ensure compliance with Chapter 42 rules
 - Unrelated business income tax (UBIT) implications?
 - Acceptance of interests in LLCs or other pass-through entities
 - S corporation stock



Specific Types of Gifted Property

- Cash
- Securities – marketable versus non-marketable
 - UBIT
 - Limitations on disposition
- Real estate
 - Due diligence: Phase I environmental survey; appraisal
 - Consider use of single-member LLC to accept donation
- Tangible personal property
 - Expected use
 - Anticipated costs



Specific Types of Gifted Property (cont'd.)

- Intellectual property
- Conservation easements and façade easements
- Gifts of property with expected disposition within three years



Questions?

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