



# Too Good to be True?

Gifts of Tangibles -  
Do's, Don'ts and  
Dilemmas



Hemenway  
& Barnes LLP

150 *years*

## Gift Acceptance Policies

### What is a Gift Acceptance Policy?

A gift acceptance policy is a formalized written guideline adopted by an organization governing the acceptance and administration of gifts by the organization.

### Goals/Purposes

1. To promote and encourage gifts to benefit the organization.
2. To provide discipline in gift acceptance and administration and ensure that all gifts are consistent with the needs of the organization.
3. Mechanism for organization's Board to establish policies to protect the organization and decide who is authorized to make decisions on behalf of organization when accepting gifts.
4. To generate more benefit than cost
  - a. Avoid accepting gifts that will harm the organization by evaluating risks, costs and benefits before the gift is made and enable the organization to decide whether it is in the organization's best interest to accept, reject or renegotiate the gift with the donor.
  - b. A tool to help the organization benefit from past experience with different kinds of gifts.
  - c. Speed up process of closing a gift.
5. Tool to create and maintain good donor relations
  - a. Potential to send mixed signals to donors in absence of gift acceptance policy.
  - b. Outlines the responsibilities that donors have when making gifts (such as obtaining appraisals).
  - c. Prevents donors from making mistakes and unwanted tax consequences.
  - d. Provides development staff with list of gift types to market to appropriate donors.
6. To enable an organization to evaluate a potential gift and, if necessary, tactfully say "no" to a gift.
7. Tool to educate Board members, staff and the public (publish on website and in organization's annual report) about the issues associated with certain forms of gift.
8. To comply with Form 990 (Schedule M) – Does the nonprofit have a gift acceptance policy that requires the review of any "non-standard" gifts (gifts other than by cash or check).
9. Need for annual review of gift policy and procedure for amending the policy.

### Provisions

- Mission Statement & Vision

- Purpose of Gift Acceptance Policies
  - a. Defines considerations and processes through which the organization assesses the desirability of accepting potential gift and determines whether to accept gift as offered.
  - b. Intended to be a resource to prospective donors and advisors to provide guidance when making gifts to the organization.
  - c. Provides when seeking advice of legal counsel is appropriate.
- Restricted vs. Unrestricted Gifts
  - a. Unrestricted gifts clearly preferable.
  - b. Address extent to which organization will accept gifts for specific programs and purposes
    - i. Restricted gifts must be consistent with the organization's mission.
    - ii. Restricted gifts incur greater accounting costs.
  - c. Restricted gifts should require a Gift Agreement.
- Authority to Accept Gifts
  - a. Addresses who at organization has authority to accept and extent to which consultation is needed with Executive Committee and/or Board.
  - b. Right reserved to refuse any gift, including gifts that are inconsistent with the charity's stated mission or that would impose an unreasonable burden on or risk to the organization.
- Conflict of Interest
  - a. Identifying donor conflicts of interest - prospective donors should be strongly urged to obtain independent legal and financial counsel with respect to their gifts and the resulting tax consequences. It should be made clear that the charitable organization does not represent the donor.
  - b. Address donor-conflict issues as well as Board and staff conflict issues.
- Identifies Types of Acceptable Assets – Gifts can take many forms:
  - a. Cash – policy should indicate how checks should be payable with delivery address.
  - b. Publicly traded securities - policy should describe means by which securities are to be delivered and statement that all marketable securities generally sold as soon as possible after receipt.
  - c. Closely held securities should be accepted only after prior review and approval by Executive Committee, after consultation with Investment Committee and legal counsel, if appropriate. If accepted, closely held securities sold as soon as possible after receipt.
  - d. Tangible personal property should be accepted only after prior review and approval by Executive Committee and a determination that the property fulfills the mission of the organization (the organization has a legitimate need and use for the item) or is readily marketable. No personal property should be accepted

under conditions that obligate the organization to continue to own the property in perpetuity.

- e. Real estate should only be accepted after review and approval by Executive Committee after consultation with legal counsel, if appropriate. Due to the expenses involved in connection with gifts of real estate (such as appraisals, title rundowns and environmental reports), it may be appropriate to provide for a minimum market value. All mortgages and other encumbrances must be discharged prior to acceptance of the property.
  - f. Life insurance is acceptable if the organization is named as owner and beneficiary of the policy. If not a paid up policy, arrangements must be made with respect to premium payments prior to acceptance of the policy.
  - g. Retirement assets.
  - h. Other types of property (such as intellectual property and royalties) may be accepted only with prior approval of the Executive Committee after a review of the marketability of the gift, carrying costs and potential exposure to liability.
- Provides Guidelines as to Acceptable Forms of Gift
    - a. Outright gifts
    - b. Gifts made through donor advised funds
    - c. Bequests made under wills or trusts
    - d. Beneficiary designations made of life insurance policies, annuities and retirement plans
    - e. Charitable gift annuities – organization needs to understand liability created when issuing an annuity, registration and investment rules
    - f. Charitable remainder and lead trusts
    - g. Remainder interests (gifts subject to retained life estates) – consider expenses for maintenance of property prior to death of donor and conduct and control of the property during that time
    - h. Bargain sales
- Miscellaneous Provisions
    - a. Fees – Policy should address who bears cost for fees incurred in connection with gifts to the organization
    - b. Recording of gift – Gifts are recorded by the organization on the date of transfer and credited at *fair market value*
    - c. Acknowledgement – The organization must comply with IRS rules with respect to acknowledgement of gifts, bearing in mind that the donor will retain the sole responsibility for determining the date and value of the gift
    - d. IRS filings upon sales of donated property within three years of receipt (Form 8282) when the charitable deduction exceeds \$5,000
    - e. Amendment provisions – require review and acceptance by Board

- Gift and Donor Recognition Policies
  - a. Confidentiality – Permission should be granted for an organization to publicly announce any gift
  - b. Naming (as well as un-naming) procedures should be addressed

## Summary

1. Need for gift acceptance policy even if organization is small with limited resources
2. Gift acceptance policy will contribute to an organization and have a long-lasting impact on the governance of the organization

## Gift Agreements for Charitable Donations of Art and Other Tangible Objects

What is a gift agreement? A gift agreement is a contract between a donor and a charitable organization that documents the terms of a particular gift.

### Introduction

- Clarifying donor intent at the outset of any conversation regarding charitable giving, and properly documenting that intent, will help both parties feel good about giving and receiving.
- If the donor and institution are unable to agree on the gift's purpose and vision or if the gift is not consistent with the organization's mission, then it is better not to proceed with the gift.
- All gifts of tangible objects should be documented in writing.
- A deed of gift may be sufficient for unrestricted gifts of tangibles.
- The deed of gift should clearly identify the donor, the recipient organization, and the donated works, and make it clear whether copyrights are also being transferred.
- Both the donor and the charity should sign the deed of gift.
- For large, complex or restricted gifts of tangible objects, a gift agreement is an important way to memorialize the understanding between the donor and the charity.
- Both donor and donee should have legal counsel. If a donor refuses professional advice and chooses to rely on the charity's own lawyers in preparing a gift agreement, the charity should be especially vigilant about documenting communications with the donor.

## Importance of Gift Agreements for Restricted, Complex or Large Gifts

- The gift agreement is intended to create a legally binding contract between the donor and the recipient institution.
- The gift agreement helps clarify the donor's intent and the obligations of both parties.
- Acceptance of gift by recipient institution implies institution is willing to accept donor's terms and will work to fulfill the contract.
- As in the case of any contract, gift agreement can indicate penalties if either party does not fulfill agreement.
- Gift agreement should be consistent with organization's Gift Acceptance Guidelines.

## Terms to Include in Gift Agreement:

- Preamble
  - Identification of parties – donor and recipient institution [an organization listed as a US charity under §501(c)(3)].
  - Identification of gift
    - Gifts other than cash – the agreement should include a schedule that clearly identifies the objects covered by the agreement including, for art, the title, artist, medium, size, date created, and whether any copyrights are being transferred with the art.
    - Cash or marketable securities – the agreement should include a description of any cash or marketable securities that will be donated.
- this a gift commitment or has gift already been made? Be specific.
- the gift unrestricted or restricted?
  - If unrestricted, say so.
  - Related use rule –if the donor wants to deduct fair market value for the object (rather than the donor's cost basis), then the charity must intend to use the object for its exempt purposes. The gift agreement should not include provisions that jeopardize the related use of the donated object if that is the parties' intention.
  - If the parties are not concerned about the related use rule and intend to sell the donated objects, the gift agreement could provide for the sale of the objects and set forth the time frame and specifics regarding the sale.
  - If gift is restricted, purpose to be added – note that detailed language regarding purpose is set forth in separate paragraph. Confirm that purpose designated by donor is consistent with the mission of the charitable organization.
  - Please see discussion of administration of gift below.
- statement that recipient organization is accepting gift/commitment.

- ☐ applicable, mention in memoriam gift or naming opportunity.
- Confirm funding commitment.
- One time gift or installment payments over time.
  - Contribution schedule with dates for installment gifts.
  - Note that fractional gifts of art are subject to special income, estate and gift tax rules.
- If gift is for a specific project/purpose, agreement should indicate if installment contributions will be contingent upon satisfactory project process as outlined in a written report delivered to the donor in each calendar year.
- If gift is for a specific project/purpose, agreement should provide that expenditures made by charitable organization for project/purpose shall appear in the organization's financial records which are made available to the donor.
- If gift is restricted, need separate paragraph describing purpose of gift and agreed upon use of gift, including alternative uses should initial purposes become impractical for any reason.
- Purpose should not be too limited – build in flexibility.
- Agreement should provide that the charitable organization will notify the donor immediately, in writing, of any change in its program or organization that would affect its ability to achieve the grant purposes (such as changes in its exempt status, changes in key senior staff positions or changes in program or strategic direction). A change in tax exempt status or significant financial improprieties may result in termination of the grant.
- Agreement should provide that during the period of the gift commitment, the organization shall maintain its records so that they adequately show the use of the gifted asset for the restricted purpose.
- Agreement should provide that the organization will notify the donor immediately, in writing, should it contemplate using the gifted asset for any purpose other than what is set forth in the agreement.
  - Agreement should provide what happens if any portion of contribution is not used for specific project/purpose, unless the donor specifically grants permission in writing to apply the Commitment to another purpose. May provide that donated objects will be transferred to another charitable organization for uses related to its charitable activities.
- Terms and conditions of any naming/recognition opportunity.
  - Agreement should provide that naming opportunity is contingent upon the donor fulfilling his or her contribution obligations.
  - Agreement should provide the exact name of gift, provisions for signage, wording, where displayed (e.g., location), how name is communicated.
  - Agreement can provide that if in the future the organization has financial needs for which it receives significant additional funding to which naming rights apply,

the organization will display a permanent plaque or other marking, in a mutually convenient location, stating that (construction/funding of the building/room/program) was made possible through the generosity of the donor.

- Dedication event
  - If applicable, agreement should address press releases and announcements on web sites and through social media to support dedication and promotion of the gift and provide that neither party's approval will be unreasonably withheld or delayed.
- Confidentiality
  - Agreement should provide that terms will be held confidential by the institution and officials, employees, directors and agents, except to the extent the institution or any of such individuals are required by law to disclose certain terms.
  - If there is to be disclosure of the donor, the agreement should provide how the donor will be identified.
- Representation and Warranties
  - Both parties should agree that they have power and authority to enter into the agreement, that it has been duly executed, that it won't violate law and that no consent/approval/filing is require with any governmental authority.
- Administration of Gift
  - For gifts of art and other tangible objects, the parties may wish to cover the following:
    - i. Where and how the work will be exhibited, and for how long
    - ii. Naming rights
    - iii. Whether the work can be loaned to other organizations and if so, the permissible terms of such loans
    - iv. How the donation should be credited for purposes of exhibition, catalog and publicity purposes
    - v. Who owns the copyright in the work
    - vi. Rights to photograph or reproduce the work
    - vii. Insurance
    - viii. Shipping
    - ix. Care and preservation of the work, including payment of the costs of same
    - x. Ongoing rights of the donor to review and approve any of the above terms once the donation is complete
    - xi. Any further pledge of the work if the donation is of less than a complete interest in the work



- Governing law choice – generally preferable to have law of state where charity is based apply.
- Procedures for changed charitable circumstances, altering or amending agreement.
- Agreement should include provision for use of gift in unlikely event that at some future time it becomes impossible or impractical for all or part of the gift to be used for the specific purpose for which it was created, and permit charity to direct funds to purposes that are deemed to be most consistent with the wishes and intentions of the donor.
- If there is a need for cy pres, modification, deviation or other court proceeding, agreement should provide who bears the costs of the proceeding.
- Agreement should provide that it may be modified, altered or amended at any time by written mutual consent of the donor and the charity.
- Agreement should be binding on donor's estate/heirs.

## Conclusion

- Taking a few preventative steps and documenting the gift agreement will go a long way toward preserving donor intent, meeting the needs of the charitable organization, promoting a positive image of philanthropy and helping reduce legal fees in the long run.
- Even most specific agreement may not address future changes in every circumstance.
- Charities may decide that not accepting a gift is preferable to carrying out a purpose that interferes with the mission of the charity.
- Charities must be able to adapt to changing circumstances over time. Stringent restrictions imposed by a donor may seem sensible at the time, but years later the charity may not be able to meet those restrictions due to changes external to the charity. Some flexibility, and trust in the charity, will better ensure that the donor's charitable interests will be met over the long term.
- If the donor and the charity have a clear understanding of the terms of a gift, later problems may be avoided.
- Both sides should have separate legal counsel.

## Help Your Donors Get the Tax Benefits They Want

Donations of art and collectibles to an appropriate charity can provide tax benefits to a donor, but must be done using procedures that are somewhat different than what donors and your charitable organization may be used to in dealing with donations of cash or of publically traded stock.

By making a charitable donation of art or collectibles using the proper procedures a donor may:

- Receive an income tax deduction.
- Avoid the special capital gains rates that apply to sales of art and collectibles: 28% federal (vs. 15 to 23.8% for most other assets) and 12% Massachusetts (vs. 5.25% for most other assets).
- Avoid capital gains that push other investment income or gains into the new 3.8% Medicare Tax.
- Avoid high costs of maintaining and insuring a collection; these costs are not tax deductible for most collectors.
- Avoid estate taxes on the value of the art of 40% federal and up to 16% Massachusetts.

**To enable your donor to obtain the maximum income tax benefits:**

1. Make sure that the donor is aware of the limitations on deductibility:
  - a. The donor's maximum charitable deduction for any one year is limited to 30% of his adjusted gross income (AGI), normal maximum is 50%. Any unused amounts can be carried forward, but only for five years. A donor making a very valuable donation in relation to her AGI may prefer to make a gift of a partial interest or of only some parts of her collection. She may want to give other parts as a loan with the intention of completing the gift in a few years when she can use the full value of the gift as a deduction.
  - b. The donor's maximum charitable deduction is further limited to 20% of AGI if he gives to a private foundation. This should make a gift to your public charity more desirable than a gift to the donor's own private foundation.
2. The donor's charitable deduction is further limited to her tax basis if she makes a gift of art to a charity that will not actually use the art for its related charitable purposes (a related purpose does not include immediately selling the art).
3. Additional limitations on the deductibility of the contribution apply to high income donors, artists donating their own works, fractional interest gifts and gifts of future interests.
4. The donor will need a proper written acknowledgement from your organization before the donor's tax return filing due date (usually April 15 of the year following the donation). It should state:
  - Name of your organization
  - Description (but not the value) of the items donated
  - Description and good faith estimate of the value of goods or services that your organization provided in return for the donation, or
  - No goods or services were provided by your organization in return, if that was the case, or
  - Goods or services provided in return consisted entirely of intangible religious benefits, if that was the case

5. The donor will need an appraisal of the donated items.
6. If the donation is worth more than \$500, the donor will need to file a Form 8283; some portions may need to be completed by your organization, including a certification that your organization intends to use the items for its related charitable purposes.
7. If the donated items are disposed of within three years, your organization must file Form 8282 reporting that fact. Because such a disposition may call into question whether your organization actually intended to use the donated items for its charitable purposes, filing such a form could bring the donor's original tax deduction into question resulting in an audit and loss of deductions by the donor. For this reason donors may reasonably require that your organization hold the object for at least three years or at least notify the donor if there is any consideration of disposing of the object within three years.
8. If the donation is worth more than \$5,000, the donor will need a qualified appraisal.
9. If the donation is worth more than \$20,000, special documentation may be required so that the object can be reviewed by the IRS Fine Arts Panel.
10. Note that your organization is not actually required to provide these acknowledgments or forms, but since the donor will need them in order to claim a charitable deduction, you should volunteer them and be cooperative about providing any other information or documentation needed. In addition, while your organization should not appraise the items donated, you can certainly volunteer to refer the donor to appropriate appraisers.

**To enable the donor's estate to get the maximum estate tax benefit the rules are much simpler:**

1. There are no AGI or tax basis limitations on the estate tax charitable deduction.
2. It is good form to give the donor's estate an acknowledgment, but the estate will not actually need that to claim an estate tax deduction.
3. Forms 8283 and 8282 are not applicable to donations through an estate.
4. The estate will need an appraisal and may require assistance in identifying one.



**Nancy E. Dempze** serves as a professional trustee, executor and estate planner for individuals and families. Nancy also represents non-profits in connection with planned giving and development. Nancy helps clients develop and implement tax-efficient, wealth-transfer strategies for a variety of complex assets in ways that are consistent with client's overall goals and values. Nancy serves on the boards at the Museum of Science, Manomet Center for Conservation Sciences, Old Sturbridge Village, Westwood Land Trust and Youk's Kids.



**Charles Fayerweather** works with clients in the areas of taxation of individuals, estates, and nonprofit organizations. Charles has represented nonprofits with virtually every issue that arises during the life of an organization. These range from formation and obtaining recognition of tax-exempt status through on-going regulatory and tax compliance, fundraising, employment and compensation issues, liability reduction and governance issues. Charles had served on the boards at North Bennett Street School, The Sharon Education Foundation and Friends of the Sharon Dog Park.



**Joan Garrity Flynn** has practiced probate law for over 30 years. She focuses her practice in the areas of estate and charitable planning; estate, trust and guardianship administration; and probate court equity matters. Joan's experience has included a variety of estate planning, estate settlement and nonprofit legal matters. Joan also serves as trustee for private family trusts and charitable foundations. Joan's board service has included the Jesuit Collaborative, Parmenter Health Center and Weston Educational Enrichment Funds.



**Arthur B. Page** has over 30 years experience and an outstanding reputation as a trusted advisor. In addition to his work on estate and business planning for families and high net worth individuals, Art provides general counsel for colleges, foundations, public charities, and other nonprofit tax-exempt organizations. His emphasis in this area is on planned giving services. In addition, he serves as a trustee, and provides financial management for individuals and charitable foundations through the firm's Trust Department. Art serves on the boards of the Travis Roy Foundation, Boston Partners in Education and Perkins School for the Blind.

## Contact Us

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A special focus for Hemenway & Barnes is providing counsel to Nonprofit organizations, including museums, educational institutions and healthcare institutions. If we can help your organization, please don't hesitate to ask us any questions – we would love to get to know you better.



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