Best Practice in Gift Agreements

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Prepared By: Ann House
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Comments To: ahouse@miami.edu
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Description of Practice:

Employing the use of appropriate gift agreements is the first step in good donor stewardship and enables clear communications and record keeping for both the donor and the institution regarding purpose, payment schedule, recognition, investment policies and future disposition of commitments. Setting naming threshold amounts for buildings and endowments ensures consistent treatment of commitments.

Prospective Users of Practice:

- Development/gift officers/planned giving officers--closing commitments, communicating with donors
- Financial processors/managers--recording information on the institution's financial books/financial system
- System staff/IT supervisors--producing pledge reminders
- Donor relations officers/researchers—producing stewardship reports and donor profiles
- Gift and records directors--recording accurate gift information and payment schedules in the development database
• Senior advancement services professionals--managing some of the staff who are involved in the process of creating and generating gift agreements
• General counsel--ensuring agreements are legal and in line with institutional policies
• Advancement/development office management--projecting gift revenue

Issues Addressed:

This practice illustrates how to draft gift agreements; set policies and procedures governing the creation of gift agreements; identify the types of assets funding gifts; decide the purposes of gifts (endowed chair, endowed scholarship, naming buildings, bequests, unrestricted, etc.); know when you may not need a gift agreement; and determine the enforceability of an agreement.

Desired Outcomes:

• Improve donor relations by outlining clear expectations for gifts through a set of policies and procedures that have been approved by the institution and/or its governing board
• Insure the institution can honor the donor's wishes when a gift is made and that the gift is made at an appropriate level, which should be determined by institutional policy
• Avoid legal hassles by outlining the expectations of each party--the donor and the institution--and documenting those expectations upon review by legal counsel
• Streamline processes that saves time for donors and the institution by having established policies in place, staff identified who have a key role in the process, and legal counsel involvement as needed
• Provide clear instructions for spending and the stewardship of the commitment

Process:

The process should start with:

• Written policies establishing naming threshold amounts for different types of commitments and for the required use, approval, and routing and recording of gift agreements
• Gift agreement templates that can be modified to include specific information
• Gift agreement templates could be prepared for different purposes such as endowments, current spending, and deferred gifts. These templates should be
• approved by general counsel staff (or outside attorneys), and/or finance officers of the institution—usually the controller and the treasurer

• A determination of person(s) who should be approving draft gift agreements based on each template before they are presented to the donor

• If the draft gift agreement departs from the standard language in the template, a list of exceptions triggers and additional collateral review required

• Training for development officers and their support staff, advancement services staff, and donor relations/stewardship staff on the policies and the process

Institutions are then ready for donors to make a commitment.

• This may happen when:
  o Donors decide unsolicited to make a commitment, or
  o Development officers who have been preparing for the donor commitment are ready to provide the donor a written proposal outlining the outcomes of funding one or more things at the Institution.

• The donors may work with any of a number of the institution’s representatives, including major or planned gift officers; financial officers of the institution; and/or, in some cases, the planned giving staff where establishing a gift in perpetuity.

The donors and institution's representatives must discuss and agree upon:

• The amount of gift needed to establish a type of gift (scholarship endowments, chairs, internal or external building namings, etc.);

• The schedule on which the commitment will be paid;

• The type of asset funding the gift;

• The purpose or use of the funds;

• Any namings that may be included; and

• The outcomes that donors can expect.

Then, a specific agreement draft may be prepared from the appropriate gift agreement template, after which the following should be considered:

• A review of each specific agreement for:
  o Type of donor (individual, individual and spouse foundation, corporation, etc.)
o Amount of commitment (does it meet established thresholds?)

o Type of asset funding the agreement (cash, stock, trust, etc.)
  - Note: assets which may not fund an individual's commitment (e.g., Donor-Advised Funds, private or family foundations) require a different donor or a special agreement.

o Naming specifics

o Payment information (duration may be determined in policy such as accepting only 5 year pledges)

o Stewardship expectations

- The realization that no two agreements are likely to be identical and agreements may need additional pre-approved paragraphs to cover such as:
  o Matching/challenges
  o Donor-advised funds
  o Removing names if commitment is not fulfilled
  o Scholarship Preferences
  o Donor buying back stock
  o Estate trustee changes
  o Term endowments
  o Space changes
  o Waiving spending policy
  o Multi-donors to one endowment (grass roots)
  o Sponsorships
  o Athletic benefits

After preparation of the specific agreement, the agreement should be routed to all necessary institutional approvers. Depending on the agreement, the approvers may include:

- Deans or unit heads
- Financial aid office
• Legal counsel (especially where non-standard language is requested by donors, their financial advisers, or by fundraisers)
• Donor relations/stewardship
• Provost or vice president for academic affairs
• Finance and treasurer
• External relations
• Sponsored research
• VP development
• President

All approvers should be given the draft at once, rather than sequentially, in order to keep the approval process as efficient as possible. Tracking of the gift agreement approval process should be handled centrally within advancement services.

**Once all institutional approvals have been received, the agreement is ready to be presented to the donor.** If the donor agrees to make the commitment, the following should be considered:

• If the donor changes the agreement, the approvals should again be completed.
• The designated person at the institution should be the final signature.
• Copies or originals (according to policy) of agreements should go to the donor and advancement services gift processing staff.
• The spending authority should be informed.
• The donor relations staff should be informed for acknowledge and stewardship purposes.

**Other considerations for gift agreements:**

If a donor wishes to **change an agreement** the use of a gift amendment is advised. A template should be created for this purpose.

If the remainder of the pledge is to be paid through the **donors’ estate** if/when a schedule can't be met during the donors' lifetimes, the donors must be informed of this policy and it should be stated in the agreement.

If the commitment is being made by a **corporation or foundation**, the agreement must state that the person(s) signing the agreement have the legal right to sign for the entity.
If the commitment is being funded by a **family or personal foundations**, the donor in the agreement should be the foundation.

At educational institutions, if the gift is determined to be a **sponsored gift or grant** (the decision of which is often made by a senior level executive in the Finance Office), then the institution’s Office of Sponsored Programs or Sponsored Gifts handles the agreement. These gifts **may or may not** be counted by Advancement or according to the CASE Reporting Standards and Management Guidelines. (See the Best Practice entitled “Gift Administration - Gifts versus Grants versus Contracts”)

**Enforcing Gift Agreements** is rarely done by an institution and if done, it is usually after a donor dies. The commitment must be for a specific purpose and there must be consideration or detrimental reliance. Consideration and detrimental reliance are both defined in CASE Reporting Standards and Management Guidelines and can be generally interpreted as determining whether or not a donor is receiving anything in return for his or her gift. Was there a quid pro quo for the donor? Will the institution take legal action against a donor after a building was built, for example, and the pledge was never paid by the donor? When and how an institution will enforce an agreement varies. An institution’s legal counsel will need to weigh in on any discussions involving those donors who want consideration (something in return) for the gift. Often that can easily be guaranteed, but not always.

Sometimes a commitment may require a **business decision** instead of a legal decision. An example is requiring that the institution must match the commitment. It should be determined who can make that decision.

Commitments funded by a **gift-in-kind** may require specific language and follow policy. (See the Best Practice entitled “Gifts in Kind”)

Commitments funded by a **donor-advised fund** may require specific language and follow policy. (See the Best Practice entitled “Donor Advised Funds”)

If the commitment is for **endowment**, make the donor understand the endowment investment and spending policy.

Some institutions use language to remove an external name if, as a result of action made by the donor, the naming could cause damage to the institution’s **reputation**.

For naming of **physical space**, include language of removal of the name if the commitment is not fulfilled. Also include language if there is a space change to give the donor another naming according to his/her level of giving. Determine if the naming is for a period of time or in perpetuity.

The donor should be encouraged to seek review of the agreement by the donor’s **advisors**.
Sponsorships of events or programs should clearly list the benefits received and the fair market value of each if the benefit is determined to be non-deductible. (See the Best Practice entitled “Quid Pro Quo Contributions”)

According to IRS policy 526, donors cannot be involved in choosing student recipients of scholarships. Agreements should clearly state that the institution choses the recipient.

**AASP Recommendation:**

Executing a gift agreement is best practice for all commitments, but is especially important for any commitment that is multi-year, for a specific purpose, names a fund, names a physical space, creates an endowment, or includes obligations on the part of the institution or the donors. It is also best practice when working with an institution's internal and external auditors requesting documentation.

**Sample Policies & Procedures:**

**University of Miami:**

Policies for Endowment Gifts (F70) and naming of Schools, Colleges, Hospitals, Centers, Institutes, and Departments and for Naming and Support of University Buildings and Physical Spaces (F140). Copies of policies will be sent on request to digna@miami.edu

Sample gift agreements, amendments, and special paragraphs at: www.miami.edu/advancement/forms