



THE UNIVERSITY of TEXAS SYSTEM
Nine Universities. Six Health Institutions. Unlimited Possibilities.

Best Practices Regarding University-Affiliated Foundation Relationships

Advisory Task Force Report

August 19, 2013

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Executive Summary

Mission Alignment

Recommendation #1:

Each U. T. System institution should engage its affiliated foundations in a process to review or develop a Memorandum of Understanding (MOU), consistent with the recommendations in this Report, that (a) clearly defines the relationship between the university and its affiliated foundation(s), (b) assures the preservation of mission alignment over time, and (c) is periodically reviewed, assessed, and adapted in keeping with changing circumstances and the passage of time.

Transparency

Recommendation #2:

Universities and their affiliated foundation (s) should work together to implement practices that increase transparency, openness, and disclosure to the supported institution and the public.

Best Relationship Practices and University-Affiliated Foundation Policies to Assure Exemplary Governance and Activities

Recommendation #3:

Recognizing that good governance and strong board leadership are essential to the mission fulfillment of each university and its affiliated foundation (s), the Task Force has identified several best governance practices that should be followed.

Recommendation #4:

University-affiliated foundations should adopt policies that are transparent, reflect best practices, and mitigate even the appearance of impropriety, unfairness, financial self-dealing, or fiscal imprudence.

Gift Acceptance Policies and Honoring Donor Intent

Recommendation #5:

Institutions and university-affiliated foundations should adopt and consistently apply gift acceptance policies, thoroughly document donor intent, and carefully review proposed gifts to ensure that donors' intentions can be fulfilled and that through the acceptance of gifts institutions will not be subject to undue external influence, such as over academic programs and appointments, or to financial or compliance risk.

I. INTRODUCTION

A. Background

There is great diversity among the 21 U.T. System university-affiliated foundations reviewed by the Advisory Task Force on Best Practices Regarding University-Affiliated Foundation Relationships (hereafter the “Task Force”). This diversity reflects the distinct genesis and histories of these organizations, their unique relationships with the supported universities, and their varying organizational structures, missions, and asset sizes.

Some university-affiliated foundations operate under a detailed memorandum of understanding with considerable guidance, collaboration, and even direct assistance from the supported university. Others operate by way of agreements or bylaws that provide little in the way of delineating the relationship, duties, and shared objectives between the foundation and the affiliated university. Some conduct significant fundraising activities for the affiliated schools, invest their funds with The University of Texas Investment Management Company, and keep detailed and transparent records of their deliberations and processes. Some share staff and office space with the affiliated university. Others are wholly autonomous with respect to the affiliated university, acting strictly as independent, private foundations with a unique mission to support a single institution and with very little direct involvement from that institution other than annual requests for funding.

The U. T. System’s university-affiliated foundations reflect the distinctive contributions of their founders, donors, and volunteer trustees, many of whom are university alumni, supporters, and business and community leaders. The Task Force recognizes that the independence and diversity of the U. T. System’s affiliated university foundations is a great strength, one that uniquely reflects and serves the System’s mission and community.

At the same time, as a public entity entrusted with both private and public funds, the U. T. System’s governing board has a responsibility to ensure that

the development, management, and expenditure of resources that support U. T. System institutions are done in a manner consistent with federal, state, and local laws, and that the focus of university fundraising efforts by university personnel remain on funds to be administered by the university. The U. T. System also shares with its institutions and the affiliated foundations a special obligation to maintain the public’s trust.

Whether a university-affiliated foundation is dependent on the affiliated university, interdependent, or fully independent, its actions are necessarily bound in the public’s eye to the supported university and to the reputation of the entire U. T. System. Without regard to the degree of legal separation and independence, each university-affiliated foundation should demonstrate the highest levels of accountability and transparency while also safeguarding donor privacy and proprietary business information.

The U. T. System is not alone in recognizing that to support the diversity and independence of its university-affiliated foundations, as well as the System’s institutional integrity, it is necessary to discover and institute best practices regarding university-affiliated foundation relationships. Across the country, public institutions are increasingly relying on affiliated foundations to foster a culture of philanthropy, raise private support, forge public-private partnerships that facilitate entrepreneurial ventures, and serve as advocates in support of public higher education. The U. T. System is supported by a diverse group of affiliated foundations that play a vital role in supporting its growth and excellence over many years. Thoughtful examination of current foundation-institution relationships, identification of established best practices, and consideration of ways foundation-institution partnerships can be strengthened will help both the U. T. System’s institutions and affiliated foundations advance their missions and ensure they operate with the full accountability owed to the public they serve.

B. Charge to the Task Force

In November 2012, the Board of Regents Chairman Wm. Eugene Powell established the Task Force to “assure that relationships between the U. T. System institutions and the U. T. System and affiliated foundations are optimally structured to serve as a national model for public universities for the best management, compliance, and oversight practices.”

For the purposes of this review, university-affiliated foundations are defined as Texas nonprofit trusts or corporations whose sole, primary, or operationally significant purpose is to provide financial support to a U. T. System institution (see Appendix A for the complete list of foundations affiliated with University of Texas System institutions considered in this review).¹

In accordance with the Chairman’s charge (see Appendix B), the Task Force included in its research and deliberations identification of best practices in seven key areas of university-foundation management, including:

1. Best structures for affiliated foundations/university interactions and reporting.
2. Ideal location of and staffing for foundation offices.
3. Methods for requesting, record-keeping, and provision of funding for university support to assure no impermissible direct benefits to U. T. employees.
4. Overlaps in foundation and university fundraising.
5. Compliance with current legal requirements concerning conflicts of interest and tax issues.
6. Ways to enhance delineation of university and foundation activities to reduce confusion or ambiguity.
7. Ways to ensure alignment between university-affiliated foundations and university missions.

C. Work of the Task Force

Since November 30, 2012, the Task Force has convened twelve times and reviewed the general practices, organizational documents, and operations of 21 university-affiliated foundations with the goal of identifying opportunities for improvement and best practices. Task Force members also interviewed U. T. presidents from institutions with one or more affiliated foundations and received testimony from university-affiliated foundation principals and key staff members, as well as Assistant Attorney General of Texas Susan Staricka and Princeton University General Counsel Peter McDonough. (See Appendix C for a list of meetings and individuals who presented to or were interviewed by the Task Force.) The Task Force engaged a number of national experts, including David Bass of the Association of Governing Boards of Universities and Colleges, and Dr. Jeffrey Cain of American Philanthropic, LLC, a national philanthropic consulting firm. Finally, it reviewed key articles, research, and publications regarding best practices for university-affiliated foundations. The Task Force reviewed the materials included in the Appendices (see page 13) and discussed findings in the Texas State Auditor’s Report on the Cancer Prevention and Research Institute of Texas (see Appendix K).

¹As they are independent entities whose primary or operationally significant purpose is to provide financial support to a U. T. System institution, The Sealy & Smith Foundation and the Southwestern Medical Foundation were both included in the list of foundations considered in this review.

D. Findings/Guiding Principles

The Task Force's recommendations for best practices are guided by the following findings and principles:

1. A workable model for university-affiliated foundation relationships requires a shared vision endorsed by the U. T. System, U. T. institutions, and affiliated foundations.
2. The unique and historically significant contributions of each university-affiliated foundation should be acknowledged and respected.
3. Independent governance and clear separation of services/duties between university-affiliated foundations and their supported universities should be preserved.
4. Operational redundancies between university-affiliated foundations and their supported universities should be reduced or eliminated.
5. Full transparency in the relationship between each university and its university-affiliated foundations is essential.
6. Donor intent must be honored by the university and the university-affiliated foundation throughout the life of every donor gift.
7. Periodic assessment of the role of each university-affiliated foundation and the relationship with the institution supported is necessary periodically and as circumstances change.

Consistent with these findings and guiding principles and in the spirit of continual improvement, the Task Force makes the following recommendations for best practices for university-affiliated foundation relationships.

II. RECOMMENDED BEST PRACTICES REGARDING UNIVERSITY-AFFILIATED FOUNDATION RELATIONSHIPS

A. Mission Alignment

Recommendation #1:

Each U. T. System institution should engage its affiliated foundations in a process to review or develop a Memorandum of Understanding (MOU), consistent with the recommendations in this report, that (a) clearly defines the relationship between the university and its affiliated foundation(s), (b) assures the preservation of mission alignment over time, and (c) is periodically reviewed, assessed, and adapted in keeping with changing circumstances and the passage of time.

The U. T. System's 21 university-affiliated foundations operate under a broad range of agreements. Some currently operate without any formal agreement with their supported organization.

The Southern Association of Colleges and Schools (SACS) Commission on Colleges' *Principles of Accreditation: Foundation for Quality Enhancement*, Section 3.2.13 (see Appendix D), requires that, for any entity organized separately from an institution and primarily for the purpose of supporting the institution or its programs:

- (1) the legal authority and operating control of the institution is clearly defined with respect to that entity;
- (2) the relationship of that entity to the institution and the extent of any liability arising out of the relationship is clearly described in a formal, written manner; and

- (3) the institution demonstrates that
 - (a) the chief executive officer controls any fund-raising activities of that entity, or
 - (b) the fund-raising activities of that entity are defined in a formal, written manner that assures that those activities further the mission of the institution.

Accordingly, the Task Force recommends that each U. T. System institution engage its affiliated foundation(s) in a process to either review or develop an MOU consistent with the recommendations in this report. The same process should be followed for any new university-affiliated foundation seeking recognition.

At a minimum, this process should:

- (1) affirm the role of the foundation;
- (2) establish the structure of the working relationship between the foundation and institution;
- (3) clearly define the extent of any liability arising out of the relationship;
- (4) delineate respective responsibilities in the partnership;
- (5) define specific services and support to be provided by the foundation, including any fundraising activities, while working to phase out employment arrangements whereby an institution and foundation share staff;
- (6) outline institutional resources provided to the foundation; and
- (7) establish guidelines and the conditions under which the MOU may be terminated by the university or foundation and outline a process for the orderly separation of a university from a foundation and/or a foundation from a university as well as the distribution of foundation assets consistent with its articles of incorporation and bylaws.

The MOU process should principally involve the institution and the affiliated foundation, including the chief executive of the university, the chief executive officer of the affiliated foundation, and the chair of the foundation board. Representatives of the U. T. System's Office of External Relations, Office of Academic Affairs or the Office of Health Affairs, Office of General Counsel, and Office of the Board of Regents and the affiliated foundation's legal counsel should be engaged as necessary throughout the process. Working in collaboration, these entities should develop a proposed MOU that reflects the principles and practices recommended by this Task Force and that substantially complies with a model MOU developed with appropriate input from U. T. System institutions and university-affiliated foundations and approved by the Board of Regents.

The MOU process should culminate in a formal adoption of the MOU between the institution and affiliated foundation after approval by the appropriate Executive Vice Chancellor and the Office of General Counsel in compliance with applicable policies of the Board of Regents. (See Regents' *Rules and Regulations*, Rule 10501, *Delegation to Act on Behalf of the Board* at Appendix L.) The relationship between the university and university-affiliated foundation is based upon a shared goal to support the university's mission and/or its related programs, personnel, students, or facilities. The MOU should clearly define the relationship between the university and the affiliated foundation and how this relationship advances the university's mission. It should also address how the two institutions will maintain mission alignment over time.

Specifically, and expanding on the seven minimum requirements above, the Task Force recommends the MOU should:

1. Summarize the overall relationship between the foundation and the university and how the foundation's assets, functions, gift administration, or grant-making serve the university's mission.
2. Establish the President, or the President's designee, as the primary institutional staff contact for the university-affiliated foundation, and the institution's Chief Financial Officer, or the Chief Financial Officer's designee, as the primary financial contact for the university-affiliated foundation.
3. Define the foundation's role in fundraising, if any, and delineate, as appropriate, the respective oversight responsibilities of foundation and institution personnel with regard to prospect management, gift acceptance and receipting, and stewardship. The primary focus of fundraising efforts by university-compensated personnel, including development professionals, deans, and faculty, should remain on funds to be directed to and administered by the university.
4. Identify specific services provided by the foundation, which might include fundraising, gift acceptance and advancement services, records and data management, investment services, real estate projects, or other activities in support of institutional functions and priorities, and any payments or consideration provided to the foundation in exchange for such services (precise fees or payments may be documented in separate agreements).
5. Describe any institution resources provided for the use of the foundation. Resources might include budget allocations, staff support, office space, and technology. Note that, consistent with the guidance found in the Attorney General Opinion at Appendix I, the Task Force recommends recovery of costs associated with providing such resources at the same rates charged to university departments. Further, the institutions and university-affiliated foundations should use separate computers and computer systems to avoid the intermingling of data and information. If a data base is shared for purposes of maximizing efficiency, accuracy of data, and prospect management, the rationale for sharing a data base should be documented and approved in accordance with applicable policies of the Board of Regents (see Appendix L), and appropriate steps should be taken and documented to protect the interests of both the U. T. System institution and the university-affiliated foundation, for example, by implementing separate gift-processing modules. (Because funding and fee structures may vary from year to year, the MOU may reference separate support or service agreements or disclosures.)
6. Identify a process to phase out any employment arrangements currently in place between any institution and its affiliated foundation whereby an institution and foundation share staff. Where extraordinary circumstances exist requiring the continuation of any such arrangement, establish terms under which foundation functions and operations may be staffed by university employees, including a description of reporting relationships and the role played by foundation staff or board members in hiring decisions, performance evaluation, and compensation decisions. Note that, consistent with the guidance found in the Attorney General Opinion at Appendix I, U. T. System institutions lack the authority to place foundation employees on payroll or to provide them benefits reserved for state employees. (Again, because funding and fee structures may vary from year to year, the MOU may reference separate support or service agreements or disclosures.)

7. Describe records, including alumni and donor records, owned either by the institution or foundation and policies governing the use and sharing of such records, including public access under the Texas Public Information Act. The MOU should also include language related to the privacy of student information subject to the Family Educational Rights and Privacy Act (FERPA) and include procedures for providing and safeguarding any student information in full compliance with FERPA.
8. Define reciprocal responsibilities and mutual expectations regarding the frequency, content, and method of reporting between the university-affiliated foundation and its supported institution. This should include a requirement for an independent annual audit of the foundation and a requirement that it be provided to the supported institution.
9. Describe the terms, process, and frequency by which foundation funds or grants will be provided to the university, including discretionary funds or funds intended to fund the compensation or benefits of university employees (not including transfers of funds for endowed faculty or administrative positions). This should also include requisition guidelines and annual limits for seeking foundation funds or support for the purchase of tickets to attend or sponsor third-party or institutional annual dinners, galas, auctions, or other donor-related functions, and provisions for the reimbursement of university employees for expenses incurred on behalf of the foundation.
10. Define terms for the foundation's use of the university's name, service marks, branding, and other proprietary university property, consistent with Board of Regents policy.
(See U. T. System Trademark Licensing Policy at Appendix M.)
11. Include statements regarding (a) practices to identify and appropriately manage potential conflicts of interests involving institutional staff, foundation staff, and foundation board members and (b) practices to prevent the payment or accrual of impermissible benefits to university or university-affiliated foundation employees, directors, or officers. This should include a prohibition of the gift or loan of university-affiliated foundation property, services, funds, credit, or assets to university employees, families, or their representatives, except under circumstances whereby a specific program or strategy has received prior written approval by the Board of Regents.
12. Include information regarding gift or management fees assessed by the foundation.

Over time, practices and ways of doing business among university-affiliated foundations and their supported organizations may become matters of custom, habits, and conventions. Although convenient, some of these informal practices can unintentionally undermine institutional integrity. Leadership changes, the growth of campaigns and development programs, and new strategic plans and opportunities may all lead to changed needs and expectations about the relationship between the foundation and the institution.

Accordingly, institutions and affiliated foundations should engage in periodic assessment of the role of the university-affiliated foundation and its relationship with its supported institution by revisiting the MOU process at least every 5 years. The MOU process should provide an opportunity to assess and adapt responsibilities and mutual expectations in keeping with changing circumstances and the passage of time.

B. Transparency

Recommendation #2:

Universities and their affiliated foundation (s) should work together to implement practices that increase transparency, openness, and disclosure to the supported institution and the public.

The model level of transparency, openness, and disclosure that should be required of public and private institutions of every kind, including university-affiliated foundations, is a topic of ongoing public debate in Texas and throughout the nation. University-affiliated foundations are not subject to the provisions of the Texas Open Meetings Act or, except in very limited circumstances, the Texas Public Information Act. (See Appendix I.)

One thing is clear: to maintain the public's trust, a greater degree of transparency for public institutions and private foundations is required today than at any previous time.

With this in mind, the Task Force recommends each university and its university-affiliated foundations work together to implement the following specific practices regarding transparency:

1. Each university and its university-affiliated foundations should provide for the sharing, consistent with applicable laws and donor privacy, of financial information, audits, annual IRS filings, and other records with each other and outside parties.
2. Each university and its university-affiliated foundations should work together to adopt a transparency statement oriented specifically to donors, alumni, and outside parties that
 - (a) clarifies the relationship between the university and the university-affiliated foundation;
 - (b) explains the role that the private foundation plays in the university setting;
 - (c) lists each foundation's leadership, budget, and assets; and
 - (d) explains the difference between making a gift to the U. T. System, a U. T. institution, or the university-affiliated foundation.
3. Each university and its university-affiliated foundations should adopt practices to assure the university is aware of foundation policies regarding gift or administrative fees, including the disclosure to donors or potential donors of any and all fees for endowment or non-endowment gifts, pledges, or bequests.
4. Each university and its university-affiliated foundations should establish a practice to assure routine reports to donors.
5. Each university should identify all affiliated foundations on its website, clearly noting their status as separate from the supported institution. Similarly, each university-affiliated foundation should have a well-developed website that provides public access to information about the foundation's mission, a list of foundation employees and board members, and clear contact information for the foundation.

C. Best Relationship Practices and University-Affiliated Foundation Policies to Assure Exemplary Governance and Activities

Recommendation #3:

Recognizing that good governance and executive board leadership are essential to the mission fulfillment of each university and its affiliated foundation(s), the Task Force has identified best governance practices that should be followed:

1. Ensure that the work of the foundation is aligned with the strategic priorities of the supported university.
2. Collaborate to establish strong periodic orientation programs to educate new university officials and all new foundation board members about the foundation's mission, legal requirements, and fiduciary duties.

Recommendation #4:

University-affiliated foundations should adopt policies that are transparent, reflect best practices, and mitigate even the appearance of impropriety, unfairness, financial self-dealing, or fiscal imprudence.

Because of the unique public-private relationship between U. T. System institutions and their affiliated foundations; the varied and often long-term nature of gifted assets, restricted and unrestricted; and the way in which donor funds are collected by one (private) entity and expended by another (public) entity, affiliated foundation financial management policies must follow applicable laws and generally accepted accounting principles. Conflicts of interest may exist both in fact and in appearance. Thus, financial management at university-affiliated foundations should also mitigate even the appearance of impropriety, unfairness, financial self-dealing, or fiscal imprudence. (See Appendix H for a summary discussion of such issues, developed by the Association of Governing Boards of Universities and Colleges.)

The Task Force recommends that each university-affiliated foundation review its policies, as may be needed, to assure each foundation board maintains fiscal integrity, protects its assets, and provides financial oversight with policies that:

1. Provide for voluntary compliance with Section 22.353 of the *Texas Business Organization Code*, which addresses the availability of financial records for inspection by the public. Section 22.353 requires certain nonprofit corporations to make the entity's records, books, and reports available for public inspection and copying at the entity's place of business (see Appendix G).
2. Enact and enforce records retention procedures that assure the orderly management and retrieval of records.
3. Address documentation such as formal minutes of meetings and documentation of decision making processes. Foundations are also encouraged to consider making these records available for public inspection unless doing so would violate state or federal law, or compromise donor privacy or sensitive confidential business information.

4. Ensure the foundation has the resources to provide for the safekeeping of gift and donor records, files, and data consistent with applicable law.
5. Address the possible restriction of the use of any foundation credit cards to authorized foundation employees and set clear credit card limits, expense guidelines, and reimbursement policies for foundation employees, if employees utilize credit cards, are authorized to spend money, or receive reimbursement for qualified purchases.
6. Address the establishment of expenditure guidelines and annual limits for the purchase of tickets to attend or sponsor another nonprofit organization's annual dinner, gala, auction, or other donor-related functions.
7. Address the prohibition of the gift or loan of university-affiliated foundation property, services, funds, credit, or assets to university-affiliated foundation employees, families, or their representatives.
8. Ensure that the university-affiliated foundation has a financial plan and budgeting process to underwrite the costs of foundation programs, operations, and services.
9. Establish specific procedures for selection of board members.
10. Establish term limits for board membership and clear conditions whereby members may rotate back onto the board after a set time or serve in a meaningful emeritus capacity, if deemed desirable.
11. Define the reporting relationship(s) of the foundation chief executive and the responsibilities of the foundation board in hiring, assessment, compensation, and termination decisions regarding the foundation chief executive.
12. Provide for the conduct of the foundation board's business in an orderly and efficient fashion, and periodically assess the performance of the board, its committees, and its members.
13. Develop internal guidelines for annual continuing education and provide for annual briefings for all university-affiliated foundation staff, directors, and officers regarding prohibitions against self-dealing, conflicts of interest, and other applicable laws related to an employee's, director's, or officer's legal and fiduciary responsibilities.
14. Define the conditions under which a foundation director, officer, or board candidate may have a conflict of interest that either precludes service on the board or requires recusal from board consideration of and decision-making on specific issues.

D. Gift Acceptance Policies and Honoring of Donor Intent

Recommendation #5:

Institutions and university-affiliated foundations should adopt and consistently apply gift acceptance policies, thoroughly document donor intent, and carefully review proposed gifts to ensure that donors' intentions can be fulfilled and that through the acceptance of gifts institutions will not be subject to undue external influence, such as over academic programs and appointments, or to financial or compliance risk.

University and foundation leaders are mutually charged with ensuring that gifts—including endowments and other donor-restricted funds—will be used over time for the purposes intended by donors. The challenge of assuring compliance with donor intent for universities and university-affiliated foundations becomes greater as endowments age and expand. Unreasonably narrow donor-imposed restrictions and conditions can impose significant compliance burdens, limit an institution's ability to make the most effective use of the assets, and may result in the accumulation of assets restricted for purposes that may become impossible or impracticable for institutions to fulfill (see Appendix J).

The U. T. System Office of External Relations currently maintains an endowment compliance process that is a model for universities nationwide. Institutions and university-affiliated foundations should ensure that policies and procedures are in place that will assure donors that the assets they donate to the foundation in support of the university's mission are used as intended and that gifts will serve the best interests of the institution. The adoption and consistent application of gift acceptance policies, thorough documentation of donor intent, and careful review of proposed gifts are essential to ensure that donors' intentions can be fulfilled and that institutions will not be subject to undue external influence over academic programs or appointments or subject to financial or compliance risks.

Specifically, the Task Force recommends:

1. Universities should be willing to consult with university-affiliated foundations on the development of gift-acceptance policies that address ethical practices, authority to negotiate and accept gifts, donor recognition, gift restrictions, endowment agreements and thresholds, and acceptance of outright and planned gifts by the foundation. *U. T. System Administration Policy, UTS 138* provides clear guidance on the gift terms acceptable to the U. T. System (see Appendix F).

These policies should require consultation between the foundation and appropriate institution representatives prior to the foundation accepting gifts restricted for (a) institution purposes other than those addressed in existing gift acceptance policies, or (b) that may subject the institution to unusual conditions or requirements.

Universities and university-affiliated foundations should ensure that procedures and practices are in place to ensure that donor intent is documented and to enable ongoing stewardship and monitoring of compliance with donor intent for gifts for current use as well as for term and permanent endowments.

2. Universities and university-affiliated foundations should maintain policies that ensure that endowments are prudently managed in compliance with Texas's Uniform Prudent Management of Institutional Funds Act and that costs and performance of portfolios invested outside of the U. T. System are competitive with The University of Texas Investment Management Company (UTIMCO). Appropriate U. T. System staff should assure that universities monitor foundation investment performance annually, through review of the foundations' 990 tax forms, and discuss areas for possible improvement, including potential access to UTIMCO services, with foundation counterparts.

III. CONCLUSION

If approved by the U. T. System Board of Regents, the Task Force recommendations should be implemented through amendment to Regents' Rules (see Appendix E) and/or policy changes addressing the establishment and periodic review of university-affiliated foundations.

- A. The Rules and policies should detail conditions for approval of the establishment of new affiliated foundations as defined in this review.
- B. The Rules and policies should provide that, as a condition of such approval, the proposed new affiliated foundation will execute a Memorandum of Understanding (MOU) containing the provisions recommended by the Task Force and approved by the U. T. System Board of Regents.
- C. The Rules and policies should also include language related to the execution of an MOU as a condition for the continued approval for the use of the name or logo of any entity within the U. T. System.

IV. APPENDICES

- Appendix A** List of University-Affiliated Foundations
- Appendix B** Charge to the Task Force by Chairman of the U. T. System Board of Regents
- Appendix C** Table of Task Force Meetings and Interviews
- Appendix D** The Southern Association of Colleges and Schools Commission on Colleges' *The Principles of Accreditation: Foundation for Quality Enhancement*, Section 3.2.13
- Appendix E** Regents' *Rules and Regulations*, Rules 60101, *Acceptance and Administration of Gifts*
Regents' *Rules and Regulations*, Rule 60305, *External Nonprofit Corporations*
Regents' *Rules and Regulations*, Rule 60306, *Use of University Resources*
- Appendix F** U. T. System Administration Policy, UTS 138, *Gift Acceptance Procedures*
- Appendix G** *Texas Business Organization Code*, Section 22.353
- Appendix H** Excerpts from AGB's *Effective Foundation Boards: A guide for members of institutionally related foundation boards*
- Appendix I** Texas Attorney General Opinion No. MW-373 (1981)
- Appendix J** *Protecting Donor Intent*, by Dr. Jeffrey J. Cain
- Appendix K** Executive Summary from Texas State Auditor's Report on the Cancer Prevention and Research Institute of Texas (CPRIT)
- Appendix L** Regents' *Rules and Regulations*, Rule 10501, *Delegation to Act on Behalf of the Board*
- Appendix M** U. T. System Trademark Licensing Policy

APPENDIX A

ADVISORY TASK FORCE ON BEST PRACTICES REGARDING UNIVERSITY-AFFILIATED FOUNDATION RELATIONSHIPS LIST OF UT-AFFILIATED FOUNDATIONS

UT Arlington

None

UT Austin

The McCombs School of Business Foundation
The University of Texas Law School Foundation
The Lyndon Baines Johnson Foundation
Wildflower Donor, Inc.
The University of Texas Fine Arts Foundation
Texas Interscholastic League Foundation
UT Communication Foundation

UT Brownsville

None

UT Dallas

Foundation for the Callier Center
The Utley Foundation

UT El Paso

None

UT Pan American

The University of Texas - Pan American Foundation

UT Permian Basin

John Ben Shepperd Public Leadership Foundation

UT San Antonio

None

UT Tyler

University of Texas at Tyler Foundation

UT Southwestern Medical Center

Southwestern Medical Foundation*
St. Paul Medical Foundation
UT Southwestern Moncrief Cancer Foundation

UTMB - Galveston

The Sealy & Smith Foundation*

UTHSC - Houston

University of Texas System Medical Foundation

UTHSC - San Antonio

Cancer Therapy and Research Center Foundation

UT MD Anderson Cancer Center

CLL Global Research Foundation

UTHSC - Tyler

None

UT System Administration

The University of Texas Foundation

* As this foundation is an independent entity whose primary or operationally significant purpose is to provide financial support to a U. T. System institution, it was included in the list of foundations considered in this review.

APPENDIX B

CHARGE TO ADVISORY TASK FORCE ON BEST PRACTICES REGARDING UNIVERSITY-AFFILIATED FOUNDATION RELATIONSHIPS

November 15, 2012

The Task Force is asked to make recommendations to the U. T. System Board of Regents, within 180 days, to assure that relationships between U. T. System institutions and the U. T. System and affiliated foundations are optimally structured to serve as a national model for public universities for the best management, compliance, and oversight practices. The recommended model will allow all involved in this important nonprofit volunteer service to serve most effectively and efficiently in the 21st century and beyond.

In the spirit of continual improvement, the Task Force is asked to review issues concerning best patterns for interactions with separately incorporated legal entities set up to benefit the U. T. System or one or more U. T. System institutions or operations. Individual budget units within the U.T. System that carry the historical name "foundation" but are not separate legal entities are not the focus of this review.

The Task Force is encouraged to talk with each U. T. president, seek the participation of the presidents and officers of affiliated foundations, and include national experts in the dialog. A representative of the Texas Attorney General's office will provide advice and support to the Task Force.

Work of the Task Force should include the identification of best practices, with particular emphasis on:

- 1. Best structures for affiliated foundations/university interactions and reporting**
- 2. Ideal location of and staffing for foundation offices**
- 3. Methods for request, record-keeping, and provision of funding for university support to assure no impermissible direct benefits to U. T. employees**
- 4. Overlaps in foundation and university fund-raising**
- 5. Compliance with today's legal requirements concerning conflicts and tax issues**
- 6. Enhance delineation of roles of university and foundation activities to reduce confusion or ambiguity**
- 7. Ensure alignment between university-affiliated foundation and university missions**

Task Force Membership:

Regent Brenda Pejovich, Chair

Regent Robert Stillwell

Regent Wallace Hall, Jr.

President Diana Natalicio

President David Callender

Chancellor Francisco G. Cigarroa, M.D., *ex officio*

General Counsel to the Board Francie Frederick, *ex officio*

Vice Chancellor Randa Safady, *ex officio*

Interim Vice Chancellor and General Counsel Dan Sharphorn, *ex officio*

Participation to include:

Institutional presidents

Foundation presidents and officers, invited

National experts

Representative of the Office of the Attorney General of Texas

APPENDIX C

TABLE OF TASK FORCE MEETINGS AND INTERVIEWS

Meeting Date

Participants/Interviews

November 30, 2012

December 19, 2012

Dr. Rodney Mabry, President, UT Tyler

Dr. Diana Natalicio, President, UT El Paso

Susan Staricka, Assistant Attorney General , Office of the Attorney General

January 4, 2013

Dr. David Daniel, President, UT Dallas

Dr. David Callender, President, UT Medical Branch - Galveston

January 31, 2013

Dr. Robert Nelsen, President, UT Pan American

Veronica Gonzalez, VP for University Advancement, UT Pan American

Lisa Prieto, Chief of Staff, UT Pan American

Lydia Aleman, Associate VP for University Advancement, UT Pan American

John Kelso, President, Sealy-Smith Foundation

Kevin Dillon, Senior Executive Vice President , Chief Operating and Financial Officer, UTHSC - Houston

Dr. David Watts, President, UT Permian Basin

February 15, 2013

Deborah Morrill, Vice President for Institutional Advancement and Chief Development Officer, UTHSC - San Antonio

Sherri Ortiz, Director of Development, Cancer Therapy and Research Center

Dr. Jeffrey Cain, Founding Partner, American Philanthropic

David Bass, Director of Foundation Programs, Association of Governing Boards of Universities and Colleges (AGB)

February 25, 2013

Jaime Ramon, Chair, UT Pan American Foundation

Matt Masek, Vice President and Chief Legal Officer, UT MD Anderson Cancer Center

Don Jansen, Senior Attorney, UT System Office of General Counsel

Kyle ZumBerge, Attorney, UT System Office of General Counsel

Peter G. McDonough, General Counsel, Princeton University

David Bass, Director of Foundation Programs, AGB

March 8, 2013

Dr. Daniel K. Podolsky, President, UT Southwestern Medical Center

David Bass, Director of Foundation Programs, AGB

March 19, 2013

William C. Powers, President, UT Austin

Patricia A. Ohlendorf, Vice President for Legal Affairs, UT Austin

Ward Farnsworth, Dean, School of Law, UT Austin

Dr. Thomas W. Gilligan, Dean, Red McCombs School of Business, UT Austin

Dr. Robert L. Hutchings, Dean, Lyndon B. Johnson School of Public Affairs, UT Austin

David Bass, Director of Foundation Programs, AGB

April 11, 2013

Joe Holt, Chairman, McCombs School of Business Foundation

John Massey, President, UT Law School Foundation

Larry Temple, Chairman, Lyndon Baines Johnson Foundation

April 23, 2013

Hector DeLeon, President, The University of Texas Foundation

Dr. Jeffrey Cain, Founding Partner, American Philanthropic

June 26, 2013

APPENDIX D

The Principles of Accreditation:

Foundations for Quality Enhancement



Southern Association of Colleges and Schools
Commission on Colleges

1866 Southern Lane
Decatur, Georgia 30033-4097

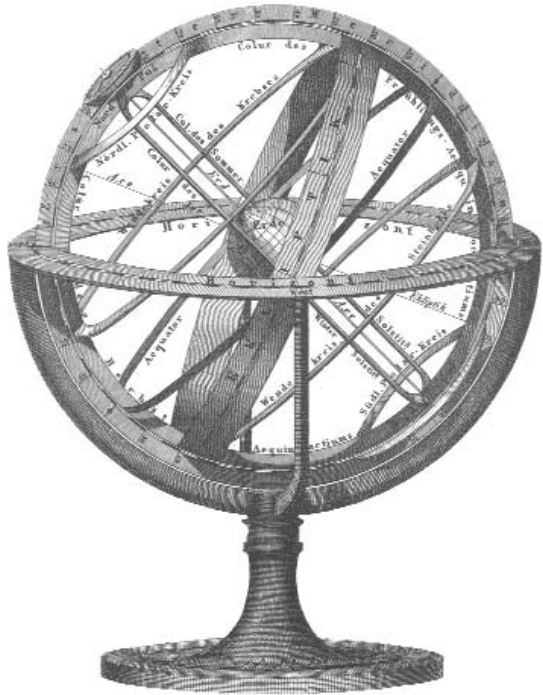
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404-679-4558 (Fax)
www.sacscoc.org

Approved by the College Delegate Assembly:
December 2001
Revised by the College Delegate Assembly:
December 2006, 2007, 2009, 2011

Fifth Edition
First Printing

■ SECTION 3:

Comprehensive Standards



The Comprehensive Standards set forth requirements in the following four areas: (1) institutional mission, governance, and effectiveness; (2) programs; (3) resources; and (4) institutional responsibility for Commission policies. The Comprehensive Standards are more specific to the operations of the institution, represent good practice in higher education, and establish a level of accomplishment expected of all member institutions. If an institution is judged to be significantly out of compliance with one or more of the Comprehensive Standards, the Commission’s Board of Trustees may deny reaffirmation and place the institution on a sanction or, in the case of other reviews, place the institution on a sanction. (*See Commission policy “Sanctions, Denial of Reaffirmation, and Removal from Membership.”*)

A candidate institution is required to document compliance with Core Requirements 2.1-2.11, all the Comprehensive Standards (except 3.3.2), and Federal Requirements in order to be awarded initial membership.

Implicit in every Comprehensive Standard mandating a policy or procedure is the expectation that the policy or procedure is in writing and has been approved through appropriate institutional processes, published in appropriate institutional documents accessible to those affected by the policy or procedure, and implemented and enforced by the institution.

INSTITUTIONAL MISSION, GOVERNANCE, AND EFFECTIVENESS

3.1 Institutional Mission

- 3.1.1** The mission statement is current and comprehensive, accurately guides the institution’s operations, is periodically reviewed and updated, is approved by the governing board, and is communicated to the institution’s constituencies. (**Mission**)

3.2 Governance and Administration

- 3.2.1** The governing board of the institution is responsible for the selection and the periodic evaluation of the chief executive officer. (**CEO evaluation/selection**)
- 3.2.2** The legal authority and operating control of the institution are clearly defined for the following areas within the institution’s governance structure: (**Governing board control**)

- 3.2.2.1 institution's mission;
 - 3.2.2.2 fiscal stability of the institution; and
 - 3.2.2.3 institutional policy.
- 3.2.3 The governing board has a policy addressing conflict of interest for its members. (**Board conflict of interest**)
- 3.2.4 The governing board is free from undue influence from political, religious, or other external bodies and protects the institution from such influence. (**External influence**)
- 3.2.5 The governing board has a policy whereby members can be dismissed only for appropriate reasons and by a fair process. (**Board dismissal**)
- 3.2.6 There is a clear and appropriate distinction, in writing and practice, between the policy-making functions of the governing board and the responsibility of the administration and faculty to administer and implement policy. (**Board/administration distinction**)
- 3.2.7 The institution has a clearly defined and published organizational structure that delineates responsibility for the administration of policies. (**Organizational structure**)
- 3.2.8 The institution has qualified administrative and academic officers with the experience and competence to lead the institution. (**Qualified administrative/academic officers**)
- 3.2.9 The institution publishes policies regarding appointment, employment, and evaluation of all personnel. (**Personnel appointment**)
- 3.2.10 The institution periodically evaluates the effectiveness of its administrators. (**Administrative staff evaluations**)
- 3.2.11 The institution's chief executive officer has ultimate responsibility for, and exercises appropriate administrative and fiscal control over, the institution's intercollegiate athletics program. (**Control of intercollegiate athletics**)
- 3.2.12 The institution demonstrates that its chief executive officer controls the institution's fund-raising activities. (**Fund-raising activities**)
- 3.2.13 For any entity organized separately from the institution and formed primarily for the purpose of supporting the institution or its programs,

(1) the legal authority and operating control of the institution is clearly defined with respect to that entity; (2) the relationship of that entity to the institution and the extent of any liability arising out of that relationship is clearly described in a formal, written manner; and (3) the institution demonstrates that (a) the chief executive officer controls any fund-raising activities of that entity or (b) the fund-raising activities of that entity are defined in a formal, written manner which assures that those activities further the mission of the institution. **(Institution-related entities)**

3.2.14 The institution's policies are clear concerning ownership of materials, compensation, copyright issues, and the use of revenue derived from the creation and production of all intellectual property. These policies apply to students, faculty, and staff. **(Intellectual property rights)**

3.3 Institutional Effectiveness

3.3.1 The institution identifies expected outcomes, assesses the extent to which it achieves these outcomes, and provides evidence of improvement based on analysis of the results in each of the following areas: **(Institutional Effectiveness)**

3.3.1.1 educational programs, to include student learning outcomes

3.3.1.2 administrative support services

3.3.1.3 academic and student support services

3.3.1.4 research within its mission, if appropriate

3.3.1.5 community/public service within its mission, if appropriate

3.3.2 The institution has developed a Quality Enhancement Plan that (1) demonstrates institutional capability for the initiation, implementation, and completion of the QEP; (2) includes broad-based involvement of institutional constituencies in the development and proposed implementation of the QEP; and (3) identifies goals and a plan to assess their achievement. **(Quality Enhancement Plan)**

(Note: This requirement is not addressed by the institution in its Compliance Certification.)

1. Title

Acceptance and Administration of Gifts

2. Rule and Regulation

Sec. 1 Authority to Accept Gifts and Develop Acceptance Procedures. The authority to accept gifts to The University of Texas System or to any of the institutions is vested in the Board of Regents and delegated by the Board as specifically set out in this Rule. Except as provided in this Rule or any other Rule in the Regents' *Rules and Regulations*, or approved institutional policies, no member of the staff of any institution has the authority to accept gifts.

Sec. 2 U. T. System Gift Acceptance Procedures. The Board delegates to the Vice Chancellor for External Relations the authority and responsibility to promulgate a set of guidelines regarding the acceptance, processing, investment, and administration of gifts. These guidelines, known as [The University of Texas System Administration Policy UTS138, Gift Acceptance Procedures](#), shall be adhered to by the U. T. System and the institutions. In promulgating the [U. T. System Gift Acceptance Procedures](#), the delegate shall also consider provisions to:

- 2.1 accomplish the goal of increasing financial support for the U. T. System through the appropriate assistance of donors,
- 2.2 allow staff members to respond to donor initiatives quickly and with certainty,
- 2.3 establish administrative processes to accept and administer gifts in a prudent and efficient manner, with fiduciary responsibilities of fundamental importance,
- 2.4 comply with the Texas Constitution and applicable federal and State law,
- 2.5 comply with the provisions of the [Internal Revenue Code](#) and related regulations,
- 2.6 specifically incorporate provisions related to the acceptance of pledges to fund endowments as follows:

(a) at least 20% of the donors' total required minimum funding must be received prior to the acceptance of an endowment, and

(b) the pledge for payment of the remaining funds shall not extend beyond five years from the date of execution of the gift agreement. With the written approval of the Vice Chancellor for External Relations, the pledge period may be longer than five years under rare and special circumstances, and

2.7 provide that, in the interest of financial responsibility and efficiency, it is the specific preference of the Board that all endowment gifts be eligible for commingling for investment purposes with other endowment funds.

Sec. 3 Board Approval of Nonconforming Gifts. Recommendations regarding the acceptance of gifts or other actions that do not conform to all relevant policies, including but not limited to the [U. T. System Gift Acceptance Procedures](#), shall be made through the Vice Chancellor for External Relations to the Board of Regents after review by appropriate offices of the terms of the gifts, the nature of the donated assets, and/or the requested action.

Sec. 4 Gifts of Art

4.1 Outdoor Works of Art. Approval by the Board is also required prior to the acceptance of a gift of an outdoor work of art. Considerations will include appropriateness with regard to the institution's Campus Master Plan and expense related to installation and/or continuing maintenance.

4.2 Gifts of Statuary Depicting Living Persons. No gift of statuary depicting a living person shall be accepted by an institution, unless intended for display in a museum or for addition to the collection of works of art for display in a museum. Authority to accept proposed museum gifts of statuary depicting living persons, intended for display indoors, is delegated to the presidents. Proposed gifts of statuary intended for outdoor display require approval under Section 4.1 above.

- Sec. 5 Approval of Conforming Gifts. The Board of Regents delegates to the Chancellor or the president of an institution, following prior review and approval by the appropriate Executive Vice Chancellor and the Vice Chancellor for External Relations, the authority to accept conforming gifts, including pledges, other than gifts of real property, that are not processed or administered by the Office of External Relations, and the authority to take any and all desirable actions relating to the administration and management of gifts accepted by the Chancellor or the president of the institution, as may be permitted by applicable law, policies, these Regents' *Rules and Regulations*, and the [U. T. System Gift Acceptance Procedures](#).
- Sec. 6 Gifts Requiring Approval by Executive Director of Real Estate. The Board of Regents delegates to the Executive Director of Real Estate authority to accept all conforming gifts of real property of any value that are not processed or administered by the Office of External Relations, and the authority to take any and all desirable actions relating to the administration and management of gifts accepted by the Executive Director of Real Estate, as may be permitted by applicable law, policies, the [U. T. System Gift Acceptance Procedures](#), [The University of Texas System Administration Policy UTS161, Environmental Review for Acquisition of Real Property](#), and these Regents' *Rules and Regulations*, including [Rule 60103](#) concerning guidelines for acceptance of gifts of real property. Acceptance of all gifts of real property shall be subject to the Regents' *Rules and Regulations*, [Rule 60103](#) and [The University of Texas System Administration Policy UTS161, Environmental Review for Acquisition of Real Property](#).
- Sec. 7 Gifts Requiring Approval by Vice Chancellor for External Relations. The Board of Regents delegates to the Vice Chancellor for External Relations authority to accept all conforming gifts, including pledges, of any value (either in cash or in kind) that are processed or administered by the Office of External Relations. The Board also delegates to the Vice Chancellor for External Relations authority to take any and all desirable actions relating to the administration and management of gifts accepted by the Office of External Relations, including without limitation the modification or termination of trusts and endowments as may be permitted by applicable law, policies, these *Rules and Regulations*, and the [U. T. System Gift Acceptance Procedures](#).

- 7.1 Gifts Reviewed. The Office of Development and Gift Planning Services, with assistance from the Real Estate Office, the University Lands Office, and the Office of General Counsel as required, shall review all gift assets processed or administered by the Office of External Relations and certain gift assets that the Chancellor or president is authorized to accept. Gift assets requiring review include, but are not limited to, securities, interests in limited partnerships, stock of closely-held corporations, stock of S corporations, stock options, and warrants. The Office of Development and Gift Planning Services shall also review all bequests, interests in trusts, gifts, and other funds to establish endowments and other planned gifts as defined in the [U. T. System Gift Acceptance Procedures](#).
- 7.2 Gifts to Establish Endowments. Endowments will be established with gifts that have been completed for tax purposes or with a combination of such gifts, pledges, and other funds at a minimum funding level of \$10,000.
- Sec. 8 Internal Revenue Service Forms. The Board of Regents delegates to the Chancellor, the Executive Director of Real Estate, the Vice Chancellor for External Relations, and the president of the institution the authority to execute all necessary Internal Revenue Service forms, including without limitation IRS Forms [8283](#) and [8282](#), that relate to gifts accepted by each.
- Sec. 9 Gift Benefiting an Individual. Neither the U. T. System nor any of the institutions will administer a gift for the benefit of any designated individual unless the donor is exempt from federal income taxes as defined by the Commissioner of Internal Revenue.
- Sec. 10 Service by Board as Estate Executor/Administrator. The Board of Regents will not serve as executor or administrator of an estate because of the potential for conflicts of interest and the scope of the required duties.
- Sec. 11 Prohibition to Act as Witness to Will. The employees of the U. T. System or any of the institutions should not knowingly act as witnesses to wills in which the U. T. System or an institution is named as a beneficiary so as not to jeopardize the receipt of the bequest.

Sec. 12 Service by Employee as Executor/Administrator of Estate or Trustee of Trust. Employees of the U. T. System or any of the institutions who agree to serve as trustee of a trust, or executor or administrator of an estate benefiting the U. T. System or any of the institutions are immediately to notify the Office of Development and Gift Planning Services of their appointment. Upon notification, the employee will be furnished with a statement advising of the potential for conflicts of interest and directing that all communications pertaining to the trust or estate between the employee and any office of the U. T. System or the institutions shall be in writing.

3. Definitions

None

4. Relevant Federal and State Statutes

[Internal Revenue Code of 1986, as amended](#)

[Texas Education Code Section 65.36 \(f\) and \(g\)](#) – Donations for Professorships and Scholarships

[Texas Property Code, Chapter 163](#) – Management, Investment, and Expenditure of Institutional Funds

5. Relevant System Policies, Procedures, and Forms

Regents' *Rules and Regulations*, [Rule 60103](#) – Guidelines for Acceptance of Gifts of Real Property

Regents' *Rules and Regulations*, [Rule 60202](#) – Endowed Academic Positions

[The University of Texas System Administration Policy UTS161, Environmental Review for Acquisition of Real Property](#)

[The University of Texas System Administration Policy UTS138, Gift Acceptance Procedures](#)

6. Who Should Know

Administrators
Chief Business Officers
Development Officers

Employees

7. System Administration Office(s) Responsible for Rule

Office of External Relations
Office of General Counsel

8. Dates Approved or Amended

Editorial amendments to Sections 6, 7.1, and 8 made September 1, 2010
November 13, 2008
February 9, 2006
December 10, 2004

9. Contact Information

Questions or comments regarding this Rule should be directed to:

- bor@utsystem.edu

1. Title

External Nonprofit Corporations

2. Rule and Regulation

Sec. 1 Acceptance of Gifts or Bequests. The Board of Regents recognizes that there are legally incorporated nonprofit organizations (most having the word "foundation" in their charter) whose sole purpose is to benefit The University of Texas System, the institutions, or teaching, research, and other activities within those institutions. These organizations are administered by boards of directors independent from the control and supervision of the Board of Regents. Gifts or bequests from any such external organization must be accepted and approved under gift acceptance policies.

3. Definitions

None

4. Relevant Federal and State Statutes

None

5. Relevant System Policies, Procedures, and Forms

None

6. Who Should Know

Administrators
Chief Business Officers
Development Officers

7. System Administration Office(s) Responsible for Rule

Office of External Relations

8. Dates Approved or Amended

December 10, 2004

9. Contact Information

Questions or comments regarding this Rule should be directed to:

- bor@utsystem.edu

1. Title

Use of University Resources

2. Rule and Regulation

Sec. 1 Chancellor's Authorization. Unless authorized by the Chancellor, no officer or employee of The University of Texas System or any of the institutions shall accept remuneration from or serve as an officer, director, employee, or agent of an external nonprofit corporation or an external entity that has as its primary objective the provision of funds or services for the furtherance of the purposes and duties of the U. T. System or any of the institutions. Any employee authorized by the Chancellor to act in such a capacity shall not be involved in the negotiation of the terms or conditions of any agreement relating to the provision of funds, services, or property to the U. T. System or any of the institutions.

Sec. 2 No Service as an Agent. No officer or employee of the U. T. System or any of the institutions shall act as the agent for any corporation, association, organization, partnership, or individual in the negotiation of the terms or conditions of an agreement relating to the provision of funds, services, or property to the U. T. System or any of the institutions by such corporation, association, organization, partnership, or individual.

Sec. 3 Compensation for Resources Used. The use of equipment, facilities, or services of employees of the U. T. System or any of the institutions by an external nonprofit corporation or external entity that has as its primary objective the provision of funds or services for the furtherance of the purposes and duties of the U. T. System shall be permitted only in accordance with a negotiated agreement that provides for the payment of adequate compensation for such equipment, facilities or services.

3. Definitions

None

4. Relevant Federal and State Statutes

Texas Government Code Section [2255.001](#) – Rules (Private Donors or Organizations)

5. Relevant System Policies, Procedures, and Forms

None

6. Who Should Know

Administrators
Chief Business Officers
Development Officers

7. System Administration Office(s) Responsible for Rule

Office of External Relations

8. Dates Approved or Amended

Editorial amendment to Number 4 made December 22, 2011
December 10, 2004

9. Contact Information

Questions or comments regarding this Rule should be directed to:

- bor@utsystem.edu

1. Title

Gift Acceptance Procedures

2. Policy[Table of Contents](#)

Sec. 1 Purpose. Private sector support is critical to The University of Texas System. Contributions from individuals, foundations, corporations, and other entities are vitally important to the fulfillment of the institution's mission and to the provision of high-quality educational opportunities. The purpose of these procedures is to clarify and facilitate the process for making gifts to the U. T. System and its 15 institutions (collectively referred to hereafter as "UT").

Sec. 2 Procedures. As authorized by the Board of Regents' *Rules and Regulations*, [Rule 60101](#) these procedures are designed to outline administrative processes associated with the acceptance, administration, and investment of gifts processed or administered by the Office of Development and Gift Planning Services (ODGPS), as the designee of the Vice Chancellor for External Relations in a prudent and efficient manner, with fundamental fiduciary responsibilities kept firmly in mind. These procedures do not cover gifts given for current purposes, except gifts of securities, gifts of family limited partnerships, bequests, and trust distributions. These procedures are also intended to ensure that staff members are able to function in a timely, effective, and professional manner in the context of institutions that are engaged in energetic and comprehensive fund-raising efforts. When these procedures do not indicate an appropriate course of action or if they are inappropriate in light of all aspects of a specific situation, staff members are directed to consult with the relevant offices as outlined in these procedures to establish an appropriate course of action.

Item 3 provides definitions for terms used throughout the Gift Acceptance Procedures.

The Acceptance of Gifts Conforming to Policy Matrix summarizes the review and acceptance process.

Sec. 3 Responsibility to Donors.

3.1 Donor's Expectations. UT staff should make reasonable efforts to be aware of and sensitive to donors' expectations.

- 3.2 Legal and Professional Advice. UT representatives shall not provide legal and/or tax advice and will advise all prospective donors in writing to seek such advice from their own counsel and professional consultants. Each UT representative should be knowledgeable about gifts and should disclose to the donor advantages and disadvantages that could reasonably be expected to influence the decision of the donor to make a gift to UT. In particular, planned gift items that may have adverse tax implications to the donor or are subject to variability (such as market value and income payments) should be discussed fully.
- 3.3 Donor's Best Interests. UT will not knowingly accept a gift that it believes to be contrary to the donor's best interests.
- 3.4 Appraisals and Valuations. UT will not furnish property appraisals or valuations to donors for tax purposes or any other purpose. UT will not knowingly participate in a transaction in which the value of a gift is inflated above its true fair market value to obtain a tax advantage for a donor.
- 3.5 Written Acknowledgment and Disclosure. In accordance with best stewardship practices and the provisions of the *Internal Revenue Code of 1986*, as amended (the "Code"), and related regulations, UT will provide a timely written statement or acknowledgment of a donor's contribution that includes the institution's name; amount of cash contribution or description (but not value) of non-cash contribution; and a statement that no goods or services were provided by the institution in return for the contribution (if that was the case) or description and good faith estimate of the value of goods or services, if any, the institution provided in return for the contribution.
- 3.6 Tax Filing. In accordance with the provisions of the Code, and related regulations, proper gift records will be kept and required tax returns filed by the Office of External Relations (OER) or its designee, the ODGPS, for all gifts processed and/or administered by the ODGPS, as designee of the Vice Chancellor for External Relations. The Vice Chancellor for External Relations or the Vice Chancellor's designee(s), or, with respect to real property, the Executive Director of Real Estate, shall execute all necessary Internal Revenue Service (IRS) forms that relate to gifts processed or administered by the ODGPS, including IRS Forms 8283 and 8282. Forms 8283 and 8282 will otherwise be executed by the Chancellor of the U. T. System or the appropriate officer at the beneficiary institution.

- 3.7 Confidentiality. UT staff will adhere to strict confidentiality with regard to any information, records, and personal documents pertaining to donors and gifts. All gift records will be released only when authorized by the donor or as required by law. A limited exception to the disclosure of the name of the donor is provided in Section 552.1235 of the *Texas Government Code*.
- 3.8 Anonymity. UT shall respect the wishes of donors wishing to support UT anonymously and will take reasonable steps to safeguard those donors' identities.

Sec. 4 Review and Acceptance of Proposed Gifts.

- 4.1 Authority to Accept Gifts. The authority to accept gifts to UT is vested in the Board of Regents of The University of Texas System (Board) and delegated by the Board as specifically set out in Board of Regents' *Rules and Regulations*, [Rule 60101](#). Except as provided in Rule 60101 or any other Rule in the Regents' Rules and Regulations, or approved institutional policies, no member of the staff of any UT institution has the authority to accept gifts. All gifts must be made payable or placed in the name of the Board, The University of Texas System or a UT institution as applicable. Gifts made payable to a UT employee are not deductible as a charitable contribution and benefit the employee personally, not UT.
- 4.2 Designate a High Level Responsible Receipt Party. The President of each UT institution and the Vice Chancellor for External Relations of the U. T. System must appoint a Designated Receipt Executive. It is anticipated the Designated Receipt Executive will usually be the Chief Development Officer of each institution. The Designated Receipt Executive may designate another staff member to assume day-to-day responsibility for the receipting process. Each institution must develop written receipt procedures. The Designated Receipt Executive shall ensure all gift receipts are handled in accordance with the receipt procedures set out by each institution without exception.
- 4.3 Procedures. The institutions shall submit for consideration gifts to be processed or administered by the ODGPS to the ODGPS as soon as practical, following the procedures outlined below. Prior to acceptance by the ODGPS, the ODGPS must review all gift assets processed or administered by the OER, other than cash or marketable securities. Such review will be done in conjunction with other U. T. System offices and, as appropriate,

with The University of Texas Investment Management Company (UTIMCO) or other financial managers authorized by the Board . Each proposed gift shall be reviewed to determine whether it should be accepted, including consideration of any required cash expenses, liabilities, contingent liabilities, unrelated business income taxes, donor requirements that may result in risk of loss, and other sources of funds available to cover expenses and liabilities. This review process shall determine whether the economic risks are appropriate prior to acceptance of the gift. Examples of assets requiring review include limited partnership interests, stock of closely-held corporations, stock of S Corporations, stock options, warrants, and intellectual property.

- 4.4 Unrelated Business Income Tax. Assets to be processed or administered by the ODGPS that create potential unrelated business income tax liability must be reviewed by the ODGPS and the institution's chief business officer (CBO) in conjunction with UTIMCO for economic implications and by the Office of General Counsel (OGC) for legal implications.
- 4.5 Real Property. Gifts of real property shall comply with the Board of Regents' *Rules and Regulations*, Rule 60103, Guidelines for Acceptance of Gifts of Real Property and the U. T. System *Environmental Review for Acquisitions of Real Property*, UTS161. These and additional documents may be found on the Real Estate Office's (REO's) website at <http://www.utsystem.edu/reo>.
- 4.6 Signatures. Any gift agreement or other gift documentation to be signed by a representative of the Board shall be signed by a properly delegated representative, after review of the gift as provided in these procedures and any applicable institutional policy.
- 4.7 Institutional Policies. The presidents of the institutions must develop and implement *Handbook of Operating Procedures* policies consistent with these procedures for the review and acceptance of gifts for which responsibility for acceptance has been delegated to presidents.
- 4.8 Nonconformance with Procedures. Recommendations regarding the acceptance of gifts or other actions that do not conform to these procedures shall be made through the Vice Chancellor for External Relations to the Board after review by

appropriate offices of the terms of the gifts, the nature of the donated assets, and/or the requested action.

- Sec. 5 Gift Counting Guidelines. UT will comply with Council for the Advancement and Support of Education (“CASE”) gift counting guidelines as published in the *CASE Reporting Standards & Management Guidelines for Educational Fundraising, 4th edition*, and subsequent editions. Before entering into a capital campaign, a UT institution must develop written campaign counting guidelines, which conform to CASE. U. T. System will follow CASE standards as the official guide for campaign counting and for reporting progress to CASE and to the public toward institutional campaign goals. This will allow for parity when measuring performance against institutional peers involved in campaigns.
- Sec. 6 Gift Processing.
- 6.1 Cooperation. Institution business offices and development offices, the Office of Academic Affairs (OAA), the Office of Health Affairs (OHA), the Office of Business Affairs (OBA), the REO, University Lands (UL), the OER, the ODGPS, and the OGC will cooperate as necessary to process proposed gifts promptly.
- 6.2 Valuation. Gifts are valued as of the date transferred to the Board in accordance with the provisions of the Code and applicable regulations. The amount received from the sale of a noncash gift may be more or less than the value of the gift.
- 6.3 Real Property. Gifts of real estate must be reviewed and evaluated by the REO and/or UL as provided in the Board of Regents' *Rules and Regulations*, Rule 60103, Guidelines for Acceptance of Gifts of Real Property.
- 6.4 Securities. Gifts of securities that are donated to an institution must be reviewed and processed by the ODGPS. The Board of Regents' *Rules and Regulations* authorize only certain U. T. System and UTIMCO personnel to purchase, exchange, sell, assign, and transfer securities on behalf of the Board. No other person or entity may execute or instruct others to execute a transaction involving any securities in the name of the Board. When securities are to be given to an institution, the institution shall contact the ODGPS immediately for instructions, even if the gift is for current purpose use at the institution. For current purpose gifts, sale proceeds will be transferred to the institution after receipt and processing by the ODGPS.

Sale of the security will take place as soon as possible after the transfer. The ODGPS will notify the institution of the receipt and sale of securities as early as practicable. Acknowledgment of the gift shall be provided to the donor by the institution that the gift benefits, and will be in compliance with the provisions of the Code and regulations thereunder.

6.5 Gifts of Closely-Held Stock.

- (a) An effort should be made to obtain nonbinding repurchase provisions when the gift involves securities for which the donor or related parties are the primary market.
- (b) To the extent applicable, the following criteria, in addition to those outlined in Section 6.4 above, must be met for the ODGPS to approve or accept gifts of closely-held stock:
 - The ODGPS must assure there is a written gift agreement indicating the donor's intent to make the gift and its purpose.
 - Prior to acceptance, the donor must provide to the ODGPS financial and valuation information on the stock, including appraisals and/or statements of value.
 - Copies of any applicable shareholder agreements and buy-sell agreements must be provided by the donor for review by the ODGPS, the OGC, and UTIMCO, especially those that include any restrictions on the transfer of the stock, i.e., rights of first refusal, formulas for determining stock price.
 - The donor must provide to the ODGPS a written copy of any related offer to purchase the stock, including the purchase price per share.
 - The ownership of the stock must be properly assigned by the donor to the Board.

6.6 Gifts of Interests in Limited Partnerships.

- (a) The ODGPS or the institution's president, as appropriate, may accept gifts of interests in limited partnerships, subject to a thorough analysis of all available information by the ODGPS, with the assistance and advice of the institution's CBO, the OGC, and UTIMCO. At a minimum, the U. T.

System should receive copies of the limited partnership agreement, the proposed assignment of interest, and financial documentation sufficient to describe the assets of the partnership and their valuation.

(b) The ODGPS, the OGC, the CBO, and UTIMCO will analyze a proposed gift of an interest in a limited partnership to confirm that there is a real benefit to be derived by the institution that is commensurate with any potential risks and costs associated with the gift. Among the factors that will be considered are the following:

- The donor's relationship to the institution designated to benefit from the gift, the history of demonstrable charitable intent, and whether the limited partnership is merely a tax accommodation for the donor.
- Administrative obligations to be assumed by the U. T. System, such as monitoring the partnership for unrelated business income tax.
- Guaranteed annual distribution from the partnership interest sufficient to UT to justify the administrative costs or a cumulative payment made in the form of a preferred return before distributions to other partners at the termination of the partnership.
- Whether the partnership agreement provides for a defined distribution/ termination event or date.
- Whether the U. T. System has any obligation to make capital contributions to the partnership.
- Whether the U. T. System would be held liable for debts of the partnership.
- Whether the partnership appears to be adequately capitalized in light of its activities and maintains liability insurance.

(c) All confidentiality requirements must allow release of information as required by the Texas Public Information Act.

(d) The U. T. System should receive a full accounting for the partnership annually, as well as copies of any tax returns

filed or required to be provided to partners pursuant to the *Internal Revenue Code*.

- 6.7 Gifts of Interests in General Partnerships or Joint Ventures. UT will not accept interests in general partnerships or joint ventures due to the State constitutional limitations on incurring State debts and the risk of future liability or debt.
 - 6.8 Gifts of Personal Property (Other than Outdoor Works of Art). Gifts of personal property, other than outdoor works of art, donated to an institution must be reviewed for approval and processed by the ODGPS prior to acceptance only if used to establish or make additions to an endowment or charitable remainder trust. Gifts of outdoor works of art must comply with Board of Regents' *Rules and Regulations*, [Rule 60101](#), Section 4.1.
 - 6.9 In some instances, gifts are made to UT-affiliated external entities for benefit of the U. T. System or a UT institution. Such gifts include charitable gift annuities, those that must be given to a 501(c)(3) organization, or others that the Board, as a state agency, cannot accept or process. Such gifts must be handled exclusively by the external entity, from deposit of the funds to acknowledgment. Any gift agreement, receipt or other gift documentation must be signed by an authorized representative of the external entity. No member of the staff of any UT institution has the authority to accept gifts made to an external entity.
- Sec. 7 Current Purpose Gifts. In general, current purpose or expendable gifts are accepted by the institution president, or his/her designee, or by the Chancellor, or his/her designee, for such gifts made to U. T. System. Exceptions include, but are not limited to, marketable and closely-held securities, partnership interests, and real property. These gifts must be reviewed, evaluated, and processed by the appropriate U. T. System office as set out in Sections 4 and 6. Current purpose gifts of real property are accepted by the Executive Director of Real Estate. Gifts of securities are accepted by the ODGPS via delegated authority from the respective institution president. For further information regarding the acceptance process for current purpose gifts, please contact the ODGPS.
- Sec. 8 Gifts to Establish Permanent Endowments Held and Administered by the Board of Regents. Endowments will be established with gifts that have been completed for tax purposes or with a combination of such gifts, pledges, and other funds at a minimum funding level of \$10,000.

Endowments may be established to fund scholarship programs and other educational activities as well as the endowed academic positions specified in the Board of Regents' *Rules and Regulations*, [Rule 60202](#) concerning endowed academic positions. All endowments must be reviewed and approved by the ODGPS and must meet minimum funding levels as set out in Board of Regents' *Rules and Regulations*, [Rule 60101](#) and [Rule 60202](#). With the approval of the appropriate Executive Vice Chancellor and Vice Chancellor for External Relations, each institution may set minimum funding levels that are higher than those set by the Board. The required minimum funding level will be determined by the total value of gifts from donors and transfers of funds, valued as of the gift date or date of transfer, respectively. Reinvestment of endowment distributions, which would be considered a transfer of funds, may be used to determine the total funding value.

Example: A donor contributes \$20,000 a year for five years to fund a professorship at a total contribution value of \$100,000. At the end of the five-year period, the endowment may have reached a market value of \$250,000 due to capital appreciation. However, the contributed value remains at \$100,000. This endowment cannot be redesignated as a distinguished professorship until the contribution amount reaches \$250,000 from additional gifts or transfers of funds.

Negotiations and fundraising for an endowment are permitted prior to its formal approval and establishment by the Board or its designee(s). However, an endowment will not be announced as having been established prior to its approval by the Board or its designee(s). New endowments shall not be created and existing endowments shall not be increased using accumulated distributions from existing permanent endowments. However, under rare and special circumstances, such distributions may be used to create or add to an endowment with the approval of the Vice Chancellor for External Relations, provided the terms of the new endowment(s) are consistent with the terms of the endowment agreement governing the existing endowment.

8.1 Endowment Agreements.

(a) A written endowment agreement signed by the donor(s) is required for each new permanent endowment established. (See Item 5 for sample endowment agreements.) This instrument must, absent compelling reasons, include the following language:

- donor name(s);
- gift description and/or amount;

- pledge description, amount, and due date;
 - endowment name;
 - college, school, and/or department to benefit;
 - a statement setting out the intended use or purpose for funds distributed from the endowment;
 - a statement that the funds shall never become a part of the Permanent University Fund, the Available University Fund, or the General Fund of the State of Texas;
 - a statement that, in the opinion of the Board, if (a) a restriction contained in the endowment has become impractical or wasteful, or it impairs the management or investment of the fund, or, because of circumstances not anticipated by the donor, a modification of the restriction will further the purposes of the fund or (b) a restriction contained in the endowment on the use of the fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the Board may modify the restriction or purpose of the endowment to further the purposes of the fund in a manner consistent with the original charitable purpose expressed in the endowment;
 - a statement providing that all future additions to the endowment, including those made by the Board or the institution administration, shall be subject to the provisions of the endowment agreement and shall be classified as permanent endowment funds; and
 - other provisions the responsible development officer and the ODGPS determine are necessary or appropriate.
- (b) In cases where an endowment is established pursuant to an institution's solicitation or campaign, the solicitation letter or document sent to prospective donors may be used as the endowment agreement to evidence the donative intent and purposes. If the solicitation materials do not contain the provisions required in bulleted paragraphs above, a separate gift agreement memorandum containing the required provisions and signed by the appropriate institution representative should be provided to the ODGPS by the UT personnel responsible for the solicitation.

- (c) A gift agreement memorandum should also serve as the endowment agreement in situations where funding is from multiple donors with no primary donor or donors. (See Item 5 for a sample endowment agreement entitled “Newly Created Endowment with Multiple Donors.”)
- 8.2 Custody of Assets. The assets donated to fund an endowment may be delivered to the ODGPS for custody and investment by UTIMCO pending acceptance. A request for acceptance should be submitted to the ODGPS by the institution as soon as possible after delivery of the assets. Once an endowment has been officially established, the donated assets must be delivered to the ODGPS as soon as possible for custody and investment by UTIMCO.
- 8.3 Selection Criteria for Scholarship and Fellowship Recipients.
- (a) A donor may specify or require that
- the scholarship or fellowship be for institution-wide use;
 - the recipient be registered in a particular college, school, or department within the institution or the recipient be limited to students studying in a specific academic major or a certain area of study or concentration;
 - the recipient have a specified class standing or have completed a specified number of semester hours of college work;
 - consideration of recipients be conditioned on academic performance;
 - consideration of recipients be based on financial need;
 - a preference be exercised in association with the renewal of the award;
 - recipients be students from a particular geographic area (city, school district, county, or state). The population of UT students from the named geographic area should be large enough to allow for consistent use of the scholarship and to avoid an allegation that the funds were "targeted" to a particular individual or individuals;

- the recipient be a U.S. citizen or legal resident of the United States. Any gift to be designated for U.S. citizens must also include permanent residents as federal courts have ruled that state entities must give equal consideration to U.S. citizens and to individuals admitted to permanent residency; or
 - recipients have received part or all of their preparatory education from a particular geographic area or region outside of the U.S. It is generally illegal to give or deny benefits based on a person's national origin. Therefore, requiring recipients to be from a particular country is not permissible.
- (b) If consistent with the Board of Regents' *Rules and Regulations*, U.S. Department of Education regulations, Office of Civil Rights recommendations, and interpretations of the Texas Higher Education Coordinating Board, the donor may specify certain other selection criteria as a preference for recipient selection, but not as a restriction. UT will make reasonable efforts to honor preferences specified by a donor as provided in this paragraph; however, as provided by applicable law, no person shall be excluded from participation in, denied the benefits of, or be subject to discrimination under, any program or activity sponsored or conducted by the U. T. System or any of its institutions, on the basis of race, color, national origin, religion, sex, age, veteran status, or disability. It is not appropriate to provide scholarships based on a student's position on a political or social issue.
- (c) Endowed scholarship or fellowship awards should be based on the funds distributed from the endowment, rather than a specific amount. The size and number of awards will be determined by the appropriate scholarship committees at the institution or under the scholarship program applicable to the endowment. Scholarship or fellowship amounts may also be referred to in more general terms such as "tuition and required fees" in the endowment agreement.
- (d) The IRS will not recognize a contribution for charitable tax deduction if the donor retains control over the gift funds or how they are used. In accordance with that understanding, the donor may not participate in the final selection of scholarship recipient(s), name a non-UT employee to any

final selection committee, or structure the criteria so narrowly as to limit selection to a small population comprised solely or primarily of individuals related to the donor or that the donor would choose. In rare and special circumstances, such as whereby gift funds are contributed by a foundation, an exception to this provision may be granted by the Vice Chancellor for External Relations.

- 8.4 Endowed Academic Positions. There are six categories of endowed and named academic positions with minimum funding levels as set forth in Board of Regents' *Rules and Regulations*, [Rule 60202](#). With the specific approval of the Board, an endowed academic position may be established without the required minimum funding level only in accordance with agreements recommended by the Chancellor, the appropriate Executive Vice Chancellor, and the Vice Chancellor for External Relations.

No initial appointment will be made to an endowed academic position without prior approval as a Request for Budget Change by the president of an institution after review and approval by the appropriate Executive Vice Chancellor. Subsequent new or continuing appointments to endowed academic positions may be approved as a part of the annual operating budget. As the IRS will not recognize a contribution for charitable tax deduction if the donor retains control over the gift funds or how they are used, a donor may not participate in the final selection of the appointment or name a specific individual as the holder of an endowed academic position. In rare and special circumstances, such as whereby gift funds are contributed by a foundation, an exception to this provision may be granted by the Vice Chancellor for External Relations.

- 8.5 Pledge Policy. Pledges from donors that follow these procedures may be accepted to fund endowments of any level recognized by the Regents' *Rules and Regulations*.

(a) At least 20% of the donor's total required minimum funding amount prior to the acceptance of an endowment must be received prior to the acceptance of an endowment, i.e., before the endowment will be established.

(b) The pledge for payment of the remaining required minimum funding shall not extend beyond five years after the date of execution of the endowment agreement; however, with the approval of the Vice Chancellor for External Relations, the

pledge period may be longer than five years under rare and special circumstances. A pledge for any amount beyond the required minimum funding is not bound to a five-year pledge period. As an example, for an endowed scholarship that is fully funded with a \$25,000 gift, an additional \$75,000 pledge may be extended reasonably longer than five years.

- (c) All funds that otherwise would be distributed from the endowment will be reinvested as a permanent addition to the endowment until the endowment is funded with the then required minimum funding level for the endowment or is dissolved as provided in Section 8.5(e) below, except in the case of endowed academic positions with the approval of the Vice Chancellor for External Relations or the Vice Chancellor's designee.
- (d) Funding levels will not be determined by the amount of net sale proceeds received from a noncash gift or by the current market value of the investment held in an endowment. As an illustration, a donor gives a gift of stock valued at \$10,000 to create a new endowment. The stock is sold for net sales proceeds of \$9,500. The \$10,000 endowment may still be created because the donor contributed a gift valued at \$10,000, although the endowment's value is only \$9,500.
- (e) If the donor is unable to fulfill the pledge by the end of the five-year period, the institution shall notify the ODGPS to determine an appropriate course of action. Typically, the endowment will either be dissolved or redesignated as follows:
 - If there are insufficient funds held in the endowment to reach the minimum funding level required for an endowment, the endowment may be dissolved by the Board or its designee(s) and the president of the beneficiary institution shall have the discretion to designate an existing endowment to which to transfer the funds, or expend the funds for the general purposes of the institution, taking into consideration the original intent.
 - If there are sufficient funds held in the endowment to reach the minimum endowment funding level for an endowment, but insufficient funds to reach the required funding level for the endowment as originally established, the endowment may be redesignated to the highest level of endowment category possible based upon the book

value of funds held and the original intent, with the approval of the Board or its designee(s).

- Sec. 9 Establishment of Quasi-Endowments Held and Administered by the Board of Regents. All quasi-endowments must be reviewed and approved by the ODGPS and must meet minimum funding levels as set out in the Board of Regents' *Rules and Regulations*, [Rule 60101](#) and [Rule 60202](#). The required minimum funding level will be determined by the total value of transfers of funds to the endowment, valued as of the date of transfer. Reinvestment of endowment distributions may be used to determine the total funding value. An endowment will not be announced as having been established prior to its approval by the Board or its designee(s). New endowments shall not be created and existing endowments shall not be increased using accumulated distributions from existing permanent endowments. However, under rare and special circumstances, such distributions may be used to create or add to an endowment with the approval of the Vice Chancellor for External Relations, provided the terms of the new endowment(s) are consistent with the terms of the endowment agreement governing the existing endowment.

A written agreement, signed by the institution's president or the appropriate dean or department head, is required for each new quasi-endowment established. (See Item 5 for a sample endowment agreement entitled "Newly Created Quasi Endowment.") This instrument will, absent compelling reasons, include the following language, as applicable:

- information and provisions described in Section 8.1; and
- amount and source or description of the funding. Funds must be identified as either restricted or unrestricted.

- Sec. 10 Classification of Endowment Funding.

- 10.1 Permanent and Quasi-Endowments. When mixed sources of funds (both gifts given specifically for endowed purposes and current funds) are used to establish an endowment, separate but related permanent and quasi-endowments will be created. (See Item 5 for a sample endowment agreement entitled "Newly Created Quasi/Perm Endowment.") Each endowment account must be funded with at least the minimum endowment funding level of \$10,000, (i.e., there would need to be at least \$20,000 total to establish separate endowment accounts). If the endowment is initially funded with less than \$20,000 from mixed sources (both endowed and current funds), the entire

endowment will be classified as a permanent endowment. When funding permits, a separate but related quasi-endowment shall be created.

- 10.2 Additional Contributions. If only a permanent endowment account is in existence at the time of an additional contribution to an endowment established with mixed sources of funds, the institution will review the source(s) and amounts of funds to be added to determine if a separate, but related quasi-endowment account should be established. Administrative approval of the related quasi-endowment is not needed if there is no redesignation of endowment level or other amendment. Alternatively, if only a quasi-endowment is in existence at the time of an additional contribution, administrative approval of a related permanent endowment is not needed if there is no redesignation of endowment level or other amendment.
- 10.3 Additional Contributions to Separate Accounts. If separate permanent and quasi-endowment accounts exist at the time of an additional contribution, the institution will review the source(s) of funds to determine the correct allocation.
- 10.4 Transfer of Current Funds. When a transfer of current funds is to be combined with a donor's pledge, the ODGPS will consider the total of the donor's pledge, rather than the amounts of payments received, to determine whether separate permanent and quasi-endowment accounts should be established.
- 10.5 Reinvestment of Distributions. Any reinvestment of endowment distributions will be classified in the same manner as the corpus of the endowment.
- 10.6 Permanent Endowment Funds. Notwithstanding any of the above, any additional funds from any source will be classified as permanent endowment funds where the existing permanent endowment is governed by a donor-executed endowment agreement that contains language that "all future additions to the endowment, made by the donor or others, including those made by the Board of Regents or the institution, shall be subject to the provisions of the endowment agreement and shall be classified as permanent endowment funds."

Sec. 11 Investment, Payout, and Reinvestment Policy for Endowments.

- 11.1 UTIMCO. As authorized by law, the Board has contracted with UTIMCO to invest all funds donated to UT that are under the sole control of the Board.
- 11.2 Investment Restrictions. No matching funds or other funds of UT may be held or managed by a party selected by the donor. No endowment shall be accepted in which the donor directs the investment transactions or holdings or may approve investment policy or strategy or on which the donor places any other investment restrictions.
- 11.3 Standard for Investment Decisions. The primary and constant standard for making investment decisions for endowments shall be "that standard of judgment and care that prudent investors, exercising reasonable care, skill, and caution, would acquire or retain in light of the purposes, terms, distribution requirements, and other circumstances of the fund then prevailing taking into consideration the investment of all the assets of the fund rather than a single investment."
- 11.4 Collective Investments. All endowment gifts should be eligible for commingling for investment purposes with other endowment funds. The Board has established the U. T. System Long Term Fund, governed by and invested according to the U. T. System Long Term Fund Investment Policy Statement, to provide for the collective investment of endowment funds. This commingling permits enhancement of long-term investment programs, affords appropriate risk control through diversification, and provides for optimization of asset mix through time.
- 11.5 Long Term Fund. Specific language that allows endowment funds to be invested in the U. T. System Long Term Fund or otherwise pooled for investment purposes should be included in all endowment agreements.
- 11.6 Agreement Terms. An endowment agreement shall not include terms regarding endowment payout that conflict with either the payout policies established by the Board or the payout provisions of the Texas Uniform Prudent Management of Institutional Funds Act, as amended.
- 11.7 Charge of Certain Expenses. To acknowledge the Board's ability to charge certain expenses against the endowment funds

for administration, management, and compliance, the endowment agreement should specify one of the following:

(a) donor(s) acknowledge(s) and agree(s) that in connection with administration and management of the endowment funds, the Board may charge certain expenses against the endowment funds for administration, management, and similar charges; or

(b) the Board may not charge certain expenses against the endowment for administration and management.

11.8 Management of Payout and Reinvestment. To ensure the Board has the ability to manage payout and reinvestment policies, the endowment agreement should specifically allow the following:

(a) funds distributed during a year may be retained by the institution and expended for the purposes of the endowment in subsequent years; and

(b) the reinvestment of some portion of the payout as a permanent addition to the principal of the endowment at the discretion of the Board or institution's administration.

11.9 Endowments Funded with Mineral Interests in Real Property. In accordance with the Texas Trust Code and the Uniform Principal and Income Act (UPIA), a certain percentage of mineral royalty proceeds must be allocated to endowment principal. Because complex and numerous depletion calculations would be required to determine the correct amount to allocate to endowment principal and consistent with requirements for the Permanent University Fund, 100% of mineral royalty proceeds, including bonuses, rentals, and royalties, should be allocated to principal for ease of administration. An institution may request a lesser allocation of principal by submitting a written request to the ODGPS. Such request must be reviewed and approved by the UL in consultation with the ODGPS and the OGC.

Sec. 12 Amendment or Termination of Endowments.

12.1 Authorization for Changes. Once a permanent endowment is created, the terms, purpose, or existence of that endowment may be changed only if authorized by the terms of the endowment agreement, Board policy, or applicable laws.

12.2 Review of Amendments. Any request received or initiated by an institution to amend the terms or purpose of a permanent endowment or to terminate an endowment must be sent to the ODGPS for review and approval with the legal advice of the OGC. The OGC will determine whether the endowment may be modified judicially or nonjudicially pursuant to the Texas Uniform Prudent Management of Institutional Funds Act or *Texas Education Code* Section 65.36(f).

12.3 Requests to amend or terminate a quasi-endowment must be sent to the ODGPS for review and approval. Upon termination of a quasi-endowment, the ODGPS will coordinate the disbursement of the endowment's proceeds with UTIMCO.

Sec. 13 Endowments Held and Administered by External Trustees. UT's interest in any endowment held and administered by an external trustee must be reviewed and approved by the ODGPS.

In addition to provisions set out in Sections 8, 9 and 12 above, to the extent practicable, the Board requires the following for endowments held and administered by external trustees.

13.1 Endowment Agreements. A written endowment agreement signed by the donor(s) is required for each endowment. Endowments held and administered by UT-affiliated external foundations must, absent compelling reasons, include language as set out in Section 8.1 above consistent with Board-held endowments.

13.2 Distributions. A predictable stream of distributions from an endowment held by an external trustee, consistent with the Board's endowment payout policy and not in conflict with the payout provisions of the Texas Uniform Prudent Management of Institutional Funds Act, as amended. The U. T. System prefers that any of its institutions receive such payout on a quarterly basis, but no less often than annually.

13.3 Appreciation. That all appreciation from an endowment held by an external trustee be maintained in the endowment, except that distributed for the purpose(s) of the endowment.

13.4 Annual Reports. That the external trustee provides annual reports to the ODGPS that detail the value of the assets of the endowment and the annual receipts and expenditures.

- 13.5 Accounting Records. That separate accounting records be maintained for each such endowment so that investment performance can be accurately analyzed over time.
- 13.6 Appointments to Endowed Academic Positions. That all appointments to endowed academic positions be selected by the institution.
- 13.7 Acceptance of Interest. That a request for acceptance of UT's interest in the endowment be submitted by the institution to the ODGPS as soon as possible after delivery of the gift to the external trustee or notification by the external trustee that the endowment has been established.

Sec. 14 Planned Gifts.

14.1 Solicitation and Negotiation.

(a) The OER, the ODGPS, and the OGC must review and approve

- an initial or new advertisement or planned giving brochure; and
- an existing advertisement or planned giving brochure that has been materially modified since last approved by the OER, the ODGPS, and the OGC to be mailed or otherwise furnished to potential donors before distribution to donors. Minor modifications to existing planned giving advertisements or brochures require review by the ODGPS prior to distribution to potential donors.

(b) Negotiation, execution, and acceptance of any planned gift shall follow procedures outlined in these procedures. All agreements shall include language previously approved by the OGC unless otherwise approved in accordance with the processes set forth in these procedures.

(c) It is the responsibility of each UT representative to keep detailed written notes to supplement written correspondence to demonstrate ethical practices in negotiations with each donor.

(d) The institution's representative working with a donor who desires to make a planned gift shall contact the ODGPS as

soon as the institution's representative becomes aware of the potential gift.

- (e) Payout rate guidelines for charitable remainder trusts are provided below in Section 14.4(d) for use by all UT staff members authorized to enter into negotiations concerning planned gift agreements to assist them during discussions with donors.
- (f) Donors should be informed that payout rate guidelines may be adjusted if market conditions change significantly before an agreement is finalized.

14.2 Restrictions on Acceptance of Planned Gifts and Donated Assets.

- (a) In accordance with Texas law, the Board cannot accept gift annuities and deferred gift annuities. Inquiries concerning gift annuities and deferred gift annuities will be referred to appropriate external foundations established to benefit the U. T. System or its institutions.
- (b) Consistent with Board policy, the Board may serve as trustee of trusts for which the donor retains the right to change the charitable beneficiary only if: (a) U. T. System or its institution(s) will receive irrevocably at least 50% of the total funding of the trust; and (b) the value of the U. T. System or institution's irrevocable interest equals the minimum requirements established below in Section 14.4(d) for accounts that cannot be pooled for investment purposes.
- (c) Consistent with Board policy, the Board may serve as trustee of trusts that allow for invasions of principal only if: (a) the standards for invasion of principal are objective and nondiscretionary; (b) the U. T. System or institution will receive irrevocably at least 50% of the total funding of the trust; and (c) the value of the U. T. System or institution's irrevocable interest equals the minimum requirements established below in Section 14.4(d) for accounts that cannot be pooled for investment purposes. To avoid conflicts of interest, the Board will not serve as trustee of a trust that allows income beneficiaries to invade the principal of the trust at the discretion of the trustee.
- (d) Consistent with Board policy, the Board may serve as trustee of a charitable remainder trust with multiple

charitable remainder beneficiaries only if: (a) the U. T. System or institution will receive irrevocably at least 50% of the remainder; (b) the value of the U. T. System or institution's interest will be at least the minimum trust gift levels established below in Section 14.4(d); and (c) the other charities agree to provisions deemed appropriate by the OGC.

As an example, a donor may fund a charitable remainder trust with assets that may not be pooled for investment purposes, such as real estate or restricted stock, name the Board as trustee and a 50% irrevocable remainder beneficiary for further benefit of one or more institution(s), and name a non-UT institution(s) as 50% remainder beneficiary(ies). In this instance, the Board would accept trusteeship if the trust terms were acceptable and the trust was funded at a minimum gift level of \$100,000.

- (e) To avoid conflicts of interest and to avoid liability issues, the Board cannot serve as the guardian of a person, or as an executor or administrator of an estate.
- (f) Consistent with the Code and related regulations, the Board will not accept a planned gift that is known to have the potential to create unrelated business income tax liability for a charitable remainder trust.
- (g) In accordance with the provisions of the Code and related regulations, the Board will not accept stock in an S Corporation to fund a charitable trust without the written consent of all other shareholders.

14.3 Management and Investments.

- (a) The ODGPS is not authorized to administer or manage trusts of which the Board is not trustee.
- (b) The U. T. System may request reimbursement from charitable trusts of which the Board is trustee for any third party charges incurred by the trust. Such charges may include, but are not limited to, bank custodial fees, real estate expenses such as appraisals, surveys, environmental assessments, maintenance and repairs, and legal fees. In circumstances where it is deemed inappropriate for the affected trust to bear such expenses, the institution shall

reimburse the trust. If multiple institutions are involved, then such costs shall be shared pro rata.

14.4 Types of Planned Gifts.

(a) Wills and Bequests.

- When an institution is notified of the death of a person who has named the U. T. System or an institution as a beneficiary, the ODGPS must be notified immediately and forwarded copies of all available documentation and correspondence. If the ODGPS is notified of the death of a person who has named the U. T. System or an institution as a beneficiary, the ODGPS shall promptly notify the beneficiary of the bequest. The OER and the ODGPS have exclusive authority to handle matters related to estates benefiting UT, including authority to sign partial or complete releases of liability, and will be responsible for promptly supplying documentation to other U. T. System offices as appropriate.
- The ODGPS will provide instructions to estate executors and administrators regarding the disposition of estate assets bequeathed to UT. All estate distributions will be transmitted as directed by the ODGPS. Any tangible personal property not liquidated by the executor should be shipped directly to the institution. Unless otherwise requested by the institution, the ODGPS will promptly transmit any bequests designated for use as current funds to the institution.
- Any UT employee who agrees to serve as executor or administrator of an estate that benefits the U. T. System or an institution must immediately notify the ODGPS of his or her appointment. Upon notification, the employee will be furnished a statement advising of the potential for conflicts of interest and directing that all communications pertaining to the estate between the employee and any office of the U. T. System or the institution shall be in writing.
- Employees of UT should not knowingly act as witnesses to wills in which the U. T. System or an institution is named as a beneficiary.

- The U. T. System will not draft wills and other documents for donors, but, when appropriate, may provide sample language for the donor's consideration.
- If an individual provides a copy of the individual's will to a UT employee and the will names the U. T. System or an institution as a beneficiary, the institution will promptly send a copy of the will to the ODGPS for review. As necessary, and at the discretion of the ODGPS, the ODGPS will furnish copies to the OGC and the institution development office for further review. Any UT employee to whom an individual's will is furnished must protect the confidentiality of its contents to the extent allowed by law.

(b) Charitable Remainder Trusts Held and Administered by the Board.

- All charitable remainder trusts for which the Board would be the trustee must be reviewed by the ODGPS, UTIMCO, and the OGC. A charitable remainder trust of which the Board is proposed to be trustee should have no more than two income beneficiaries, the youngest of which is at least 55 years of age. A term charitable remainder trust (not to exceed 20 years) may have income beneficiaries of any age and is not limited to two income beneficiaries.
- If the charitable remainder trust (a) has acceptable terms, (b) is funded with cash or marketable securities, and (c) may be pooled for investment purposes, the trust must be initially funded at a minimum gift level of \$50,000.
- If the charitable remainder trust (a) has acceptable terms, and (b) is funded with assets that may not be pooled for investment purposes, the trust must be initially funded at a minimum gift level of \$100,000.
- A unitrust with a net income payout or net income with make-up provision payout should be established for trusts funded with assets other than cash or marketable securities. Other acceptable terms depend upon the standard criteria plus the ability and length of time required to liquidate or manage the asset used to fund the trust.

- The Board will not serve as trustee of charitable remainder trusts funded in whole or in part with real property. However, the Board may serve as successor trustee of such a trust after the real estate is liquidated. UT staff will recommend that the donor or other individual or external entity serve as initial trustee and may provide information to the donor on non-UT institutions in the donor's locale that may serve as trustee.
- The following are the recommended maximum payout rates for charitable remainder trusts for which the Board would be the trustee:

For annuity trusts and straight unitrusts with income beneficiaries:

Ages 55 to 69	5%
Ages 70 to 79	6%
Ages 80 and above	7%

For net income unitrusts with income beneficiaries:

All ages	5%
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For term charitable remainder trusts: 7%

- Exceptions to Section 14.4(b) must be reviewed by the ODGPS and UTIMCO and approved by the Vice Chancellor for External Relations. Exceptions related to trusts containing real estate must first be reviewed and approved by the Executive Director of Real Estate.
- The annuity payout may not be less than 5% nor more than 50% of the initial fair market value of the property placed in the charitable remainder annuity trust. Also, the remainder interest must be at least 10% of the initial fair market value of all property placed in the annuity trust.
- The unitrust payout may not be less than 5% or more than 50% of the fair market value of the assets, valued annually, of the charitable remainder unitrust. Also, the remainder interest of each property contribution to the unitrust must be at least 10% of the net fair market value of such property as of the date of contribution to the trust.

- A request for acceptance must be submitted by the institution to the ODGPS as soon as possible after receipt of the gift.

(c) Charitable Trusts Held and Administered by External Trustees.

- Any UT employee who agrees to serve as trustee of a trust benefiting the U. T. System or an institution must immediately notify the ODGPS of his or her appointment. Upon notification, the employee will be furnished with a statement advising of the potential for conflicts of interests and directing that all communications pertaining to the trust between the employee and any office of the U. T. System or the institutions shall be in writing.
- All charitable remainder trusts for which the Board would be the successor trustee must be reviewed by the ODGPS, UTIMCO, and the OGC. Donors who name the Board as successor trustee of a charitable remainder trust should be advised in writing that the Board will review the terms of the trust, the most recent financial statement, and all tax filings for the trust at the time of succession, and determine then whether or not it will serve as successor trustee.
- The external trustee must provide annual reports to the ODGPS that detail the value of the assets of the trust and the annual receipts and expenditures.
- A request for acceptance must be submitted by the institution to the ODGPS as soon as possible after receipt of the gift. Revocable interests will not be accepted.

(d) Charitable Lead Trusts.

- The Board may be designated as a beneficiary of a charitable lead trust if other criteria of this policy are met, but to avoid conflicts of interest, the Board will not serve as trustee of a charitable lead trust. Upon request, UT personnel may provide information to the donor on non-UT institutions in the donor's locale that may serve as a trustee.

- Consistent with Board policy, a predictable stream of income from a charitable lead trust of which the U. T. System or an institution is named as a beneficiary is preferred.
- (e) Gift Annuities. Since the Board cannot accept gift annuities and deferred gift annuities, these types of gifts may be referred to [The University of Texas Foundation, Inc.](#) for the benefit of UT.
- (f) Gifts of Retirement Plan Assets. The ODGPS or the institution's president, as appropriate, may handle gifts of retirement plan assets naming the Board as beneficiary, including processing remaining assets, and may execute all necessary documents. UT representatives should provide appropriate language for beneficiary designation forms to ensure proper and prompt receipt of assets.
- (g) Life Insurance.
- The ODGPS or the institution's president, as appropriate, may accept gifts of life insurance policies naming the Board as owner and beneficiary and may execute all necessary documents.
 - The beneficiary institution is responsible for preserving the value of a life insurance policy owned by the Board pursuant to institution guidelines. The guidelines should cover situations in which the insurance policy is not paid-up and does not have any source of funds for payment of the premiums identified at the time of the gift or thereafter.
 - U. T. System has chosen not to endorse any formal charitable life insurance programs or products.
- (h) Pooled Income Fund.
- Gifts to the U. T. System Pooled Income Fund may be accepted only if the beneficiaries are age 55 or older and there are no more than two income beneficiaries for each account established in the Fund. The minimum gift needed to enter the Fund is \$10,000 or a contribution of \$5,000 with a pledge that additional contributions will be made to bring the total dollar share in the Fund to \$10,000 within five years.

- All gifts must be made in cash or readily marketable securities.
 - A request for acceptance must be submitted by the institution to the ODGPS as soon as possible after receipt of the gift.
- (i) Gift of a Remainder Interest in Real Property with Retained Life Estate.
- A gift of a remainder interest in a personal residence, vacation property, or farm, with a life estate reserved by the donor, must be reviewed, evaluated, and approved by the REO and the OGC and processed by the REO and the ODGPS prior to acceptance.
 - While the life estate exists, the donor(s) or life tenant(s) will be responsible for all expenses of maintenance, taxes, and insurance. At the time the remainder interest is conveyed to UT, the donor must sign a separate life estate agreement with the Board to clarify responsibility for maintenance, taxes, insurance, and other issues during the term of the life estate. See Item 5 for a sample form of Life Estate Agreement.
 - The REO will coordinate with the benefiting institution to schedule visits with the donor(s) or life tenant(s) at the property. Such visits should take place at least annually.
- (j) Bargain Sale.
- An individual may transfer an asset to the Board for benefit of an institution and receive less than the fair market value in return. Typically, bargain sales involve the transfer of appreciated property.
 - The ODGPS, the OGC, the CBO, and the REO, if applicable, shall analyze a proposed bargain sale to confirm it is in the best interest of the institution.

Sec. 15 Gifts Related to Namings of Facilities and Programs.

Any naming of facilities and programs must follow the Naming Policy as set out in Board of Regents' *Rules and Regulations*, [Rule 80307](#). Facilities and programs may be named to memorialize or otherwise recognize substantial gifts and significant donors or individuals

designated by donors. Each institution shall develop guidelines for what constitutes substantial and significant donations to warrant a gift-related naming, which must be approved by the Executive Vice Chancellor for Academic or Health Affairs, the Vice Chancellor for External Relations, and the Vice Chancellor and General Counsel.

A written gift agreement signed by the donor(s) is required for each gift-related naming. The OER must be furnished with a fully signed copy of the gift agreement for every gift-related prominent naming. The agreement must, absent compelling reasons, include the following language:

- donor name(s) and address;
- gift description and/or amount;
- pledge description, amount, and due date;
- name of the institution receiving the gift and/or pledge;
- a statement setting out the intended use or purpose of the gift;
- the proposed naming of the facility or program;
- a statement anticipating changes of circumstances, such as changes in the donor's gift intentions or changes to the facility or program as determined by the Board, thereby allowing for an alternative recognition or removal of the naming; and
- a termination provision that contemplates the unlikely event of a change in circumstances whereby the public image of the donor conflicts with the purpose or mission of the Board or institution or would disparage, impair, or adversely impact the reputation, image, or integrity of the Board or institution in the event of a continued association with donor and the continuation of the naming.

The OER shall provide sample gift agreements to each institution and will review draft agreements prior to execution by the donor and the institution. In the case of a prominent facility or program corporate naming, the institution shall negotiate an agreement with the corporation using the Standard Corporate Naming Gift/Licensing Agreement prepared by the OGC. Any substantive variations to these gift agreements must be approved by the OER and the OGC. If the donor presents a gift agreement for use, its terms must be reviewed by the OER and the OGC to ensure the agreement contains all essential elements as set out above. See sample forms of Gift Agreement for

Individual Prominent Facility Naming; Corporate Gift Agreement for Naming of Prominent Facility or Program; Corporate Gift Agreement for Naming of a Less Prominent Facility; and Corporate Gift Agreement for Naming of a Less Prominent Program.

The institution shall inform the OER in writing if pledges are not paid on schedule. Upon receipt of such notification, the OER will consult with the institution to determine an appropriate course of action.

Sec. 16 Corporate Gifts Related to Website Sponsorships.

Acknowledgment of a gift by posting a company logo on an institution's website must comply with the terms and conditions of the institution's policy on website solicitations and U. T. System Guidelines for Web Site Solicitations. Board of Regents' *Rules and Regulations*, [Rule 80103](#) provides broad authorization for the placement of hypertext links to other websites from UT web pages, in accordance with U. T. System and institution guidelines that set forth the restrictions necessary to preserve the space so created for its intended purpose of acknowledging sponsorship, generating revenue, or avoiding costs.

A sample Corporate Gift Agreement Website Sponsorship shall be provided to each institution. The Executive Vice Chancellor for Business Affairs must preapprove both Exhibits A and B of the agreement. Any substantive variations to this agreement must be approved by the OER and the OGC. See sample form of Website Sponsorship Gift Agreement.

3. Definitions

Administrative Approval Process - the procedure for accepting gifts to be approved by the Vice Chancellor for External Relations or his/her designee and that conform to U. T. System Board of Regents' policy.

Available University Fund (AUF) - distributions from the Permanent University Fund.

Bargain Sale - when an individual transfers an asset to charity and receives less than the fair market value in return.

Book Value - as pertaining to an endowment, the book value is the original value of all gifts and contributions made to the endowment, as well as reinvestment of earnings and any realized gains or losses resulting from the sale of noncash gifts.

Charitable Lead Trust - a trust in which distributions are paid to one or more qualified charities for a certain period of time, after which the charitable interest terminates and the trust remainder typically reverts to designated non-charitable beneficiaries.

Charitable Remainder Trust - a tax-exempt trust that provides for payment to non-charitable beneficiaries for life (or lives), or a term-of-years not to exceed 20 years, after which the trust remainder goes to one or more qualified charities.

Closely-Held Stock - a corporation the stock of which is held by a few shareholders, often the management or the members of a family. Some closely-held stock is publicly traded. Closely-held stock of a "closed corporation" is not publicly traded.

Completed Gifts - generally, a gift is complete when the donor has parted with dominion and control over the transferred property or property interest, as in the unconditional delivery of the gift to the donee or the donee's agent, leaving the donor without the power to change its disposition, whether for the benefit of the donor or for the benefit of others. A gift that is subject to conditions may not amount to a completed gift at all.

Corporate Naming - the naming of any facility or program after a corporate or other business-oriented entity.

Current Purpose Gifts - non-endowed gifts to be expended for the purposes designated by the donor.

Deferred Gift Annuity - a charitable gift annuity for which payments to the annuitant(s) begin more than one year after property is transferred to the charity. (See Gift Annuity.)

Endowments Held and Administered by External Trustees - funds administered by a trustee other than the U. T. System Board of Regents, from which a UT institution receives distributions, or from which the institution will receive distributions at a specified time. Examples of such trustees are banks, individuals, or other charitable entities.

Facilities - all physical facilities and buildings.

Prominent Facilities - buildings; athletic facilities; other prominent facilities, such as wings of buildings, major components of buildings, large auditoria, concert halls, atriums, prominent outdoor spaces, and clinics.

Less Prominent Facilities - facilities such as laboratories, classrooms, seminar or meeting rooms, and patient rooms that the Vice Chancellor for External Relations, in consultation with the Executive Vice Chancellor for

Academic or Health Affairs, determines are less prominent and therefore not within the category of Prominent Facilities.

Gift Annuity - a charitable giving device by which a donor transfers money or other property to a qualified charity in exchange for guaranteed lifetime payments, the present value of which is less than the amount transferred.

Gift Value - the value of a gift at the time it is made. Gifts are valued in accordance with the provisions of the *Internal Revenue Code* and regulations thereunder.

Individual Naming - the naming of any facility or program after an individual or noncorporate entity.

Intellectual Property - creations of the mind: inventions, literary and artistic works, symbols, names, images, and designs used in commerce. Intellectual property includes inventions, patents, trademarks, and copyrights. ([More on intellectual property.](#))

Limited Partnerships - a limited partnership is an entity in which one or more persons, with unlimited liability (called General Partners) manage the partnership, while one or more other persons only contribute capital; these latter partners (called Limited Partners) have no right to participate in the management and operation of the business and assume no liability beyond the capital contributed.

Market Value - the price that an asset would bring in a market of willing buyers and willing sellers, in the ordinary course of trade.

Mineral Interest in Real Property - rights to gas, oil, and other minerals, whether joined to or severed from the surface estate.

Permanent or True Endowment - a fund created with gifts received from a donor with the restriction that the principal is not expendable. The gifts are invested in perpetuity and only the distributions are expended for the purposes designated by the donor.

Permanent University Fund (PUF) - a State endowment fund that was established by the Texas Constitution of 1876, and that supports 18 institutions and six agencies of The University of Texas System and The Texas A&M University System. The PUF consists of 2.1 million acres in West Texas and the portfolio of assets resulting from the investment of mineral royalties generated by the land. Fiduciary responsibility for managing and investing the PUF is constitutionally assigned to the UT Board of Regents. ([More on PUF.](#))

Programs - all nonphysical entities.

Prominent Programs - major entities, such as colleges, schools, academic departments, and prominent academic centers, programs, and institutes.

Less Prominent Programs - academic centers, programs, and institutes that the Vice Chancellor for External Relations, in consultation with the Executive Vice Chancellor for Academic or Health Affairs, determines are less prominent and therefore not within the category of Prominent Programs.

Prominent Naming - the naming of prominent facilities or prominent programs.

Quasi-endowment - institution funds functioning as an endowed fund that may be dissolved and returned to the institution with the approval of the U. T. System Board of Regents.

S Corporation - a form of corporation, allowed by the Internal Revenue Service for most companies with 100 or fewer shareholders, none of which can be partnerships, corporations, or nonresident aliens that enables the company to enjoy the benefits of incorporation but be taxed as if it were a partnership. Formerly known as Subchapter S Corporation.

Surface Interest in Real Property - any interest in the surface of real property and improvements, and all other property interests that do not constitute the mineral estate.

Term Endowment - funds for which the donor has stipulated that the principal may be expended after a stated period or on the occurrence of a certain event.

The University of Texas Foundation, Inc. (UT Foundation) - a nonprofit corporation established in 1967 to accept and manage gifts in support of UT. The U. T. System and its institutions are the beneficiaries of the UT Foundation, but the Foundation functions independently under its own Board of Directors and pursues its own investment policies in the management of its portfolios. ([More on UT Foundation.](#))

The University of Texas Investment Management Company (UTIMCO) - an investment management corporation created in March of 1996 solely for the purpose of managing the investment of assets under the fiduciary care of the U. T. System Board of Regents. The Board controls UTIMCO and appoints all nine members of the UTIMCO Board. ([More on UTIMCO.](#))

The University of Texas System Board of Regents - the governing body for The University of Texas System. It is composed of nine members who are appointed by the Governor and confirmed by the Senate. Terms are of six years each and staggered, with the terms of three members expiring on February 1 of odd-numbered years. ([More on the Board of Regents.](#))

The University of Texas System Long Term Fund (LTF) - an internal U. T. System pooled investment fund of privately raised endowments and other long-term funds of the 15 institutions of the U. T. System. ([More on the Long Term Fund.](#))

The University of Texas System Pooled Income Fund (PIF) - a trust maintained by the U. T. System in accordance with federal tax laws in order to obtain favorable tax treatment for donors to the Fund. It is designed to receive gifts of cash and readily marketable securities, paying the income from pooled gifts to persons designated by the donors during their lives. At the death of the life beneficiary, a proportionate part of the principal of the trust is severed and distributed to the U. T. System or institution as designated by the donor.

Website Solicitations: Sponsorship Acknowledgments - a logo or identifier with a hypertext link to a person's or entity's website, placed on a UT web page to acknowledge the person's or entity's donation of services or products or financial or research support to U. T. System or to an institution or a college, school, department, unit, center, institute, or program of such institution.

4. Relevant Federal and State Statutes

[Internal Revenue Code of 1986, as amended](#)

[Texas Education Code Section 65.36\(f\)](#)

[Texas Government Code, Chapter 552, Texas Public Information Act](#)

[Texas Property Code, Chapter 163](#)

5. Relevant System Policies, Procedures, and Forms

[Regents' Rules and Regulations, Rule 60101](#)

[Regents' Rules and Regulations, Rule 60103](#)

[Regents' Rules and Regulations, Rule 60202](#)

[Regents' Rules and Regulations, Rule 70301](#)

[Regents' Rules and Regulations, Rule 80103](#)

[Regents' Rules and Regulations, Rule 80307](#)

[UTS122, Guidelines for Web Site Solicitations](#)

[UTS161, Environmental Review for Acquisition of Real Property](#)

Sample Endowment Agreements:

[Gift Only](#)

[Gift and Pledge Above Minimum Funding](#)

[Gift and Pledge Below Minimum Funding](#)

[Newly Created Endowment with Multiple Donors](#)

[Newly Created Quasi Endowment](#)

[Newly Created Quasi/Perm Endowment](#)

Other Sample Agreements:

[Life Estate Agreement](#)

[Standard Corporate Naming Gift/License Agreement](#)

[Corporate Gift Agreement for Naming of a Less Prominent Facility](#)

[Corporate Gift Agreement for Naming of a Less Prominent Program](#)

[Gift Agreement for Individual Prominent Facility Naming](#)

[Website Sponsorship Gift Agreement](#)

[Acceptance of Gifts Conforming to Policy Matrix](#)

6. System Administration Office(s) Responsible for Policy

Office of External Relations

7. Dates Approved or Amended

March 21, 2005

April 1, 2009

October 6, 2011

October 4, 2012, as approved by Randa S. Safady, Vice Chancellor for External Relations

May 8, 2013, as approved by Randa S. Safady, Vice Chancellor for External Relations

8. Contact Information

Questions or comments about this policy should be directed to:

- bor@utsystem.edu

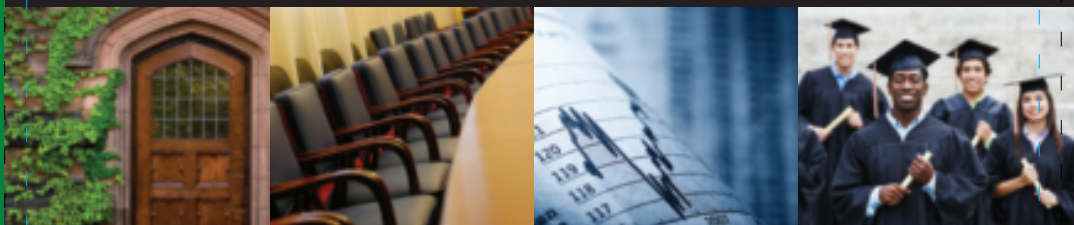
APPENDIX G

Sec. 22.353. AVAILABILITY OF FINANCIAL INFORMATION FOR PUBLIC INSPECTION. (a) A corporation shall keep records, books, and annual reports of the corporation's financial activity at the corporation's registered or principal office in this state for at least three years after the close of the fiscal year.

(b) The corporation shall make the records, books, and reports available to the public for inspection and copying at the corporation's registered or principal office during regular business hours. The corporation may charge a reasonable fee for preparing a copy of a record or report.

Acts 2003, 78th Leg., ch. 182, Sec. 1, eff. Jan. 1, 2006.

<http://www.statutes.legis.state.tx.us/Docs/BO/htm/BO.22.htm#22.353>



Effective Foundation Boards

A GUIDE FOR MEMBERS
OF INSTITUTIONALLY RELATED
FOUNDATION BOARDS

AGB ASSOCIATION OF
GOVERNING BOARDS
OF UNIVERSITIES AND COLLEGES

SECTION THREE

Characteristics of Effective Foundation-Institution Partnerships

At their best, foundation-institution relationships are marked by trust, candor, and collaboration. This special collaborative relationship allows the host institution to focus on its core educational purpose and still have access to expanded capacity and flexibility through an affiliated foundation. It allows the foundation to support the institution by concentrating on other functions, such as asset management, fundraising, and entrepreneurial ventures. The foundation chief executive, institution president, foundation board, and institution or system governing board all play roles in defining, maintaining, and strengthening this relationship. While the formal structure is often defined by working agreements and tradition, effective foundation-institution partnerships are defined by the following five characteristics:

1. Clarity and consensus about the role of the foundation

In effective foundation-institution partnerships, administrators, staff, and board members of the foundation and of the institution share a clear understanding about the specific functions of the foundation. Institution and/or system boards have ultimate responsibility for determining the role of the foundation and the structure of the foundation-institution relationship. Foundation boards, however, should be actively engaged in the ongoing process of determining how the foundation can best support the institution and how the partnership should be designed.

A memorandum of understanding (MOU) or operating agreement serves as a contract between the institution and the foundation, memorializing agreed-upon roles and responsibilities. More importantly, the collaborative process of developing the agreement and periodically updating it ensures that the foundation's efforts are accurately aligned with institutional needs and provides boards and administrators an opportunity to consider how the foundation could better serve the institution. Orientations of institution and foundation boards should educate all volunteer leaders about the foundation-institution partnership and the respective roles of each board.

2. Integrated planning and alignment of strategic priorities

Institution and system boards appropriately focus on different issues and work with different time horizons than do their foundation counterparts. For example, while the institution board might be struggling to address mid-year cuts in state funding, the foundation board might be concerned about the sustainability of endowment spending. Thoughtful, collaborative planning can help resolve sometimes-competing claims in ways that benefit the institution, its students, and the larger community over time. While institution administrators might see rapid endowment growth as a green light for spending, moderation of endowment payouts during flush times can offset future market shocks. Similarly, sustained investment in planned giving and major gift programs may require current sacrifices but yield significant future returns in the form of endowed faculty positions and financial-aid resources.

Planning processes for the institution and the foundation need to be coordinated and integrated. Including foundation board members in the institution's strategic-planning process gives them a deeper understanding of institutional priorities and generates stronger support for fundraising priorities. It not only allows the institution to tap into the foundation board members' professional expertise and experience, but it also helps to ensure that institutional plans leverage foundation resources. In turn, the foundation's annual and long-term plans should identify specific objectives tied to institutional priorities, and appropriate institution administrators should be included in foundation-planning processes.

3. Trust, candor, and regular communication

Effective foundation-institution partnerships are based on candor and trust, which are supported by frequent formal and informal communication. While institution presidents report to the campus or system governing board, they also spend a significant portion of their time working on fundraising plans in conjunction with foundation leaders. Foundation chief executives often report to both the institution president and foundation board. Disagreements about the use of foundation resources, funding priorities, and institutional politics are inevitable. When leaders—professional and board, institution and foundation—can frankly share their questions and concerns as issues arise, they can often resolve them before they become divisive. Institution and foundation leaders need to abide by a “no surprises” rule because surprises corrode trust and undermine the ability to work through differences productively.

Regular reciprocal reporting between institution and foundation boards provides a baseline of shared information. Informal meetings among board chairs and chief executives provide opportunities to privately explore issues and ideas outside the sometimes politically charged context of open governing board meetings. Overlapping memberships between the governing and foundation boards, occasional joint meetings, and social events not only provide formal conduits for communication but also foster stronger social connections and greater trust.

4. Formal and transparent business processes

The host institution and the foundation need to maintain formal processes and procedures, especially related to their interaction, to protect the integrity of both organizations. A close working relationship between organizations (institutions and foundations) and individuals (professionals and board leaders) is needed on a day-to-day basis. At times, however, collegiality can lead to informal business practices that pose risks for the institution and the foundation and can create liabilities for chief executives and board members. Public colleges, universities, and systems are subject to complex but different regulatory regimes than private nonprofit organizations. State entities may be prohibited from undertaking actions that are appropriate for a publicly supported charity.

To prevent misunderstandings—not just between the institution and the foundation but also from the public perspective—agreements and transactions between the two organizations should be documented and freely disclosed. Full transparency of their interactions can help dispel any impression that the foundation serves as a means of concealing expenditures made on behalf of the institution from public scrutiny. In addition, outlining the respective authority of the foundation and institution boards, as well as documenting decisions (and decision-making processes) can help shield institution and foundation chief executives from political pressures and public reprisals.

5. Flexibility

Foundations support their host institutions in a wide variety of ways, and a given foundation's functions evolve as institutional needs and circumstances change. Effective foundation-institution partnerships depend on clearly defined roles and shared strategic objectives, but they also allow for flexibility. Strategic decisions concerning institutional operations, campaign plans, unexpected opportunities, leadership transitions, and changes in public policy or funding may require foundations to assume new or different functions on a temporary or permanent basis. The creation of a state matching-funds program might prompt a foundation to defer capital projects in favor of a special-purpose campaign designed to take advantage of the new incentive, or an unexpected gift of commercial property might lead to the creation of a real estate subsidiary.

While such flexibility is an important ingredient in the foundation-institution partnership, it needs to be carefully managed and monitored. A foray into real estate development could distract the foundation board and professional staff from fundamental governance responsibilities or sound campaign planning that, over time, could undermine fundraising efforts. Thoughtfully undertaken, such projects can build the long-term capacity of a foundation and increase the volume and variety of support it provides to the host institution.

Effective Foundation Boards: A Guide for Members of Institutionally Related Foundation Boards is available through AGB's Web site at <http://agb.org/publications/institutionally-related-foundations>.

Other AGB publications and resources for college and university foundations include:

- *Foundations for the Future: The Fundraising Role of Foundation Boards at Public Colleges and Universities* by Michael Worth
- *Margin of Excellence: The New Work of Higher Education Foundations* by Rick Legon
- AGB's Foundation Leadership Forum, taking place January 26-28, 2014 in Los Angeles, California
- Regional workshops and Webinars
- Foundation consulting service

For information or assistance please contact David Bass, Director of Foundation Programs and Research, at DavidB@AGB.org or (202) 776-0850.

APPENDIX I



The Attorney General of Texas

October 5, 1981

MARK WHITE
Attorney General

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McAllen, TX. 78501
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205
512/225-4191

An Equal Opportunity/
Affirmative Action Employer

Mr. E. D. Walker, Chancellor
The University of Texas System
601 Colorado Street
Austin, Texas 78701

Opinion No. MW-373

Re: Agreement between the
University of Texas Law
School Foundation and the
University of Texas
School of Law

Dear Mr. Walker:

You inquire about the relationship between the University of Texas and the University of Texas Law School Foundation. The University of Texas Law School Foundation is a nonprofit corporation with the purpose of supporting the educational undertaking of the School of Law of the University of Texas. It solicits donations and expends funds to benefit the law school, acting as conduit and coordinator of gifts made by other parties. You state that the foundation and school of law wish to formalize their relationship through a Memorandum of Understanding which you have submitted to us. The memorandum states the foundation's intent to continue to make donations to the university, describes the purposes to be served by these donations, and states certain conditions under which the university will accept them.

You ask whether the university's compliance with its representations under the Memorandum of Understanding would constitute a gift or grant of public money to a corporation in violation of article III, section 51 of the constitution, which provides in pertinent part:

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever.

The Memorandum of Understanding raises this constitutional question because, in addition to providing for donations flowing from the foundation to the law school, it also states that the law school will provide, for example, office space, utilities, and some staff assistance to the foundation.

We must first, however, determine whether the university has statutory authority to accept the terms of the five sections of the memorandum. Section 65.31 of the Education Code states some relevant powers of the University of Texas Regents.

(a) The board is authorized and directed to govern, operate, support, and maintain each of the component institutions that are now or may hereafter be included in a part of The University of Texas System.

....

(c) The board has authority to promulgate and enforce such other rules and regulations for the operation, control, and management of the university system and the component institutions thereof as the board may deem either necessary or desirable....

(e) The board is specifically authorized, upon terms and conditions acceptable to it, to accept and administer gifts, grants, or donations of any kind, from any source, for use by the system or any of the component institutions of the system.

Section 65.31(e) of the Education Code gives the regents considerable discretion to accept donations "of any kind" with conditions attached by the donor. We believe this broad language authorizes the regents to accept gifts of money, other intangibles, real and personal property, and services. See Letter Opinion R-1009 (To Honorable Frank Smith, Jan. 27, 1948). The conditions attached to the grant must be acceptable to the regents.

The board has considerable latitude in exercising powers delegated to it by the legislature, subject to review for abuse of discretion. Foley v. Benedict, 55 S.W.2d 805 (Tex. 1932); Letter Advisory No. 6 (1973). However, the board is charged with the governing of the university system, see Education Code Section 65.11, and the exercise of its specific powers must be in furtherance of this duty. A "university system" is the association of agencies of higher education under a single governing board. Educ. Code §61.00319. The broad powers granted the regents by section 65.31(a), (c), and (e), i.e., to support and maintain, to promulgate rules and regulations, and to accept gifts, are to be exercised on behalf of the component institutions of the system. The University of Texas at Austin is an "institution of higher education within The University of Texas System." Educ. Code §67.02. Thus the board of regents must exercise its powers of governance for the purpose of higher education as carried out by the component institutions. Grants accepted for the university at Austin must reasonably relate to its purposes as an

educational institution. See Attorney General Opinions M-391 (1969); WW-334 (1958); WW-5 (1957).

The Memorandum of Understanding contains a number of statements as to the foundation's goal of serving the educational purposes of the law school and the kind of assistance it has rendered in the past and proposes to render in the future. These statements are found in sections one through three:

1. The Foundation has engaged in development activities for The University of Texas School of Law (The Law School), has assisted in maintaining alumni relations on behalf of The Law School, has participated in the Continuing Legal Education (CLE) program of The Law School, has provided various and substantial support for the development of The Law School, its faculty and staff, and has furnished important administrative and other services to The Law School and The University. The continuation of these activities is essential to the maintenance of a law school of the first class. The University and The Foundation deem it appropriate to, and do hereby, memorialize the nature of the relationship between The Foundation and The University and The Law School, ratify and approve these past activities by The Foundation, and agree mutually for the future regarding the respective roles, rights, and obligations of The University and The Foundation in this relationship.

2. The Foundation is a nonprofit educational corporation chartered in 1952 for the purposes of supporting the educational undertaking of The Law School by furthering legal education, legal research, financial assistance to deserving students, and the progress of law, and of soliciting donations for particular objectives to accomplish such purpose, and of cooperating with the advancement of the general welfare of The University as a whole. The Statement of Development Policy by the Board of Trustees of The Foundation includes the activities of securing, holding in trust, and administering funds for the benefit of The School of Law of The University of Texas at Austin.

3. The Foundation agrees that, during the term of this Memorandum of Understanding, The Foundation: (1) will continue to invest and administer the funds presently on hand for the benefit of The Law School; (2) will continue to

conduct a development program for the benefit of The Law School and The University to insure procurement and retention of outstanding law faculty members, to enrich the educational environment of The Law School, and by other reasonable means to enhance the prestige of, and to advance, The Law School, and will utilize its expertise, resources, and personnel for such purposes; (3) will use reasonable efforts to finance and conduct, or work with law school alumni groups interested in financing and conducting, programs and publications designed to maintain good alumni relations on behalf of The Law School; (4) will use on behalf of The Law School, or will lease, loan, or give to The Law School from time to time, to the extent that it is feasible to do so, equipment needed by The Law School or helpful to its operations; (5) will continue to render other assistance to The Law School of the general nature of the assistance that it has rendered in the past, and to render other assistance to The Law School in the future as may mutually appear desirable; and (6) will continue to recognize The School of Law of The University of Texas at Austin as the sole beneficiary of its development policy and its educational support.

These provisions restate and elaborate on the foundation's purpose, as expressed in its charter, which is to support legal education by soliciting and expending donations for that purpose. They express numerous specific purposes directed at serving the law school's educational enterprise: the provision of administrative services, financial aid for students, and funds and services directed at faculty recruitment. In addition, it has participated in the law school Continuing Legal Education program and has worked with alumni groups. With the possible exception of the latter endeavor, these activities are closely related to the educational function of the university. See Attorney General Opinions M-391 (1969)(provision of financial aid to students); WW-334 (1958)(Texas Tech television channel may accept commercial programs provided directors find reasonable relationship to statutory purposes of college); WW-5 (1957)(Texas Tech may engage in educational television broadcasting); V-1476 (1952)(salary of university comptroller may be supplemented with donated funds); O-4167 (1941)(University may spend funds for purpose of soliciting gifts from potential donors). Cf. Attorney General Opinion M-223 (1968)(hospital district may spend public funds to pay travel costs of employees who recruit prospective employers). The legislature has in fact recognized that universities may cooperate with alumni associations. See V.T.C.S. art. 1396-2.23A(E)(8). It has, however, prohibited the use of appropriated funds for the support and maintenance of alumni organizations or activities. General

Appropriations Act, Acts 1979, 66th Leg., ch. 843, art. IV, §17, at 2859. Thus, if the regents of the university believe that the support of alumni organizations will benefit the educational purposes of the school, they will have to locate a permissible funding source. The foundation can provide precisely that.

Section four of the memorandum states in part the terms and conditions on which the university is willing to accept donations from the foundation:

4. The University agrees that, during the term of this Memorandum of Understanding, The University: (1) will provide reasonable space in or near The Law School building, as approved by The University President and The Law School Dean, to The Foundation for the purpose of carrying out its obligations hereunder and for its general operations on behalf of The Law School; (2) will provide the utilities and telephone service reasonably needed by The Foundation in carrying out its activities under this Memorandum of Understanding; and (3) will permit reasonable use of University equipment and personnel as needed to coordinate the activities of The Foundation with the educational operations of The Law School, and hereby expressly recognizes that the Dean, Associate Deans, and members of The Law School faculty may reasonably assist from time to time in development programs as may be needed or helpful in coordinating those Foundation activities with the operations of The Law School.

In our opinion, the university has statutory authority to provide the foundation with the items enumerated in section 4 as "terms and conditions" attached to donations. See Educ. Code §65.31(e). University property is state property, see Walsh v. University of Texas, 169 S.W.2d 993 (Tex. Civ. App. - El Paso 1942, writ ref'd), but the regents have power to determine the use of campus buildings. Splawn v. Woodard, 287 S.W. 677 (Tex. Civ. App. - Austin 1926, no writ). Compare V.T.C.S. art. 601b, §4.01 (Purchasing and General Services Commission's control of public building does not extend to higher education buildings).

Counties have been permitted to provide a private entity with space in a public building where convenient or necessary to carry out a county purpose. See Sullivan v. Andrews County, 517 S.W. 2d 410 (Tex. Civ. App. - El Paso 1974, writ ref'd n.r.e.) (county leased clinic to physicians); Dodson v. Marshall, 118 S.W. 2d 621 (Tex. Civ. App. - Waco 1938, writ dism'd) (space in courthouse leased to individual for concession stand); Attorney General Opinions MW-200 (1980) (county provided rent free space in courthouse to employees credit union); H-912 (1976) (contract with physician to practice in

county medical clinic). Counties have only those powers expressly or impliedly granted by the constitution and statutes. Canales v. Laughlin, 214 S.W.2d 451 (Tex. 1948); Anderson v. Wood, 152 S.W. 2d 1084 (Tex. 1941). The regents of the University of Texas have far broader powers to operate and manage component institutions within the system pursuant to regulations they deem necessary and desirable. Educ. Code §65.31(c). In our opinion, the board of regents has statutory authority over the provision of space to private entities at least as great as, and in all probability greater than, that of the commissioners court. The provision of utilities may be regarded as incidental to the provision of space in the law school in view of the difficulty of the foundation making separate provision for them.

Section 65.31(e) of the Education Code permits the university to "accept and administer" grants. This language implicitly acknowledges that the university will have to devote some of its resources to administering grants it accepts, in particular the services of personnel. The regents have statutory authority to decide whether or not to accept a grant which involves particular administrative costs for the university.

There is little or no precedent for a governmental body providing telephone services and the use of equipment to a private entity which uses space provided by the governmental body. See Attorney General Opinion MW-200 (1980)(county may provide media free space in courthouse, but may not provide free telephone service). However, we believe the regents may regard the provision of this assistance as incidental to the provision of office space in the law school to the foundation. The foundation exists to serve the educational purposes of the law school by making various types of donations. The joint purposes of the law school and foundation may possibly be accomplished in a more cost effective way if the board of regents provides the foundation with a telephone and some equipment, rather than requiring it to use foundation resources to pay its telephone bills and buy its own copy machine. We conclude that the board of regents has authority under section 65.31 of the Education Code which permits the law school to provide to the foundation in reasonable amount the resources enumerated in section four of the memorandum.

Section five of the agreement states as follows:

5. It is expressly mutually agreed that:
(1) staff personnel working for or serving The Foundation may be paid as University employees, but the salaries and The University's portion of retirement benefits for such personnel will be reimbursed to The University by The Foundation, and other usual benefits for such personnel will be provided by The University; however, all such personnel are subject to all of the rules, regulations, and personnel policies of The University; (2) funds raised by the development

activities of The Foundation may be subject to a reasonable management or operations charge or fee by The Foundation, but all such charges or fees in regard to endowed funds shall come from income and not from corpus; all funds, whether endowed, restricted, or unrestricted, raised by the development activities of The Foundation shall be held, invested, managed, and disbursed by The Foundation for the sole benefit of The Law School, subject to any restrictions placed thereon by particular donors.

We understand section five, subsection (1) to provide that foundation employees are permitted to be on the university payroll and to be eligible for retirement and other benefits provided by the university to its own employees. The statutes and appropriations act forbid this arrangement. The appropriations act provides funds for departmental operating expense and staff benefits. Acts 1979, 66th Leg., ch. 843, art. IV, at 2787. See V.T.C.S. art. 6813~~8~~. In our opinion, these funds are appropriated for university employees, and may not be specifically allocated for salaries or fringe benefits for the employees of a private corporation which is under contract with the university. See Acts 1979, 66 Leg., ch. 843, art. V, §1(p), at 2895. Nothing in the university's budget request to the sixty-sixth legislature indicates that any of the law school's departmental operating expense was to be allocated to foundation employees. State of Texas Request for Legislative Appropriations, Fiscal Years Ending August 31, 1980 and 1981, the University of Texas of Austin, at 74, 87.

Where authorized by law, state agencies may employ an independent contractor, but he does not occupy an office or position under the state nor is he an agent of the state. Attorney General Opinion V-345 (1947). See also Attorney General Opinion H-1304 (1978). In addition, the appropriations act may authorize an expenditure for a consultant. Attorney General Opinion S-13 (1953). However, where the appropriations act indicates that work is to be done by employees under the direct control of the agency, it may not expend its appropriation to contract for the performance of those services by an independent contractor. Attorney General Opinion S-80 (1953). In our opinion, employees of the Texas Law School Foundation are not entitled to be paid by the university. Nor are they entitled to receive vacation and sick leave benefits which the appropriations act provides state employees. Acts 1979, 66th Leg., ch. 843, art. V, §7(a),(b),(c), at 2901.

Employees of the Law School Foundation may not become members in the Teacher Retirement System. Section 3.03(b) of the Education Code provides as follows:

Every employee in any public school or other branch or unit of the public school system of this

State is a member of the retirement system as a condition of his employment.

"Employee" is defined in part as "any person employed to render service on a full-time, regular salary basis ... by the board of regents of any college or university." Educ. Code §3.02(a)(3). In Attorney General Opinion 0-3399 (1941), it was determined that public school teachers who were employed and paid by the federal government and whose services were controlled by a federal agency could not participate in the teacher retirement system. These persons were not teachers as that term is defined in the retirement statute because they were not employed by any state educational agency but were employed directly and exclusively by the federal government. See also Attorney General Opinion 0-3409 (1941). Since employees of the Law School Foundation are not university employees, they are not eligible for retirement benefits under the teacher's retirement system.

Nor are employees of the foundation entitled to participate in the group insurance plan which the university provides its employees. Article 3.50-3 of the Insurance Code, the Texas State College and University Employees Uniform Insurance Benefits Act, provides group coverage for all employees of Texas state colleges and universities. "Employee" is defined as any person employed by a governing board of a state university, senior or community/junior college, or any other agency of higher education. Ins. Code art. 3.50-3, §3(a)(4)(A). Employees of the Texas Law School Foundation do not fit this definition and consequently are not eligible for insurance benefits under article 3.50-3 of the Insurance Code. See also V.T.C.S. art. 5221b-6(b)(2)(unemployment compensation for state employees); art. 6252-19 (Tort Claims Act makes state liable for torts of persons in paid service of state); art. 8309g (workmen's compensation for state employees).

Having examined the memorandum from the perspective of the university's statutory authority to agree to it, we turn to your question: whether the university would violate article III, section 51 by complying with its representations under the memorandum. Article III, section 51 of the constitution provides in pertinent part:

The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever

This provision prevents the legislature from giving away public funds or enacting a statute which authorizes a state agency or political subdivision to do so. See Texas Pharmaceutical Ass'n v. Dooley, 90 S.W. 2d 328 (Tex. Civ. App. - Austin 1936, no writ). Thus, the legislature may not authorize the University of Texas to grant public funds to an individual or corporation.

Although article III, section 51 on its face prohibits only grants of money, it has been liberally construed to prohibit the grant of state property and contract rights as well as money. Rhoads Drilling Co. v. Allred, 70 S.W. 2d 576, 582 (Tex. 1934)(dicta); Attorney General Opinions WW-790 (1960); WW-153 (1957).

We note that provisions one through three of the memorandum do not raise the constitutional issue which concerns you. These provisions describe the foundation's donative purposes, and do not refer to benefits flowing from the university to the foundation. Section five does not raise the article III, section 51 issue, because various statutes prevent the university from providing foundation employees with the described benefits.

Section four of the memorandum does, however, raise the constitutional issue. It states that the university will provide the foundation with office space, telephone service, utilities, assistance from university staff and the use of university equipment. We have determined that the regents have statutory authority to provide this assistance to the foundation; we must next consider whether statutes granting such authority are constitutional as applied to the situation you present.

Article III, section 51 of the constitution requires that a grant by the university to the foundation must serve a public purpose, appropriate to the function of a university, and that adequate consideration must flow to the public. Attorney General Opinions MW-89 (1979); H-1260 (1978); H-520 (1975); H-403 (1974). In addition, the university must maintain some controls over the foundation's activities, to ensure that the public purpose is actually achieved. Attorney General Opinions MW-89 (1979); H-1309 (1978); H-912 (1976). If these conditions are met, the grant by the public entity is not unconstitutional.

As made clear by sections one through three of the memorandum, and by its charter, the foundation exists to serve the educational function of the law school. Public education is an essential governmental function. Rainey v. Malone, 141 S.W. 2d 713 (Tex. Civ. App. - Austin 1940, no writ). The assistance provided by the foundation to the university helps it accomplish a public purpose entrusted to it.

The foundation's charter requires it to devote its resources to benefitting the law school; therefore, the law school would still receive donations from the foundation even if it did not provide office space and other in kind assistance. See Boyd v. Frost National Bank, 196 S.W. 2d 497 (Tex. 1946).

Nonetheless, a public purpose may be served by providing the foundation with rent-free space in the law school. This determination is to be made by the university in the first instance, and if challenged, ultimately by a court. Attorney General Opinion H-403

(1974); see also Dodson v. Marshall, supra, at 624. Although we lack sufficient information to state with certainty how the foundation's presence in the law school serves the public purpose of higher education, we can at least raise some possibilities for consideration by the regents.

For example, if law students and faculty members have easy access to the foundation office, they may learn about and benefit from the scholarship and research grants it offers. The foundation's presence in the law school may help achieve full and efficient use of its resources by prospective recipients. It will also serve the convenience of persons in the law school who can contact the foundation with a minimal expenditure of time. See Attorney General Opinion MW-200 (1980).

Law school administrators work with the foundation to coordinate foundation activities with those of the law school. Their convenience will be served if the foundation is easily available for consultations. If the foundation also provides administrative services, these can be utilized easiest on the law school premises.

Another factor to consider is whether the provision of office space and other assistance to the foundation enhances the cost effectiveness of operating the foundation. The regents might consider the value of the office space, telephone, utilities, equipment, and staff assistance the law school will provide as compared to equivalent items purchased on the market. Rental paid for an office would probably include a landlord's profit. Since the foundation's resources are to be used to benefit the university, savings on overhead costs should go to the law school. Providing the foundation with an office might free some resources worth more than the office from use for overhead so they could be devoted to law school education.

In addition to serving a public purpose, the provision of office space and related assistance to the foundation must be subject to controls, contractual or otherwise, to insure that the public purpose is met. The Memorandum of Understanding is not a contract, since the representations made by the foundation either relate to its past activities or express generalized intentions as to future help. The promises appear too vague to be enforceable as a contract, and the foundation's compliance with its legal duties under the charter does not constitute consideration. See Teague v. Edwards, 315 S.W. 2d 950 (Tex. 1958).

However, other controls exist to assure that the provision of university office space and other benefits to the foundation serves and will continue to serve a public purpose, whether it is the convenience of the law school or increasing the value of the foundation's contributions to public education. The board of regents has sufficient rule-making power to establish controls over this transaction. See Educ. Code §65.31. In particular, it has authority

to control the use of university property. Splawn v. Woodard, supra. The memorandum recognizes this in noting that the university president and law school dean will control the allocation of space to the foundation subject to a test of reasonableness. Other office-related assistance going to the foundation is provided subject to a test of reasonableness. Memorandum, section 4. Law school administrators can see that the office space and other items provided actually serve the law school's purposes.

With respect to gifts for professorships and scholarships, section 65.36 of the Education Code provides detailed controls as to conditions which may be attached to these donations. Moreover, the convenient location of the foundation may enable law school administrators to shape foundation activities to some extent toward fulfilling the current needs of the law school. If the foundation's presence on university property ceases to serve a public purpose, it may be removed at any time, since it has no lease. The university has control of its premises and may require the foundation to vacate the office it uses. Cf. Morris v. Nowotny, 323 S.W. 2d 301 (Tex. Civ. App. - Austin 1959, writ ref. n.r.e.), cert. denied, 361 U.S. 889 (1959).

Additional controls over the allocation of university space to the foundation are found outside of the university. The state auditor is required to audit the use of public funds by the university and report to the Legislative Audit Committee. V.T.C.S. art. 4413a-13(1),(2). Thus, university expenditures on behalf of the foundation will be subject to examination by the auditor and legislature.

In addition, the Open Records Act defines "governmental body" to include the portion of every corporation "which is supported in whole or in part by public funds...." V.T.C.S. art. 6252-17a, §2(F). Since the foundation receives support from the university that is financed by public funds, its records relating to the activities supported by public funds will be subject to public scrutiny. See Open Records Decision No. 228 (1979).

Despite the absence of contractual controls designed to ensure that the presence of the foundation in the law school will serve a public purpose, we believe the regents can exercise sufficient control over this transaction pursuant to statutory authority. Furthermore, additional limitations on the foundation derive from other statutes as discussed above. Consequently, the university may comply with its representation under section four of the memorandum.

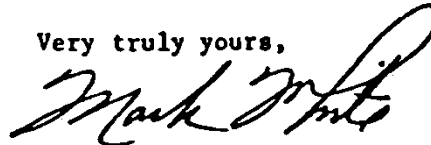
S U M M A R Y

The University of Texas may provide the Law School Foundation with office space and other

assistance where a public purpose will thereby be served. The regents have authority to decide in the first instance whether a public purpose is served. Sufficient statutory controls exist to ensure that the public purpose will be achieved. Thus, the university may provide the foundation with the stated benefits without violating article III, section 51 of the constitution.

The university lacks authority to place foundation employees on its payroll and give them fringe benefits reserved for state employees.

Very truly yours,



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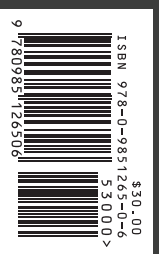
HOW TO DEFINE AND SAFEGUARD
YOUR PHILANTHROPIC PRINCIPLES

Donors have left fortunes to charitable purposes, only to have their money given to causes they would never have supported. All too often, the trustees and staff of grantmaking institutions drift from intended goals, lose accountability, or pay insufficient attention to the principles that governed their founders' charitable giving. In some cases, assets have been put to uses that would have repelled the original benefactors; turning a generous and well-intentioned gift into a punchline. This guidebook offers detailed guidance to philanthropists who want to ensure that the assets they dedicate to charity are disbursed as they intend. It identifies common pitfalls, explains relevant tradeoffs, and describes successful strategies used by other donors. It lays a broad range of options before you, and suggests ways you can define, secure, and perpetuate your charitable intentions.

Learn more at
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HOW TO DEFINE AND SAFEGUARD
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JEFFREY J. CAIN

The Philanthropy Roundtable

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PhilanthropyRoundtable

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Published by The Philanthropy Roundtable, 1730 M Street NW, Suite 601, Washington, DC, 20036.

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ISBN 978-0-9851265-0-6
LCCN 2012932753

First printing, February 2012

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FOREWORD

Why Donors Must Protect Their Philanthropic Principles

The Philanthropy Roundtable is delighted to publish this guidebook by Jeffrey Cain on how donors can define and safeguard their philanthropic principles. With this guidebook, we hope to help philanthropists to think through the best strategies for carrying out their charitable purposes and core values.

The need for such a guidebook is clear. All too often the trustees and staff of grantmaking institutions pay little attention to the principles governing their founders' charitable giving. Indeed, one can imagine that in many cases the initial donors would never have created their foundations if they knew then what would later be funded in their names.

For example, oil magnate J. Howard Pew established the J. Howard Pew Freedom Trust (one of seven trusts making up the Pew Charitable Trusts) in 1957 to "acquaint the American people" with "the evils of bureaucracy," "the values of a free market," and "the paralyzing effects of government controls on the lives and activities of people," and to "inform our people of the struggle, persecution, hardship, sacrifice and death by which freedom of the individual was won." Admirers and critics alike of Pew's recent signature initiatives—such as its crusades for campaign finance regulation, universal early childhood education, and recognition of the dangers of global climate change—can agree that in the past two decades, with the exception of its emphasis on religion in public life, J. Howard's worldview and philanthropic goals have played little role in informing Pew's strategy and charitable giving.

Of course, founding donors themselves are often partly to blame for departures from their principles. Instructions have frequently been so open-ended that future trustees have very little guidance in setting philanthropic strategy. John D. MacArthur gave his trustees no instructions at all. "I'll make [the money]," he told them. "You people, after I'm dead, will have to learn how to spend it." John D. Rockefeller's mission for the Rockefeller Foundation was "to improve the well-being of mankind throughout the world," a charge that could justify just about any philanthropic expenditure. Andrew Carnegie left one instruction to the Carnegie Corporation: to provide pensions to American presidents and their widows. Otherwise, he wrote: "I give my Trustees full authority to change policy or causes hitherto aided . . . They shall best conform to my wishes by using their own judgment."*

The Ford Foundation is the best known example of donor neglect. Henry Ford had a fairly well-articulated philosophy of giving, both in his writings and inter-

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views—e.g., “I do not believe in giving folks things. I do believe in giving them a chance to make things for themselves”—and in the record of his generous contributions during his lifetime to organizations such as Henry Ford Hospital, historic Greenfield Village, and the Anti-Cigarette League of the United States and Canada. However, in his documents establishing the Ford Foundation, he left no instructions on its philanthropic purposes. Indeed, there is compelling evidence that Henry Ford created his foundation principally to maintain family control of the Ford Motor Company. How it was supposed to give out its money he did not say.

Henry’s grandson, Henry Ford II, was later to write his famous 1977 resignation letter from the Ford Foundation board. “The foundation is a creature of capitalism,” he wrote, “a statement that, I’m sure, would be shocking to many professional staff people in the field of philanthropy. It is hard to discern recognition of this fact in anything the foundation does. It is even more difficult to find an understanding of this in many of the institutions, particularly the universities, that are the beneficiaries of the foundation’s grant programs . . . I’m not playing the role of the hard-headed tycoon who thinks all philanthropoids are Socialists and all university professors are Communists. I’m just suggesting to the trustees and the staff that the system that makes the foundation possible very probably is worth preserving.”

The irony is that the Ford family could have shaped the philosophical and philanthropic direction of the Ford Foundation but voluntarily abdicated this role. Henry Ford II was chairman of the Ford Foundation during its first decade as the foundation began its ideological transformation to the left, and he and his brother initially controlled a majority of the Ford Foundation board. His priority, however, was his 34-year chairmanship of the Ford Motor Company; his attention to the foundation was more limited and sporadic.

If Henry Ford II allowed the philosophical transformation of the Ford Foundation through relative neglect, at some other foundations family members actively led the way. The initial board of the MacArthur Foundation was described by one of its members as “mostly a bunch of Midwestern businessmen devoted to free enterprise and opposed to more government controls.” However, the founder’s son, Rod, much more liberal than his father, was able to seize control of the board and shape much of the foundation’s future direction. Members of the Pew family on the board of the Pew Charitable Trusts have generally been supportive of the trusts’ new strategies.

FOREWORD

Departures from donor intent are not simply ideological. In 2012, the Barnes Foundation will be moving its extraordinary collection of impressionist and post-impressionist masterpieces to a new Philadelphia museum substantially different in character from the intimate art school envisioned by Dr. Albert Barnes. In 2008, Princeton University agreed to pay \$100 million to settle a lawsuit charging that the university was ignoring the mission of the Robertson Foundation that established and substantially funded the Woodrow Wilson graduate school: preparing students for government service, especially in international affairs.

In order to help donors understand and avoid such problems, The Philanthropy Roundtable suggests the following guidelines for donors who want to safeguard their philanthropic principles:

- Clearly define your charitable mission. Write it down in your founding documents. Supplement your mission statement with a long written or oral record about your likes and dislikes in charitable giving.
- Choose trustees and staff who share your fundamental principles. Choose family members, friends, and close business associates such as lawyers, bankers, and accountants only if they fit into this category.
- If possible, separate your philanthropic interests from your interests in maintaining control of your company. Donor intent frequently suffers when the two are mixed.
- Give generously while living, and strongly consider a sunset provision for your foundation, perhaps a generation or two after your death.
- If you do establish a foundation in perpetuity, establish procedures for electing future trustees who share your principles, and for encouraging future boards to consider respect for donor intent as part of their fiduciary duty.

—Adam Meyerson
President
The Philanthropy Roundtable

* An excellent survey of the abuses of donor intent, many of them self-inflicted, can be found in Martin Morse Wooster's *The Great Philanthropists and the Problem of "Donor Intent"* (Capital Research Center: 3rd edition, 2007).

CHAPTER 1

An Introduction to Donor Intent

This guidebook is intended to offer practical advice to philanthropists who want to ensure that the assets they dedicate to charity are disbursed as they intend. It identifies common pitfalls, explains the relevant tradeoffs, and offers detailed descriptions of successful strategies for safeguarding donor intent. It lays a broad range of options before you, and suggests ways of defining, securing, and perpetuating your charitable intentions.

What this guidebook is *not* intended to do is provide specific information for executing governing instruments, applying for tax-exempt status, or completing state filings. Those are issues best left to expert legal counsel, who can address your specific needs. Similarly, this guidebook is neither an elaborate theoretical justification for donor intent nor an exhaustive history of the many instances in which charitable institutions have violated the clear wishes of their benefactors. While those are all worthy topics, the purpose of this guidebook is more down-to-earth. It intends to serve as a practical resource for successful individuals who want to think clearly about the future of the assets they plan to dedicate to charity.

Why Donor Intent Matters

If you intend to dedicate large sums of money to charity, you should think hard about what purpose you want that money to serve. If you intend to have others collaborate in your philanthropic giving, especially after your death, you should not assume that your successors will instinctively understand your wishes. Moreover, even if they understand your wishes, you should not assume that they will necessarily want to be constrained by them. If your intentions as a donor are to be respected, you need to clarify what you want your assets to accomplish and create safeguards that help ensure their intended disposition.

You ignore donor intent at your peril. Insufficient planning for future philanthropic efforts can lead to catastrophic consequences. Philanthropists have left fortunes to charitable purposes, only to have their money go to causes they would have opposed. In some cases, their assets were put to uses that would have made them sick. The history of modern philanthropy involves a sad litany of one great foundation after another ignoring—and in some cases violating—the most cherished principles of their founders. Poor planning has likewise contributed to the destruction of families, as various relatives fight over what they believe to be the intended purpose of the funds. At its worst, insufficient attention to donor intent has made the legacy of intelligent and generous indi-

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viduals into cautionary case studies. On occasion, it has turned a well-meaning, intelligent, and generous philanthropist into a punchline.

But deviations from donor intent are not necessarily quite so dramatic. Donor intent can be compromised by a simple lack of clarity about the purpose of the donated assets—a vacuum that is inevitably filled by the interests and enthusiasms of succeeding boards and staff. In fact, most deviations from the original donor’s intentions are not the result of conspiracy or malice. They are more often than not a consequence of largely preventable issues like ill-conceived plans for leadership succession or unclear, inadequate, or contradictory instructions. To keep your resources dedicated to the causes you care about the most, it is essential that you take pains to define your mission and safeguard the means of its execution.

There are other, perhaps slightly more abstract, reasons to think carefully about defining and securing your intent. Every violation of donor intent creates a marginal disincentive for future philanthropy. Deviations from donor intent do not occur in a vacuum. Rather, they inevitably affect the decisions and behavior of other philanthropists. If a donor’s friends and colleagues see his money going to causes and groups that they believe he would disapprove of, will they be more or less likely to dedicate funds to charity? At some level, a lack of foresight and planning may serve to decrease the overall amount of charitable giving by individuals and families.

At a still deeper level, violations of donor intent call into question the very assumptions that make possible American civil society. When donor intent is violated, and particularly when it is egregiously violated, it undermines the bedrock trust on which all charitable giving rests. At the heart of the American tradition of generous giving is a respect for the dignity of each individual. That respect in turn makes possible many of the voluntary associations that enrich and strengthen our democratic culture. Violations of donor intent thus weaken our nation’s proud tradition of voluntary private initiative and erode American civil society.

Donor Intent vs. Grant Compliance

Before proceeding, it is important to clarify what we mean by donor intent. Donor intent, as we use the term, is primarily concerned with ensuring that a grantmaking organization understands and acts on the vision of its founding benefactor. Those entrusted with the responsibility of disbursing charitable resources have a moral obligation to distribute the assets in the manner they believe most consistent with the intent of the original donor.

Donor intent is related to, but distinct from, grant compliance. Grant compliance is a matter of ensuring fidelity to the terms of a specific charitable gift. A donor—individual or institutional—may make a grant to a nonprofit on the expectation that the recipient will use the grant for specific, defined purposes.

It is the moral responsibility of the nonprofit grant recipient to deploy those assets in a good-faith manner most consistent with the terms of the grant.

The distinction between donor intent and grant compliance is not always obvious. (Supporting organizations and operating foundations—both addressed in Chapter 4—involve, in some sense, issues regarding both donor intent and grant compliance, as the terms are defined here.) That is because both donor intent and grant compliance involve a relationship of trust—the former, between the original donor and those entrusted with signature authority over his checkbook; the latter, between a grantmaker and a grant recipient. Indeed, in everyday conversation, the terms “donor intent” and “grant compliance” are sometimes used interchangeably.

This guidebook is concerned first and foremost with donor intent. It is principally intended for donors who are thinking about establishing a charitable giving entity and who want to preserve their intent, as well as for trustees, directors, or family members looking to recover donor intent in the charitable entity for which they are responsible.

Thinking Ahead

For many philanthropists, donor intent is an afterthought. Many grantmaking entities are established with vague missions, muddled succession plans, and few, if any, accountability mechanisms. Unfortunately, too few philanthropists take the trouble to incorporate into their founding documents the details and language necessary to assist future generations in making operational their charitable intent.

All of this is quite understandable. Many donors put off being specific about their intent because they want to avoid unpleasant conversations—conversations about mortality, about letting go of hard-won assets, about making decisions that might upset members of (often extended or complicated) families. But the fact that these conversations are unpleasant does not mean that they are unnecessary.

By taking time to carefully consider a range of strategies for securing your philanthropic intentions, you are an exception. By understanding your options today for securing donor intent in the future, you are not only taking the necessary first step for advancing your philanthropic legacy. You are also helping your family, associates, and future directors to understand and carry out the mission you set for them.

Guidelines for Ensuring Grant Compliance

Grant compliance is an important concern for all donors. This is not the place for an exhaustive treatment of grant compliance, but it is appropriate to list a few principles that should guide thinking about how to oversee and manage grants made to public charities.

First, become familiar with the organization to which you are making a grant. Get to know its mission, leadership, and programs. Make site visits. Depending on your level of commitment to the organization, get involved in the life of the organization by attending its activities, programs, and functions. Do you feel comfortable entrusting this organization with your charitable gift? Compare this organization to like organizations working in the same or similar field. Do your homework and get involved.

Second, recognize that over time institutions and the people who run them change. As such, consider making a grant for a specific period of time rather than an open-ended grant or endowment gift. For numerous reasons, organizations over time cannot always live up to the terms of a gift. Some organizations simply go out of business. Making a long-term commitment to an organization while restricting your gift to annual grants based on performance gives you maximum leverage in terms of grant compliance.

Third, depending on the nature of your gift, ensure that there is a gift contract or grant agreement in place. There are

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many examples of gift contracts, some more complicated than others. Grant agreements can help to ensure that both parties have a clear understanding of expectations and they can also outline in advance a means of resolving disagreements.

Fourth, you may consider making your gift through an intermediary organization that will serve to enforce your intentions over time. A third-party organization can ensure compliance standards in your absence prior to disbursing funds. Likewise, you may also consider establishing successor beneficiary organizations that act as backup grantees if the original grant recipient fails to live up to the terms of the original gift agreement.

Finally, it is important to understand the limitations associated with making a grant. Even with a gift agreement, once you make the grant, the money is no longer yours. It is much easier and more effective to establish a good working relationship with an organization prior to making a gift, than it is to try, after the fact, to enforce compliance when outcomes may not be as rosy as you expected or as you were promised. It can take time, even years, to understand what you can realistically achieve through your grantmaking within a given field or with a particular organization or group of organizations. Many donors make large gifts early on that they later come to regret. Take time to learn about the field in which you are working, the people and institutions doing the work, and try to formulate realistic expectations grounded in experience rather than slick marketing brochures, attractive websites, or utopian ideas about what your gift can accomplish.

CHAPTER 2

Choosing a Timeframe for Donating Assets to Charity

There are three principal timeframes in which you can donate assets to charity:

1. Make charitable contributions while you are alive;
2. Arrange for the disbursement of your assets after your death but before a specific date or event; or
3. Create or endow an entity that is intended to exist in perpetuity.

These three options are not mutually exclusive. You can make extensive charitable contributions within your lifetime *and* create a sunset entity *and* establish a perpetual entity. Nevertheless, these are the three basic timeframes in which charitable giving can be conducted. From the perspective of donor intent, there are advantages and disadvantages to each. Donors should think carefully about what they hope to achieve before adopting any one of these strategies.

Giving While Living

If you disburse all of the assets you intend to give to charity within your lifetime, you will have effectively taken care of the issue of donor intent. After all, if there are no assets to entrust to others to disburse, there is no issue of donor intent.

You will, of course, have to grapple with the similar issue of *grant compliance*—ensuring that the charities you fund use your assets for their intended purposes. As every donor knows, grantees may or may not use contributions for their intended purposes. Or as donors learn more about their grantees, they may decide they want to work with other organizations or in different funding areas. Grant compliance is related to donor intent, but it is not quite the same as establishing the parameters within which your successors are to distribute your assets. (For more on grant compliance, please see pages 4–5.)

Giving while living resolves the issue of donor intent, narrowly understood. Again, this is not to suggest that grantees will always perform to your expectations if you spend down during your lifetime; it is possible to feel enormously frustrated with your grant recipients in the process of spending down. It is rather to say that if you disburse all of your charitable assets within your lifetime, you will not have to create mechanisms to govern the distribution of your assets after your death.

There is another important reason why many donors decide to complete their philanthropic giving during their lifetimes. They often sense that their

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money will go much further if it is spent immediately, on pressing problems. These philanthropists want to be personally involved in the programs they support, investing their time and business acumen—in addition to their wealth—to address the problems of today. They tend to be confident that later generations will make and disburse new fortunes to address future challenges.

Furthermore, if you spend down your charitable resources during your lifetime, you do not have to confront the potential problems associated with creating a grant-making entity that will survive you. For example, there is a tendency among grant-making organizations to drift away from a founding donor's vision and toward conformity with industry trends and staff preferences. That drift need not be inevitable—indeed, one purpose of this guidebook is to provide strategies for its prevention—but it is nevertheless unmistakable. To the extent that donors spend down their charitable resources within their lifetimes, the issue is taken off the table.

Giving while living likewise avoids another problem common among grant-makers whose founding donors are no longer in a position to control them: the emphasis on asset growth rather than grantmaking. Institutional grantmakers have institutional imperatives, foremost among which is the preservation of the institution. While this tendency can be mitigated by date-certain sunset provisions, it remains pronounced among entities that have perpetuity as a founda-

Charles Feeney and the Atlantic Philanthropies

Charles (“Chuck”) Feeney is perhaps the leading example of a donor who is committed to spending down his fortune within his own lifetime. Feeney co-founded the Duty Free Shoppers Group, and gave away some \$5.5 billion between 1982 and 2011. As of 2011, he planned to spend the remaining \$2 billion of the Atlantic Philanthropies’ assets by the end of 2016, and close its doors by 2020. When it shuts down, the Atlantic Philanthropies will be the largest foundation in history to spend itself out of existence. “Today’s needs are so great and varied,” says Feeney, “that intelligent philanthropic support and positive interventions can have greater value and impact today than if they are delayed when the needs are greater.” Or, as he sometimes puts it, “If I have \$10 in my pocket, and I do something with it today, it’s already producing \$10 worth of good.”

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tional goal. If your board has a fiduciary duty to perpetuate your philanthropy into the indeterminate future, it is unsurprising and perhaps inevitable that its focus will gravitate away from grantmaking and toward asset preservation.

(Indeed, a related institutional problem can afflict the grantmaking activities of many institutional donors: bureaucratic sclerosis. The pathologies to which largely unaccountable organizations are susceptible have been known to plague grantmaking organizations. Again, donors who spend down during their lifetimes are often less susceptible to the problem. “I think the worst thing that can happen is to wind up creating a foundation with 500 people in a skyscraper writing each other reports,” explains Patrick Byrne, chairman and CEO of Overstock.com. “I certainly didn’t work this hard to create something like that.”)

And, of course, even within an organization that stays committed to its founding donor’s vision, cultural and social changes can render the mission obsolete, no matter how forward-looking or principled its original purpose. Diseases can be cured, social ills can decline and even disappear. When Robert Richard Randall died in June 1801, for example, the New York sea captain and merchant left a considerable sum of money for the purpose of creating a “haven for aged, decrepit, and worn-out sailors.” Randall’s bequest, intended to be perpetual, gave rise to Sailor’s Snug Harbor on Staten Island, which by the late-19th century housed more than 1,000 retired sailors on an 83-acre campus with a working farm, dairy, bakery, chapel, hospital, conservatory, and cemetery. By the 1950s, with only about 200 residents remaining, the facility had fallen into such disrepair that it was taken over by the New York City Landmarks Commission. (The retired sailors were moved to North Carolina.) Snug Harbor has since reopened as a cultural center and botanical garden—worthy causes, to be sure, but completely unrelated to the vision of Captain Randall.

Sunsetting

It is not always practical or desirable to disburse all of your charitable dollars within your lifetime. Your giving may be focused on problems that you think will become more critical in the near future. You may be committed to helping a start-up organization build its capacity for some number of years, extending perhaps beyond your lifetime. Or, more fundamentally, it simply may not be feasible to spend all your philanthropic assets while you are alive. In these cases, it may make sense to create a limited-lifespan grantmaking entity that will survive you for a predetermined length of time.

From the perspective of donor intent, a limited-life grantmaking entity can have certain advantages over perpetual entities. Perhaps chief among them is that the founding donor frequently gets to choose the board that will lead the foundation

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over the course of its existence. (Indeed, for that reason many donors who create limited-life entities deliberately choose board members a generation younger than themselves.) In many, perhaps most, cases, the board will be populated by people who personally knew the founder, who knew his likes and dislikes. Such a board is generally more likely to be committed to fulfilling its donor's intentions.

Of course, unless board members are chosen carefully, they may steer a grantmaker in a different direction from what the founder would have wanted. There are a number of instances in which grantmakers have departed very dramatically from their founders' principles within 10 years of their deaths. A personal connection between the founder and succeeding board members often limits professional staff and unsympathetic trustees from straying too far from a donor's values—but it is not infallible.

Many donors are drawn to the idea of sunseting because limited-life entities can spend more aggressively, over a shorter, more focused period of time. The more intense pace of grantmaking makes for an outsized spending profile, with annual giving that can be greater than that of larger, perpetual entities that limit their annual payout to the legal minimum in order to preserve endowment. Limited-life grantmaking entities thus tend to have greater philanthropic impact within their prescribed lifetimes.

Consider the John M. Olin Foundation, which exercised outsized influence in the realm of advancing conservative ideas in the latter quarter of the 20th century. Some experts attribute its effectiveness to its being a limited-lifespan foundation, sunseting 52 years after it was founded. Even though the foundation's assets totaled not much more than \$150 million, during the years it existed Olin had a spending profile of a perpetual foundation with assets of \$400–500 million. The Olin Foundation made a deliberate decision to have a profound impact on its time, rather than a lighter one that spanned years into the future.

Perhaps just as importantly, limiting the life of a philanthropic entity tends to produce a greater sense of focus and purpose. Of course, sunseting in itself does not guarantee that giving will be effective. But the knowledge that a deadline was looming certainly forced the Olin Foundation to act in ways it may not have were it a perpetual entity. Deadlines enforce discipline.

Sunseting nevertheless presents a unique set of challenges. For example, precisely when a limited-lifespan entity should close up is debatable. Limited-life foundations often intend to spend down within 30 years of the death of the founder, or, frequently, the latter of either the founder or spouse. Some donors create a window of five years. Others have instituted 50-year lifespans. Still others have chosen not to set a fixed time period, but instead mandated a minimum annual payout percentage that is intended to run down principal over time.

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There is no set rule regarding when to sunset your foundation; it depends on what the foundation is trying to accomplish. In choosing a closing date, however, your aim should be to find a happy medium between achieving your philanthropic goals and curtailing the deleterious effects that the passage of time may have on your intentions.

Finally, donors considering sunseting should bear in mind a special problem facing limited-life entities. How should they prepare their favorite grantees—those whose missions neatly align with the vision of the grantmaker's founder—for the loss of funding that will occur when the foundation spends down? How should they plan to structure their investment portfolio in order to maintain a consistent level of support for grantees? How should they plan to retain key employees in an organization that is slated to shutter its doors? Once the close-out date is reached, what should be done with archival materials, legal documents, and any residual assets?

Again, there is no one-size-fits-all answer to these questions; much depends on the unique circumstances of the funding arrangement. Any donor considering a limited-life grantmaking entity should think about offering guidance to his successors on all of these issues.

Creating a Perpetual Entity

Finally, donors have the option of creating a grantmaking entity that will survive them into the indefinite future. Perpetuity is the most common choice among the founders of grantmaking entities. While an open-ended timeframe complicates plans for maintaining donor intent, it can also offer some advantages. For example, a perpetual grantmaking entity may be an attractive vehicle for a donor whose principal concern is providing long-term support for certain geographic regions, demographic groups, or programmatic causes. Similarly, it can make sense if a donor wants to make a certain kind of grant (like capital grants) or fund a certain activity (like supporting the arts, substance abuse, or disaster relief) where needs are likely to last forever.

Perpetuity nevertheless poses special challenges for those concerned with securing donor intent. Despite the susceptibility of perpetual entities to deviations from donor intent, there are steps that you can take to help safeguard against the corrosion of your philanthropic purposes. Some donors have employed strategies such as:

- incorporating mission statements and other donor intent documents into their bylaws and articles of incorporation;
- requiring their trustees to sign donor intent statements or to read their mission statement at every meeting of their board of directors;

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- including in their founding documents a requirement for regular outside donor intent audits;
- giving outside entities legal standing to take action against the board should it stray from their mission.
- All of these practices will be explored in greater detail in later chapters.

Perpetuity is notably popular among donors creating family foundations. According to one recent study, 63 percent of family foundations are established in perpetuity, with another 25 percent considering the option of perpetuity. The same study found that the “vast majority of perpetual foundations (77 percent) have never considered options other than perpetuity.” Perpetuity is often the default option for estate planners. For some founding benefactors, perpetuity is chosen somewhat unintentionally.

The same study found that one of the two most frequently given reasons for the decision to create an entity in perpetuity is the “desire for family engagement in philanthropy across generations.” It is understandable why many donors hope to use a perpetual foundation in order to unify and preserve their families. Unfortunately, the record on preserving donor intent in perpetual family foundations is mixed. Money, even money dedicated to charitable purposes, can be an enormously destructive force within families. Many founding donors fail to foresee how disbursing the family’s philanthropic assets can become a contentious problem, and one that is often complicated with the introduction of multiple marriages and half-siblings. Others perhaps overestimate the sense of familial fidelity and ancestral deference among individuals three, six, or ten generations in the future.

There are cases in which a perpetual family foundation may not be particularly problematic from the perspective of donor intent. For example, if a donor is confident that future generations will be better positioned to address future challenges, then perpetuity will probably not undermine his intent. Similarly, if his principal philanthropic objective is for his family to give generously to charity, his intent will be honored so long as the charitable assets continue to be disbursed by the family. Similarly, among families with very strong religious commitments and identities, donors often have great confidence that their families will remain committed to a set of common values, and are not particularly daunted by the prospect of establishing a family foundation in perpetuity.

When Honoring Donor Intent Becomes Impossible

What happens if a donor's intent in fact becomes impossible, impracticable, or even illegal to carry out? What if, say, you create a perpetual foundation exclusively dedicated to curing cancer—and a cure is found? What then happens to the corpus of the foundation? In these rare circumstances, courts may step in and apply the legal doctrine known as *cy pres* (pronounced either “see pray” or “sigh pray”).

Courts have traditionally used two doctrines—deviation and *cy pres*—to allow the modification of restricted gifts. Deviation is applied to make changes in the manner that a gift is managed or administered, while *cy pres* is applied in situations where a trustee or a charity seeks to modify the donor's purpose. *Cy pres*, as commonly understood, means “as near as possible” (a rough translation of the ancient Norman phrase, *cy pres comme possible*), and it provides for the courts to modify the express terms of a charitable trust by making modifications that come as close as possible to the donor's original intent.

One of the most frequently cited examples of *cy pres* involves the bequest of the wealthy abolitionist Francis Jackson. When Jackson died in 1861, he left considerable monies in trust to fund “books, newspapers . . . speeches, lectures, and such other means as . . . will create a public sentiment that will put an end to negro slavery in this country.” Four years later, at the end of the Civil War, the 13th Amendment to the Constitution

An Unavoidable Decision

If you have decided to dedicate assets to charity, you have to choose a timeframe for your giving. The decision is unavoidable. If you put it off, it will be made for you—and, quite likely, it will be perpetuity. This is not to say that the three principal approaches—spending down, sunseting, and creating a perpetual entity—are mutually exclusive. But deciding on which of them you plan to pursue, and to what extent you plan to pursue it, should largely be determined by your charitable purpose.

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ended slavery, thereby achieving the mission of Jackson's trust. The family sued to recover the funds, arguing that the purpose of the trust was now obsolete. The Massachusetts Supreme Court ruled against the family in *Jackson v. Phillips* (1867), invoking *cy pres* and directing the funds to the "use of necessitous persons of African descent in the city of Boston and its vicinity."

Another example involves John McKee, who, at the time of his death in 1902 was believed to be the wealthiest African American in the United States. McKee directed that part of his estate be held in trust until the death of his last grandchild, at which point it would be used to build "Colonel John McKee's College" for "poor colored male orphan children and poor white male orphan children." McKee left extravagant instructions for the school, down to the height and thickness of the perimeter stone wall and the parade schedule of the music and drum corps. When his last grandchild died in 1954, the trust had assets of about \$1 million. While significant, the funds were nowhere near enough to fulfill his instructions. The Pennsylvania courts invoked *cy pres*, leading to the establishment of "McKee Scholarships," which continue to fund post-secondary education for fatherless young men from the greater Philadelphia area.

Today, there are three prerequisites for applying the judicial doctrine of *cy pres*: (1) the gift must be for charity; (2) the donor must have general charitable intent; and (3) the expressed purpose of a gift must be illegal, impractical, or impossible, and the charity must no longer be able to honor a donor's wishes exactly.

The greatest amount of control that you will have over your charitable giving is during your lifetime. Giving while living, however, gives you the smallest window of opportunity in which to conduct your philanthropy, and may not be the best means of addressing your long-term goals.

Creating a charitable entity that will sunset after your death gives you a bigger window of opportunity in which to give, but somewhat less control over your giving, as your directors will carry out your charitable purpose and retire your giving vehicle after your death.

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Finally, a perpetual entity allows you the greatest time horizon for giving, but presents long-term challenges, and therefore requires special attentiveness, to the best way of maintaining your intent.

Carefully thinking through your charitable purpose should be the starting point for determining which of these three means of securing your charitable intent is right for you.

Additional Resources

Alliance Bernstein. *Smarter Giving for Private Foundations: A New Approach to Align Spending Policy with Mission*. September 2010.

Atlantic Philanthropies. *Turning Passion into Action: Giving While Living*. June 2010.

Beldon Fund. *Giving While Living: The Beldon Fund Spend-out Story*. March 2009.

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Ostrower, Francie. *Limited Life Foundations: Motivations, Experiences, and Strategies*. Urban Institute. Center on Nonprofits and Philanthropy. February 2009.

Theelin, John R. and Richard W. Trollinger. *Time Is of the Essence: Foundations and the Policies of Limited Life and Endowment Spend-down*. Aspen Institute. 2009.

CHAPTER 3

Defining Your Mission

If you choose to spend down in your own lifetime, taking the time to define your mission is an excellent idea. It will help give you greater focus and clarity, sharpening your sense of what is central and what is peripheral to your giving.

If you choose to create an entity that will outlive you, however, defining your mission is *essential* to preserving your intentions. Donor intent is easily eroded when donors fail to make clear their intentions and wishes. In the absence of clarity, fidelity to donor intent will fade as the ideas and principles that animated the founder are ignored or forgotten.

Defining your mission is not primarily a legal matter, although it may ultimately have legal consequences. In most cases, standard bylaws, trust agreements, or articles of incorporation are not designed to protect your intent. What the law requires to establish your philanthropic vehicle is often not sufficient to define your intentions or ensure fidelity to your mission. Indeed, a well-defined mission is not among the minimum legal requirements necessary to obtain IRS approval—the IRS will accept as a mission a general reference to “charity.” Your vision should be made more explicit through a mission statement (or other legacy documents) that is incorporated into your legal entity.

Defining your mission is an important step in institutionalizing your intentions so that others can, during your lifetime or in your absence, make them operational. When you are gone, the interpretation of your mission will be left to family members, trustees, and, as a last resort, the courts. The better you define your philanthropic mission during your lifetime, the better they will be able to preserve your intentions when you are gone.

Defining your mission can be a time-consuming process—it certainly takes longer than establishing the legal framework of the giving entity. Some philanthropists arrive at a clear mission only after much trial and error in making grants. Others have a clear sense of what they want to do and how they want to do it from the very beginning. Yet even in the latter case, trying to make one’s intentions operational can be very challenging. Defining a mission is a deliberative process, and achieving success often requires multiple revisions.

Thinking about Your Mission Statement

When you define your philanthropic mission, try to answer this one, crucial question: *Why?* If your successors are faced with a question about your intent, they can easily look up *what* you did and *who* you funded. A carefully crafted

mission statement will help them understand *why* you did it. Your mission statement should articulate the animating principles of—the reasons behind—your philanthropy. It should describe the ideas that animate your charitable purpose: the books, people, and institutions that shaped the thinking behind your giving.

As circumstances change, a mission statement that clearly describes your philosophy of giving will help to safeguard your intentions better than any list of rules or grantees ever could. It will guide those charged with carrying out your philanthropy by helping them to answer the question: What would our founder have done in these circumstances?

The result of a desultory or weak mission statement may be a sluggish or ineffective foundation with a floundering sense of purpose. It may lead to intergenerational contentiousness, altering your charitable entity into something you would not recognize or support. It can also result in legal action where courts thwart your wishes outright. Indeed, in terms of donor intent, a well-thought-out and well-written mission statement is absolutely essential for sustaining successor education, grantmaking vitality, quality control, and productive collaboration and continuity of vision among future trustees and family members. It is vital to maintaining your intentions.

Writing Your Mission Statement

Your mission statement should explain, at minimum, your reasons for establishing a foundation. A more comprehensive—and useful—mission statement will describe the principles and beliefs that inspire and guide your giving. Likewise helpful for future trustees is a statement of preferred operating principles, grantmaking guidelines, and a consideration of how succeeding generations should perpetuate your philanthropy.

Getting your mission statement right may take some trial and error. The following exercises can help you compose a mission statement that embodies and effectively communicates your intent.

Describing your values

Describing your values simply means explaining the things that are important to you and that ought to be taken into consideration by those who will be carrying out your philanthropic mission.

- Are you religious? Do you want your faith to be reflected in your philanthropy? If so, how?
- What are the ideas, traditions, persons, events, and circumstances that shaped you as a person?
- Why are you establishing a philanthropic entity? What are your motivations?

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- What would be the worst thing that could happen to the assets you've dedicated to charity?
- What good are you trying to achieve? What problems are you hoping to address? Are you working to improve society in general, a certain segment of society, or an institution in a particular way?
- How important is family involvement to you?
- Over time your values may come into conflict with each other, with your heirs, or with society's changing mores. How ought such matters to be resolved?
- What parts of your foundation's mission and grantmaking would you like to remain constant over time? What aspects are nonnegotiable?

Clarifying your language

What may seem obvious to you may not be obvious to others. When you sit down to write your mission statement, don't take shortcuts. Ambiguous terms need to be carefully defined. Explain how you see the connections between your principles. Always try to put yourself in the position of a reader who has never met you. Would this person understand what you were hoping to accomplish? Would he or she have a clear picture of what motivated you? Would he or she have a good sense of the kinds of things you would want to support?

Take, for example, the late Dan Searle, former CEO of Searle Pharmaceuticals and benefactor of the Searle Freedom Trust. For six months, Searle worked closely to refine his mission statement with a trusted advisor, Kimberly O. Dennis. "I would sometimes write him notes asking him to clarify certain things," recalls Dennis. "In his notes he often referred to the importance of individual responsibility as a corollary of individual freedom. If you were going to have a free society, he would say, you needed to have personal responsibility. I wanted him to clarify what role he thought government should have in enforcing the kinds of moral values that he considered integral to personal responsibility. As it turned out, Dan thought government had no place telling people how to live their lives. But I don't think this would have come through if I hadn't asked him to clarify his thinking, because it was obvious to him but it wasn't obvious to me."

"Dan went through the mission statement, paragraphs were added, paragraphs were deleted, sentences were massaged," adds Dennis. "There is not a word in that document that Dan didn't have there very intentionally. We had long discussions over whether we should use the word *freedom* or *liberty*, over whether America is a *democracy* or a *democratic republic*. Every single word is intentional."

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Formulating operating principles

In defining your mission, it is worth thinking about the principles that will guide the operation of your entity. This should not be a step-by-step set of instructions on day-to-day operations. Your aim is to describe the general contours, not to offer minute operational details.

- Do you want to support direct services to individuals: scholarships, medical care, food banks, and the like? Or do you want to effect change through advocacy and public education: policy work, research, publications? Are you comfortable with some mixture of both? If so, which do you prefer?
- Would you prefer to support local, regional, or national organizations?
- Do you prefer supporting small organizations? Start-ups? Well-established nonprofits?
- Would you rather that your funding be focused on several large grants or on many smaller grants?
- Do you prefer multi-year grants, start-up grants, or matching grants?
- What kind of relationship do you want with grantees? Do you want to give your grantees active guidance and direction? Or do you prefer to support them from a distance?
- How do you feel about supporting endowments, capital campaigns, or annual galas?
- Will you only fund specific programs? Or are you more comfortable making general-operations grants?
- What are your views on collaborative funding? Public-private partnerships?
- What kind of visibility would you like? Should your entity ever give anonymously? If so, under what circumstances? Should your successors produce an annual report, maintain a website, or otherwise promote your philanthropy?
- What is your timeframe in looking for results? Are you looking for immediate payoffs, or do you prefer to invest for the long term?
- Do you have a general sense of what kind of evaluation and assessment you would like to see in your grantmaking? Or is this the kind of question that you would rather leave to your successors? If so, you may want to make that explicit.
- Do you have strong feelings about how your assets will be invested? What do you think about mission-related investing? Program-related investing?

It may be helpful to look at other organizations that you admire. How do they operate? What do they do that makes them successful? How do they measure success?

DEFINING YOUR MISSION

Meeting with interested parties

By its very nature, philanthropy involves other people—giving money away implies that you’re giving money away *to other people*. Your giving probably involves family members, professional colleagues, community leaders, and grant recipients. As you begin to define your mission, it is important to draw in those who will immediately be charged with helping you to execute your charitable giving: staff, trustees, family members. This might involve formal meetings with a facilitator, or a series of informal gatherings over a number of months. While the mission statement should ultimately reflect your values, talking with those who will carry out your intentions early on will help to ensure that they understand your mission.

Also consider sharing your mission statement with friends, colleagues, and interested parties. Ask for their comments. One philanthropist who left nine-figure wealth to a term-limited foundation did precisely that. “Once we had a document that he was comfortable with,” says the trust’s current president, “he sent it out to about two dozen people in the foundation world and the policy world. We asked for their reactions to it. People wrote long responses, sometimes several pages long. A lot of people said he should elaborate on some point, but for every person who said to elaborate, we had someone else say the material should be shortened. We incorporated some of the recommendations, but not a lot. He was persuaded by very few of them. But what the process did was give him confidence in the document we had. He found that he liked it the way it was.”

Supplementing Your Mission Statement

Some foundations have developed documents intended to assist in preserving their founder’s intentions that go well beyond a detailed mission statement. They create legacy statements, videos, and other collateral material intended to convey the character, passions, goals, and ideas of their founder to future generations.

The Daniels Fund has assets of over \$1 billion derived from Bill Daniels’ pioneering work in cable television. Daniels took great interest in his philanthropy during his lifetime and even put considerable effort into memorializing his intentions. Although Daniels created specific allocations for spending in four states and the funding areas for his foundation, he did not specify grantmaking strategies. In the absence of close involvement from his board in developing specific grantmaking strategies, staff members (who did not know Daniels or share his values) began to define the foundation’s grantmaking approach.

In response, the Daniels Fund board embarked on a major five-year effort to instill Bill Daniels’ values and principles in the way the foundation conducted its business. Directors pored over their founder’s letters and writings. They care-

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fully studied his giving history—he had made charitable gifts for 25 years prior to his death, nearly all of which were accompanied by a note explaining his purposes—and interviewed numerous associates to better understand his intentions. After careful consideration and deliberation, the directors defined grant areas, guidelines, and grantmaking parameters, all anchored in Daniels’ words and deeds. They amended the foundation’s bylaws to include these new donor-intent documents as attachments and required a 90 percent majority of the board to amend them.

The directors also assembled a wealth of supplementary material that would help to institutionalize Daniels’ intentions at his foundation as well as at the major charities that he supported. They created, for example, a searchable archive of media coverage, photos, and other documents that record their founder’s values, beliefs, and personal charitable contributions. And they created display cases and timelines that physically communicate Daniels’ values and intentions. Interactive kiosks that explain the life and principles of Bill Daniels are located in the foundation’s lobby, as well as at organizations whose histories were shaped in large part by Daniels. These items are also available to the public through the foundation’s website. The sum total of these many parts is a strong statement of its benefactor’s charitable mission.

Other foundations have created videos of their founder speaking candidly to a sympathetic interviewer about his or her values, principles, background, and vision. Legacy statements, which are simply a more comprehensive mission statement, have also been used to transmit donors’ sensibilities across time to directors, staff, and family. Such documentation helps to capture your personal history as well as the nuance and richness of your intentions. These materials can be a powerful resource for preserving your intentions.

What a Great Mission Statement Can—and Cannot—Do

Many perpetual entities have been established in the past with vague, inconsistent, or nonexistent missions. Memorializing your philanthropic intentions through a mission statement, legacy statement, and other written or video recorded directives will not absolutely safeguard your philanthropic entity from incursions against your intentions. What it *will* do is to give those who are committed to carrying out your philanthropic intent—whether a family member, director, court, or beneficiary—a clear statement of that intent. It will give those who are inclined to preserve and advance your purposes the opportunity to do so.

CHAPTER 4

Finding the Right Vehicle(s) for Your Mission

The right charitable vehicle for your philanthropy depends on your goals and charitable objectives. Each giving entity offers you a different level of control and varying levels of responsibilities with regard to the distribution, management, and investment of your assets. And some charitable vehicles will support your philanthropic objectives and mission better than others. By matching the appropriate giving vehicle to your philanthropic mission, you will improve your chances of achieving your objectives and, over time, preserving your intentions.

This is not an either/or choice. Many donors use more than one charitable vehicle to further their philanthropic objectives. Aside from your mission and objectives, you should also take into account your estate- and tax-planning goals. The right giving entity for your philanthropic mission also hinges, to varying degrees, on whether or not you wish to establish your entity for a predetermined period of time or in perpetuity. Whether or not family members will play a role in your philanthropic legacy is another important consideration.

Charitable vehicles differ in the level of protection they afford your intentions. That is, they vary in how they can be structured, and some structures are more conducive to protecting donor intent than others. In general, however, the greater level of flexibility afforded by the charitable vehicle and the longer its lifetime, the greater possibility that donor intent may someday be compromised.

Private Foundations

The most widely established charitable vehicle is the private, non-operating foundation. (Private foundations are “non-operating” when they primarily make grants to charities rather than run their own programs.) Non-operating foundations include well-known grantmakers like the Rockefeller Foundation, the Ford Foundation, and the Bill and Melinda Gates Foundation. They also include small family foundations and large corporate foundations.

Private foundations are non-governmental, not-for-profit organizations. They are subject to federal and state laws intended to assure that they serve charitable purposes. These rules include an annual distribution requirement (5 percent of the value of its assets), an excise tax on investment income, limits on the percentage of a for-profit enterprise they may own, prohibitions forbidding self-dealing, and restrictions on grantmaking for certain kinds of recipients and activities.

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Private foundations typically derive their principal funds from a single source, such as an individual, family, or corporation. These funds are governed and managed by the foundations' trustees or directors in accordance with the foundation's bylaws, trust agreement, or articles of incorporation, as well as with the laws governing charitable organizations in the state in which they are located.

Private foundations enjoy a great degree of autonomy. You can structure them to carry out your charitable mission precisely as you wish, or, at the very least, with relatively little government interference. Unfortunately, that same autonomy can also undermine your charitable intentions over time. Donors who establish private foundations with specific charitable missions must take steps at their foundation's inception to help ensure that their intentions will be honored for the life of their foundation.

Most private foundations are set up to operate in perpetuity, but donors can limit the lifespan of their entity. Most foundations make annual grant allotments to tax-exempt public charities from the investment income derived from their endowments (though some private, non-operating foundations, like corporate foundations, act more like pass-through entities, distributing the funds that the foundation receives each year from its associated company rather than building up an endowment over time).

One advantage of foundations is their ability to hire staff to make philanthropic decisions and administer grants. The flip side of this flexibility is that foundations sometimes have higher cost structures than other forms of giving. Depending on the size of a foundation, it may need financial advisors to manage assets, staff to evaluate grant applications and administer distributions, and accountants to help the foundation comply with regulations and to file annual reporting documents. The IRS has substantial reporting and paperwork requirements for foundations, and some states, like California, also require annual audits. There are, however, a growing number of companies offering low-cost administrative services to private foundations.

Donor intent

Private foundations afford donors a great deal of control. As a donor to a private foundation, you can retain nearly complete control over the management and investment of the assets contributed to your foundation. You can decide which organizations will receive contributions, and when to make distributions. During your lifetime, you can select your trustees, hire your own staff, and define geographical, philosophical, and religious limitations. You can choose to maintain a family line of directors in perpetuity, if you wish. With a private foundation,

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you can take steps to institutionalize your intentions and mission in a manner that will help to preserve your intentions over time.

There are other advantages to independent foundations particular to families that bear on donor intent. By their very nature, and due to the level of control they allow donors, independent foundations can memorialize a family's philanthropy. They can clarify and articulate deeply held family values and principles, involving family members over many generations and allowing them to engage actively in programs and grantmaking. A private foundation also allows the family to take greater risks in investing and to implement a long-term investment philosophy. If establishing a family philanthropic legacy is your intention, a private non-operating foundation may be the surest vehicle for securing that goal.

Structuring for donor intent

There are two principal options for structuring a private foundation: a non-stock corporation or a charitable trust. (Your charitable entity's tax-exempt status is *not* contingent on which of these you choose. Tax-exemption derives from the expenditure of funds for charitable purposes.) Each structure has advantages and disadvantages that bear directly upon donor intent. Which structure is right for your charitable entity depends upon your tolerance for change and your desire for flexibility.

In general, a charitable trust is more restrictive, limiting the activities of the foundation to those things enumerated in the trust instrument. In theory, this gives trustees little room to stray from your intentions. Formal departures from the terms of a trust can usually be made only through a petition to an appropriate court, and the attorney general in the state where the trust is established is usually a party to such proceedings.

Trustees, therefore, generally must convince both a court and an attorney general when seeking changes to the original terms of the trust. Changes are generally not permitted unless the original purpose of the trust is judged to be either impossible or impracticable. In these cases, the courts may invoke the *cy pres* doctrine to devise a course of action that comes *as close as possible* to the trust's original charitable purpose. Courts and attorneys general may vary, of course, in the strictness with which they apply the doctrine.

A charitable trust integrates your intentions in a legal structure that is—at least in theory—difficult to change. While a charitable trust structure generally offers the best protection against breaches of donor intent, it is not a fail-safe mechanism. Within the last 50 years, serious violations of donor intent have occurred within charitable trusts as well as corporations. Whichever charitable ve-

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vehicle you ultimately choose, whether corporation or trust, it will not in itself be sufficient to safeguard your charitable intentions over time. Remember: it is necessary to think carefully about choosing the vehicle (or vehicles) through which your giving will be conducted. But it is not sufficient.

Establishing a private foundation as a corporation offers greater flexibility. It is a more desirable structure for donors who intend for their foundations to have employees, contracts, leases, and so forth. It may also make sense for donors who would like future directors to chart the course of their foundation. With a corporation, the foundation's charter or bylaws may be amended more easily—sometimes by a simple majority of board members.

A corporate structure retains the powers given it by state statute, and these can vary from state to state. Moreover, state legislation can affect a corporation's activities with new legislation. The California Nonprofit Integrity Act of 2004, for example, adopted new governance rules for nonprofits, including requirements for annual financial audits for foundations. Finally, in most jurisdictions it is not particularly difficult for directors to amend articles of incorporation or bylaws in ways that do not conform with the terms of the original governing documents or the intentions of their founder. This kind of flexibility, inherent in the corporation structure, can be detrimental to donor intent.

Establishing a corporate structure with members who elect directors—as opposed to simply having directors who are self-perpetuating—is one way of reducing flexibility while retaining the corporate configuration. Within this structure, members are somewhat analogous to shareholders in a for-profit corporation, in that they can elect (and remove) members of the board, but they are not necessarily on the board themselves. Members are typically fewer in number than directors, and they are appointed by the founding member, typically the donor, during his lifetime. The Arthur N. Rupe Foundation in Santa Barbara, California, is one example of a private, non-operating foundation that has a member corporate structure.

At the Rupe Foundation, the founding member, Arthur N. Rupe, may appoint or remove any of the other members. To date, he has appointed members who share his philosophical vision and who act as a safeguard for his intentions. Once Rupe is no longer capable of appointing members, the members will either become self-sustaining or the membership structure will dissolve. Thus, the membership structure can be especially useful to donors who want to retain control over their foundation during their lifetimes. Not all jurisdictions, however, have statutory provisions that allow for member nonprofit corporations.

Finally, some donors have taken additional steps to safeguard donor intent by stipulating that a percentage of their foundation's board members be made

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up of individuals from pre-determined third-party organizations named in the foundation's bylaws. Often these are organizations that the donor has been involved with for many years. They share the donor's philosophical outlook and act as a "watchdog" to ensure that his intentions are being carried out by the board. Other donors have given legal standing to third-party organizations that allows them to bring action against the foundation if it strays from donor intent. Still others have stipulated that regular donor-intent reviews be carried out by third parties—with real consequences for the foundation's leadership if donor intent is found to have been violated. Finally, some foundations' bylaws grant outside organizations the power to appoint the foundation's directors. The strengths and weaknesses of these strategies in preserving donor intent are considered in greater detail in Chapter 7.

Domicile

Laws governing trusts and not-for-profit corporations vary from state to state. Choosing a home for your foundation can be an important decision regarding donor intent. Delaware, for example, has a notably expedient court system, flexible corporate laws, and a renowned position as a corporate and financial center, making the state an attractive legal home for private foundations regardless of their philanthropic focus. In fact, Delaware is the legal home to many foundations that fund exclusively in states far from Delaware. Likewise, Florida, Virginia, and Texas have enacted provisions into law that support philanthropic freedom and that restrict the state from attempting to direct foundations' charitable missions or giving.

Other important questions of state law include the scope of trustee or director indemnification; the filing requirements for operating a foundation; and provisions permitting the board to transfer the foundation into a new jurisdiction, which can allow the foundation to take advantage of another state's laws. The donor must determine whether, and how much, flexibility will be desirable. In any case, a foundation's "home state" will generally require the foundation to register with the state's charities bureau.

Operating Foundations

Some private foundations are established as, or later become, operating foundations. Private operating foundations use the majority of their revenue to provide their own charitable services and programs. They make few or no grants to outside organizations. Museums, libraries, and research facilities such as the Getty Trust and the Carnegie Endowment for International Peace are examples of operating foundations.

Liberty Fund, located in Indianapolis, is an operating foundation that was established to encourage the study of the ideal of a society of free and responsible individuals. Its founder, Pierre F. Goodrich, believed in a unique educational model for advancing the ideas that underpin a free society. He was convinced that education in a free society requires a dialogue centered in the great ideas of civilization, and he advanced this notion through focused seminars directed by scholars.

Goodrich founded Liberty Fund in 1960 to develop, supervise, and finance its own educational activities in order to foster thought and encourage discourse on enduring issues pertaining to liberty. Goodrich had to create, by establishing an operating foundation, the very organization that would carry out his intentions. He understood that operating foundations are best suited to philanthropic missions that are unique and that cannot be carried out by an existing organization.

To qualify as an operating foundation, your organization must spend at least 85 percent of its adjusted net income or its minimum investment return directly on its exempt activities—its programs. An operating foundation is not subject to minimum charitable distribution requirements. As a further benefit, contributions to private operating foundations are deductible up to 50 percent of a donor's adjusted gross income, whereas contributions to non-operating foundations are generally limited to 30 percent. Finally, a private operating foundation may receive qualifying distributions from a non-operating foundation if the non-operating foundation does not control the operating foundation.

Because private operating foundations fund, direct, and administer their own programs, they have direct control over how their funds are spent. If programs and operations stray from the foundation's philanthropic mission, they have no one to blame but themselves. In this way, operating foundations may be said to be a more satisfactory way of securing and preserving donor intent than non-operating foundations.

Operating foundations, however, are also subject to many of the same problems as a non-operating foundation, including mission creep. Nor are they immune from the deleterious effects that time can have on a donor's intentions. In other words, while an operating foundation gives you and your directors more immediate control over how your charitable funds are directed, it does not necessarily guarantee that the foundation as a whole will stay true to its mission over time.

Community Foundations

Community foundations are tax-exempt, nonprofit, autonomous, and publicly supported philanthropic institutions composed primarily of permanent funds established by many separate donors. Historically, they were established for the long-term and diverse charitable benefit of the residents of a defined geographic

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area. According to Foundation Center, there were 737 community foundations in 2009, the last year for which data is available.

The Columbus Foundation in Columbus, Ohio, for example, was established in 1943 by Harrison M. Sayre and a group of concerned citizens who wanted to improve their community through charitable giving. Today, the Columbus Foundation is the ninth largest community foundation in the country, with over \$1 billion in assets representing over 1,800 donors. Like other community foundations, Columbus' assets are composed of an assortment of unrestricted funds that the foundation can use to fund its own programs, like its Safety Net Fund, which helps the region's most needy citizens. It also contains funds restricted to specific charitable purposes through outright gifts or planned gifts. Columbus also manages donor-advised funds and supporting organizations. Like most community foundations, donors who make gifts through the Columbus Foundation are no longer restricted to a specific geographic area in their giving. In order to compete in an emerging philanthropic-services marketplace, most community foundations have broadened their giving missions and donor services.

Donor intent

Community foundations allow expression of individual philanthropy in a public charity setting. When you choose to donate to a community foundation, you have a number of options.

- *First*, you may give to a general unrestricted fund, which allows the foundation the most flexibility to respond to community needs and to fund its own programs. This gives you the least control over how your charitable gift will be directed.
- *Second*, you can set up a designated fund, which allows you to retain some control over the ultimate use of your philanthropic dollars. Many community foundations, for example, allow donors to establish scholarship funds designated for the benefit of particular schools.
- *Third*, you can create a donor-advised fund, which affords you more, but not ultimate, control over where your charitable dollars will be directed.

Several other types of designated funds at community foundations allow donors to have limited control over the recipients of their philanthropy, including field-of-interest funds, scholarship funds, and restricted funds. In each case, you can broadly designate where and when the money ought to go.

It is important to recognize, however, that most gifts to community foundations are precisely that: gifts that you no longer control. Even with designated funds, the community foundation frequently maintains flexibility for grantmak-

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ing within broadly defined and predetermined categories. Most funds are ultimately owned and controlled by the foundation. Some donor-directed funds revert to the community foundation's general unrestricted fund after a period of time or after the death of the donor. Grantmaking activities are usually overseen by a governing or distribution board that is supposed to be representative of various community interests.

With community foundation donor-advised funds, you can reasonably expect to exercise informal influence over the distribution and investment of your funds. Nevertheless, even donor-advised funds are no longer *your* funds once you have gifted them. They belong to the community foundation. You may advise but you cannot control.

Historically, community foundations were the only option for donors who wanted to support their local community but who did not have the assets, time, or interest to establish their own charitable entity. As competition for philanthropic services has increased, however, donors now have many more options.

Some donors remain wary of community foundations because of their discretionary philanthropy. Many community foundations, for example, quietly refrained from making grants from their discretionary funds to the Boy Scouts because of its policy on homosexual adult leaders. Gifts to family-planning organizations and polarizing community activist groups have also alienated many donors from their local community foundations. For these donors, the philosophical outlook of their local community foundation simply does not match their own. Needless to say, if your funds are ultimately controlled by an organization that does not share your philosophical and philanthropic outlook, there is little chance that your intentions will be preserved over time.

Mission-driven Intermediaries

Public charity organizations that function like community foundations but that are mission driven and have a national reach have emerged in recent decades. These organizations offer the kind of philanthropic investment advice and giving vehicles found in community foundations. But instead of a geographic region, they are organized to support a specific cause or point of view.

For example, DonorsTrust, based in Alexandria, Virginia, is philosophically committed to the ideals of limited government, personal responsibility, and free enterprise. It was founded in response to charitable organizations—like many community foundations—that don't always share the same principles as their donors, potentially creating conflict over donor intent. Other mission-driven public charities also work with like-minded donors who share their approach to

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giving. Funders interested in supporting left-of-center nonprofits, for example, can work with the Tides Foundation. Similarly, there are scores of mission-driven public charity intermediaries for Catholic, evangelical, and Jewish donors.

What mission-driven charities offer you in structuring your philanthropic entity is the opportunity to create your philanthropy with like-minded people. Such groups often prove to be good stewards of your philanthropic legacy because they share your philosophical values.

Donor-advised Funds

Donor-advised funds originated within community foundations as a way for donors to establish a relatively small individual fund and to designate their fund's recipients. Donors receive tax deductions for their contributions and at the same time give up formal control of its investment or distribution. Donor-advised fund services are increasingly being offered by other types of public charities (like Rotary International and World Vision), federated giving programs (like United Way), universities, and other charitable institutions. There are also commercial donor-advised funds, which have greatly expanded since Fidelity launched its Charitable Gift Fund in 1992.

The principal advantage of donor-advised funds is their simplicity. They have relatively few rules and restrictions, and the tax benefits are immediate, even though distributions can be deferred for many years. Gifts of cash are tax-deductible up to 50 percent of adjusted gross income, and they are not subject to the excise tax or to an annual payout requirement. Nevertheless, donor-advised funds typically have high payout rates, usually about 15 percent.

Organizations that host your fund can also accept gifts such as art, land, and business assets with significant tax benefits. Much of the costly administrative work associated with any philanthropic initiative—such as processing applications, philanthropic planning, as well as tax, legal, and accounting services—is carried out by the host organization. A donor-advised fund can be established online or over the telephone. In sum, the cost of a donor-advised fund is often considerably lower than the cost of operating and administering a private foundation.

It is also worth noting that an account at a donor-advised fund cannot be used to fund your administrative staff, foundation expenses, or family office. (Unlike a private non-operating foundation, donor-advised fund expenditures can only be made to qualified nonprofit entities, not to operating expenses.) In some cases, a donor-advised fund provider may be willing to hire a philanthropic consultant to assist with gift planning and pay the consultant from its general operating funds. (In return, the provider would likely charge the account addi-

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tional administrative fees to defray the direct and indirect costs of hiring a consultant.) Of course, an individual establishing a donor-advised fund account could, at his own expense, hire staff to assist him with his charitable giving.

Donor anonymity is an especially important benefit of donor-advised funds. Because your gift is made to the host organization, distributions from your fund can remain anonymous, if you choose. This is an important factor for individuals who do not want to be inundated with solicitations or have their giving history made public through annual IRS filings, or who simply want to keep their charitable giving anonymous.

Donor intent

While donor advised funds do offer convenience and anonymity, it is important to understand that once you have made a contribution to a donor-advised fund, those funds no longer belong to you. Regulations mandate that your charitable contribution must be irrevocable and unconditional in order for you to receive the associated tax benefits. You cannot, for example, use your donor-advised fund to pay off a personal pledge. Furthermore, donor-advised funds cannot contain material restrictions or conditions that would limit the autonomy of the host organization over the fund. The host organization legally retains final discretion on where to donate.

The independent discretion of a donor-advised fund carries important implications for donor intent. While in practice the donor's wishes are *usually* followed—that is only good for business, after all—host organizations can and sometimes do reject the donor's recommendations. On the one hand, host organizations need their clients to feel as if they are in control of their donor-advised fund, in order to maintain good customer relations and grow their portfolio. On the other hand, federal regulations require host organizations to prove that you are in fact *not* in control of the fund.

To help secure their intent, individuals using donor-advised funds should have contingency plans in place in case their funds retain significant assets at the time of their death. For example, there should be a named successor advisor. The principles that govern the selection of board members are applicable to the selection of a successor advisor. (For further information on choosing board members, please see Chapter 5.) Similarly, it is worth considering a sunset clause for assets still held in donor-advised funds.

A final word of caution: because of their relative newness and rapid growth, donor-advised funds have been subject to increasing regulatory scrutiny. Lawmakers have considered from time-to-time whether or not the funds should be subject to minimum distributions and an excise tax on investment earnings, sim-

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ilar to private, non-operating foundations. Regulatory changes in this realm could adversely affect your charitable intentions.

Supporting Organizations

A supporting organization is a distinct legal entity that has a supporting relationship with a public charity. Because of this supporting relationship, it qualifies as a public charity rather than a private foundation even though it may have only one donor or one family of donors. It is one of the few organizations that has public-charity status for tax deductibility but is not required to meet the public-support test (that is, it does not need to receive at least one-third of its support from the general public).

Although a supporting organization may be formed to benefit any type of public charity, the use of this form is particularly common in connection with community foundations, university endowment funds, and organizations that provide essential services for hospital systems. Supporting organizations can save donors from the paperwork, administrative, and reporting responsibilities associated with a private foundation. Also, generations of family members may act as advisors to the organization—whose board can comprise at least some donor-chosen members—and retain control over the choice of grantees, the timing of distributions, and investment policies.

Contributions to a supporting organization qualify for more favorable tax advantages than those used to establish a private foundation. Also, supporting organizations are not subject to minimum annual distribution requirements. The day-to-day operations of a supporting organization are typically handled by the supported organization, which is attractive to donors who do not want to be involved in the administrative duties, grant management, and IRS filings. Along with these advantages, however, come important drawbacks regarding control. By law, the supporting organization cannot be controlled by the donor. Establishing the supporting organization and realizing the enhanced tax advantages entails making an irrevocable gift, which you cannot control. In most cases, the supported organization will be respectful of the donor's intentions during his lifetime—they are interested in future gifts. Once the donor is no longer in a position to make future grants, however, the supported organization loses an important incentive to honor donor intent.

While a supporting organization can operate in much the same way as a private foundation, there are important ways in which it is different. To qualify as a supporting organization, a foundation must meet one of three legal tests that assure, at a minimum, that the supported charity has some significant influence over the actions of the supporting organization and that the organization is re-

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sponsive to the needs of the charity. In other words, in a supporting organization scenario, the organization supported by your philanthropy must have influence over your grantmaking. If you choose this charitable entity to carry out your philanthropic mission, you should recognize that the supported organization may come to exercise considerable influence over your philanthropic intentions over time. You should also give careful consideration to securing expert counsel—supporting organizations are complicated.

Donor intent

Consider the example of the Robertson Foundation. Charles and Marie Robertson established a supporting organization in 1961 to train young Americans for careers in public service (specifically in diplomatic or international roles) at Princeton University's Woodrow Wilson School of Public and International Affairs. At the time, the Robertsons' gift of \$35 million was the largest donation ever made to the university.

As a supporting organization, the Robertson Foundation was typical in that it was established primarily to support the activities of Princeton University. One of the advantages of a supporting organization is that it allows donors to be involved in decision-making regarding the investment and distribution of funds. As such, the Robertsons, and subsequent generations of family members, served on the foundation's board along with representatives from Princeton.

Over time, however, family members discerned that the university was no longer carrying out the original intent of the gift and, instead, was using the supporting organization's funds, which had swelled to over \$900 million by 2007, for other, unrelated activities. Family members were outnumbered by university representatives, four to three, on the board. After making great efforts to resolve the issue, the family members sued the university in 2002, beginning a long legal battle that was finally settled in 2008, when Princeton paid approximately \$100 million to the Robertsons in what has been called the largest donor-intent award in history.

The supporting organization vehicle was probably not the right vehicle to safeguard the Robertsons' intentions over time, especially after the death of the original donors. While it did give their heirs as directors standing to litigate, the nature of the vehicle stacks the cards against the preservation of donor intent. That is, a supporting organization must at minimum share authority with the *supported* organization. Over time, the interests of the supported organization may very well come into conflict with the intentions of the supporting organization and its founders.

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At a more general level, there may be strategies donors can use to protect their intent in establishing a supporting organization. If a donor has allies within the supported organization—a trusted faculty member, for example, or perhaps a close associate on the board of the organization—he can ask that those individuals be appointed to the board of the supporting organization, thus filling the slots reserved for representatives of the supported organization with people who are likely to be sympathetic to the donor’s wishes. Another fallback strategy may involve including an exit clause providing for the funds to go to an alternative organization, in the event that the supporting organization finds itself unable to carry out the donor’s instructions.

Different Vehicles, Different Purposes

For many donors, the choice of a giving vehicle is not an either/or question. A family may have a family foundation, a number of charitable trusts, and several donor-advised funds, each with its own purpose and strategy. Today, donor-advised funds are regarded less as alternatives to other giving vehicles and more as potential complements to a family’s other charitable entities. In choosing the right giving vehicle for your philanthropic mission, it is important to match and structure each vehicle according to the charitable goals and objectives you wish it to serve. It is important for you to consider what values you would like your philanthropic dollars to advance, and to choose the giving vehicle or mix of giving vehicles most likely to accomplish your goals.

CHAPTER 5

Naming Your Board

Philanthropy is a deeply human undertaking. If you are leaving money to others to disburse to charity, you are charging them with an enormous trust. Choose the right people and you will be well-positioned to see your mission properly executed. But choose the wrong people and there is no legal framework or checks and balances that can safeguard your intentions. Taking time to carefully think through the selection of your board members—and, crucially, how they will perpetuate themselves once you are gone—is critical to preserving your mission. In fact, choosing board members may be the most important decision you make.

For this reason, there is more to choosing good board members than bringing aboard your lawyer, golf buddy, and son-in-law. You cannot simply apply the best practices of human resource management. Family members are equally tricky. It is tempting to hope that your kids will come to see things your way, or that the sharp differences between them will work themselves out once they find themselves seated around a boardroom. To be sure, expertise and family ties have their place in your decision. But neither should be your primary consideration when choosing the people you will entrust with your philanthropic resources.

Cultivating Board Members

There is, of course, no tidy way of determining another person's character or predicting how someone will behave in your absence. If there were, the matter of preserving donor intent would be easy. Nor are there fixed rules that, if you follow to the letter, will produce the same result every time. Choosing good board members is really a matter of cultivation and discernment, more an art than a science.

To cultivate board members means getting to know them. It means discussing over a long period of time their thinking, especially their thinking about the nature of philanthropy. It means posing questions that will uncover areas of agreement—and, equally importantly, disagreement. Do not settle for “yes” or “no” answers. Asking tough questions now may preserve the intent of your foundation in later years.

You will be best positioned to choose trustees if you watch how they perform on the job. When the first generation of a board worked directly with the benefactor, it generally does a better job of perpetuating his intentions. The give-and-take of making grants with those who will survive you and perpetuate your legacy will help you to assess their individual ability to serve as successors. They will also benefit from working with you during your lifetime, learning, as you

Donor Intent Is a Moral Concern

When considering the men and women who will govern and run your foundation, the most important thing in preserving your intentions over time is their moral character and philosophical outlook. Considerably less important is whether or not they are business associates, family members, or philanthropic-sector professionals. Proficiency in the law, program areas, or foundation management may be helpful in myriad ways when it comes to setting up and operating your foundation. But safeguarding your intentions is another matter. Whether or not a trustee will earn the faith you have put in him is, at heart, a *moral* rather than a *technical* problem.

Perpetuating your intent after you are gone makes moral demands of your trustees. They must be humble enough to subordinate their interests and enthusiasms to the mission you set for them. They must be disciplined enough to constantly revisit and re-engage your vision. And they must be brave enough to take managerial, fiduciary, or legal steps to protect your intent when they feel it has been compromised.

Make character and philosophical outlook your primary considerations when choosing trustees. Most people can be taught how to serve on a board relatively quickly. The willingness to subordinate one's own desires in the service of another, however, is a matter of character, one that is often developed over a lifetime.

express your giving preferences and put your mission into action, how precisely your grantmaking fulfills your goals.

Board members who share your philosophical and philanthropic outlook will also help you to define and refine your giving. In most cases, a donor begins his foundation with a certain idea, and that idea evolves over time through the successes and failures of grantmaking. Involving the individuals who will survive you in the development of the decision-making life of your grantmaking entity while you are alive is instrumental to upholding your intentions when you are gone. It can also be an especially effective way for helping family members to understand your philanthropic goals. They will learn from you—and you from them.

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In speaking candidly with your trustees about first principles and donor intent, you may or may not discover in a granddaughter or a long-time legal counsel someone who shares your point of view. Will you find through grantmaking the board members who will stand up for the principles upon which you established your foundation? Whether or not you do, your legacy will be better preserved for having cultivated board members who share your outlook.

Populating Your Board

Remember: you are putting together a board. This will be a group of people, and group dynamics will come into play. These people will have to work together. Think about how they will interact with one another. How well do any of these individuals know each other? Are they friends, colleagues, acquaintances, or strangers? How do these individuals relate to you? Do some of them know you as a personal friend, while others know you as a business associate? How different will their impressions of you be? To what degree have you been candid about your intentions with each of them? Can you foresee fault lines opening among the individuals in this group? If so, what can be done to mitigate them? Is there a particularly forceful personality who could dominate the board?

There are certain types of board members that donors should probably avoid. For instance, the ideal board member should neither be too aggressive nor too passive. An overly aggressive board member can lead to unnecessary and counter-productive friction; a too-passive board member may not be willing to stand on principle on important questions of donor intent. Similarly, board members should have neither too many nor too few competing demands on their time. Board members who cannot dedicate the time and energy to their duties may be overly reliant on others (especially staff) for setting a strategic vision; those without competing demands on their time may expand their roles beyond leadership and into staff functions.

Structuring Your Board

In addition to honoring your intent, foundation boards have other responsibilities. Their duties include managing the investment of your corpus, complying with all relevant laws and codes, and (in some cases) overseeing the performance of a professional staff.

Furthermore, your philanthropy may benefit from senior-level expertise in specific fields, such as medicine, public policy, or education reform. Expert board members can be invaluable in assessing the effectiveness and qualifications of grant recipients. The issue for some donors, then, is how to develop a board that shares their philosophical outlook and commitment to donor intent

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while also ensuring that it has the skill sets necessary to carry out the business of the foundation.

Some donors have approached this issue by structuring their foundations with multi-tiered boards, with separate responsibilities assigned to each tier. The Searle Freedom Trust in Washington, D.C., for example, has three distinct tiers that make up its board of directors. The first tier—the trustees—is responsible for handling the foundation’s resources. This tier was directed to manage financial affairs; it allows technical experts to do their work without being involved in the foundation’s grantmaking decisions.

The second tier—grant advisors—consists of four advisors, chosen by the founder, who have expertise in areas related to the foundation’s grantmaking: these advisors are primarily public intellectuals with academic, public policy, and think-tank management experience. They share the donor’s general philosophical outlook: a commitment to individual freedom, economic liberty, personal responsibility, and traditional American values. They worked closely with the donor during his lifetime. In some cases, the grant advisors have affiliations with organizations that the foundation has supported and built relationships with over time. The grant advisors, with the advice and assistance of the professional staff, make the actual decisions about where and how the foundation will direct its funding.

The third tier—the family advisors—consists of direct descendants of Daniel C. Searle, the founder. They are required to meet at least once annually with the grant advisors to review grants and have the power, on a unanimous basis, to overturn the decisions of the grant advisors. By design, the family advisors are a prudent check on the overall direction of the foundation. They, of course, bring a personal perspective to the board, one that is instructive in answering the question: If the founder were here today, what would he do? Family members participate in but do not control absolutely the affairs of the foundation. None of the tiers do. The strength of the tiered approach is in the way it separates board powers and responsibilities and delegates them to those best suited to perform them. The structure accentuates the unique abilities of the different tiers while encouraging enough cooperation among them that, in fact, the third tier of family advisors seldom if ever rejects the grantmaking decisions of the second-tier grant advisors.

The success of Searle’s tiered board structure is a consequence of the donor’s ability to find advisors who shared his philosophical outlook and who could work well together. He worked with and cultivated his family and grant advisors during his lifetime. Doing so brought clarity rather than conflict to the practical operation of the tiered structure by specifying roles and spheres of authority. Simply creating a tiered structure will not force board members who do not share your views into conformity. It may even foster resentment and power

struggles. The tiered board structure is a complement, not a replacement, for cultivating individuals who share your first principles. It is meant to enhance the operations of a board that shares your goals.

There is no easy way to determine whether creating a tiered board structure is right for your entity. The path you should take is contingent, in part, on your foundation's size, mission, areas of giving, when or if you intend to sunset, and whether or not there are family members involved. Tiering, however, can be an important tool to help preserve your legacy and should be considered as you deliberate the future of your foundation.

Compensating Your Board Members

In October 2003, the *Boston Globe* reported on a number of small foundations with giant benefits. Among the *Globe's* revelations was the compensation package offered to Paul Cabot Jr. From 1998 through 2002, Cabot was paid over \$5.1 million for his service as a trustee of the Paul and Virginia Cabot Charitable Trust, even though the foundation gave only about \$2 million to charity during this period. The scandal grabbed headlines and re-opened the question of whether it is ever appropriate to compensate the board members of philanthropic foundations.

Throughout the controversy, little if any thought was given to how compensation might be seen in light of donor intent. That was unfortunate, since compensating board members can be another mechanism for preserving donor intent. Board compensation practices vary widely, and there are benefits and drawbacks to either practice.

Arguments in favor of board compensation

1. It can clarify the agency question. Whether they take payment of \$1 or \$100,000, your board members can be seen, in a moral (although not legal) sense, as working for you. Through compensation, you can make clear your expectation that board members are not to see themselves as volunteers motivated by an altruistic desire to pursue some moral good as they see fit. Rather, by compensating your board members you are underscoring the moral fact that you intend for them to act, through the organization, as your agents, paid to execute the mission you have established at your institution. If you choose to compensate for this reason, it is a good idea to make your expectations explicit, conditioning payment on your board members acknowledging, in writing, that by accepting compensation they are acting in good faith as paid agents.

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2. It removes blanket immunity. The federal Volunteer Protection Act of 1997 (as well as similar statutes in many states) provides broad immunity from tort claims that might be filed against the volunteers of nonprofit organizations. As Harvey Dale of New York University has observed, uncompensated board members thus have a “lower risk of being held liable for negligence (or violation) of fiduciary duties.” If you provide even minimal compensation, you will eliminate this exculpatory protection and, according to Dale, you are “likely to increase the attention directors pay to fulfilling their fiduciary duties.”
3. It widens the pool of available board members. If you want specialized expertise on your board, you may have to offer some form of payment in order to secure the service of people whose time is extremely valuable. World-class experts in biomedical research, for example, may only be willing to serve on your board for a fee. Perhaps you want fellow entrepreneurs. Perhaps you want to increase diversity on your board. People have competing demands on their time. Retaining their services may very well require paying them.

Arguments against board compensation

1. It's a departure from the nonprofit tradition of volunteerism. Board members at grant-receiving public charities are generally expected to serve without compensation, while board members at grantmaking private philanthropies face no such expectation. This expectation is strong enough that many foundations would not make grants to public charities that compensated board members. If grant recipients are basically barred from paying their boards, why should grantmakers be allowed to do so?
2. It may not be necessary. You may decide that compensation simply isn't necessary to attract well-qualified board members. You may even decide that the only people you want on your board are precisely those enthusiastic enough about your mission to offer their time, free of charge.

Board compensation can be one means of harnessing individual self-interest for the purpose of preserving your intent. Whether or not it is appropriate for your foundation depends, in part, on the actual demands of board service: the time and effort that must be expended for meetings, site visits, proposal reviews, and service on committees, among other responsibilities. Recognizing the intersection between board service and self-interest will help you to think about what is appropriate for your circumstances.

Planning for Board Succession

Planning for board succession is an area where efforts to perpetuate donor intent often falter. Whether you intend to sunset your foundation or establish it in perpetuity, your founding board members in most cases will bear the responsibility of perpetuating themselves. The longer the anticipated life of your foundation, the more important it is to articulate a process for choosing the next generation of men and women who will oversee it.

“Look for These Qualities”

Bill [Daniels] said, “Here’s a list of buddies that you ought to call on when you need to replace directors.” I think it would have been very helpful if he had said, “When you look for future directors, look for these qualities,” instead of saying, “Look for these people.”

—Linda Childears
President and CEO, Daniels Fund

Board succession should unfold according to a predetermined plan, one that you have carefully considered with your original board members. The sudden loss of a key individual should not cause a crisis. If you have cultivated a set of founding board members who share your philosophic and philanthropic outlook, you have already taken one of the most important steps in ensuring that their successors will see eye-to-eye with your vision. The same qualities of character and commitment that you sought in your first-generation board members, and your process of cultivating them, ought to be emulated in choosing future generations of the board. Discussing with your founding board members and committing to paper the specific qualifications for future leadership is vitally important in transmitting your intentions.

Should you establish a foundation in perpetuity, keep in mind the importance of age diversity on your board. If the men and women whom you appoint in your lifetime as board members are of your peer group and of a similar age, it is conceivable that they may all retire at or about the same time. Imagine what would happen if there were a sudden and complete turnover of long-time board members without apparent successors. It could easily jeopardize your intent. To prevent it, try to stagger the ages of your board members.

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Hiring Staff for Your Mission

It is vital that you ensure your board members' fidelity to donor intent—but those efforts could come to nothing if you ignore your staff. Unfortunately, foundation staff can easily be ideologically removed from both the organization's founder and its board. But, depending on the structure and size of your foundation, staff can have an outsized influence on how your mission is executed.

Hire the Right People

When I was hired as president and CEO of the Daniels Fund, I was stunned by how many professionals in philanthropy asked me, "What new direction will you take at the Daniels Fund?" It simply never occurred to me that I would take the Daniels Fund in any direction other than the one defined by our donor. It seems commonplace for many of my peers in the foundation world to believe that fidelity to donor intent denies them the ability to creatively respond to the "problems of today." They have the right to their opinions, but they do not have the right to violate donor intent. There is an old saying: *personnel is policy*. What it means is that it's necessary to hire staff members who are philosophically in line with your mission and who will work to achieve it. Each new staff member you hire, at any level of the organization, is a vote you are casting in favor of donor intent—or in favor of its dismantling.

—Linda Childears
President and CEO, Daniels Fund

Staff members are on the front line meeting with organizations. Every day, they make dozens of relatively small decisions. The sum of these "little" decisions determines the proposals that will ultimately appear before the board. Over time, the effect can amount to an abdication of board responsibilities to staff members. For many reasons—ranging from labor laws to the reasonable desire to avoid unpleasant employment conflict—staff members often have the upper hand on board members, even if they lack the office.

Professional staff members are as vital to preserving and perpetuating the mission of the foundation as the board members. Like board members, they should be cultivated over time, given more responsibility as they show a greater appreciation and understanding of the foundation's mission. Taking the time to

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know and understand the character and intellectual commitments of prospective staff members, rather than merely considering their professional qualifications, is indispensable to preserving your intentions.

The Human Touch

The affairs of foundations belong, ultimately, to the messy realm of human interactions. Developing legal and organizational safeguards is essential to preserving your intentions over time. But whether or not these structural measures amount to anything largely depends upon the character and philosophical outlook of the men and women who govern and manage your foundation. Getting to know their ethical and intellectual dispositions and nurturing them in the grantmaking habits of your foundation is an important step in preserving your intentions. In other words, the time that you invest in your first-generation board members and staff will go a long way in creating a culture of fidelity to donor intent among later generations.

CHAPTER 6

Instituting Board Policies to Reinforce Your Intent

Establishing board policies that reinforce donor intent is essential to institutionalizing your philanthropic legacy. Having defined and memorialized your mission in your philanthropy's originating documents, it is now necessary to think about how these legal documents will become functional. Legal papers that codify your charitable intentions are a necessary but, unfortunately, not sufficient step in securing your philanthropic mission. Your mission must be made operational.

How, practically speaking, will your heirs, board members, and directors come to know your intentions? What steps can be taken to ensure that these documents are not ignored, that they instead become the operational framework that guides day-to-day grantmaking? How will your intent shape the culture at the entity you create?

A culture that honors your intent begins with your board, for they are the ones who are legally and morally bound to uphold your mission as it is established in your foundational documents. Taking steps to institute policies that will assist them in understanding, defending, and implementing your intentions, especially after you are gone, will help them to secure your charitable purpose. There are numerous board policies that can be adopted—from a simple reading of bylaws and mission statement prior to each directors' meeting to annual donor-intent reviews—to help make your philanthropic intentions operational.

Reviewing Your Mission at Board Meetings

The first step in institutionalizing your mission is to ensure that those who are charged with carrying it out know and understand what it is. To this end, some foundations have adopted the practice of reading and discussing their originating documents at their annual meeting. Others do it at each and every meeting of their board of directors.

Reading the foundation's mission statement reminds directors of their founder's original purpose and, through discussion, gives them the opportunity to ask how they are measuring up to their donor's intent. Furthermore, it gives board members the proper lens through which to view the business of the foundation before them at each meeting.

You may also consider having legacy statements printed at the top of their meeting agenda or in the front of their board book. This helps to constantly remind

“Read the Entire Indenture, Out Loud, Once a Year”

Our founder, James B. Duke, required his trustees to read the entire indenture, out loud, once a year. We do it every February at our board meeting. It takes about 45 minutes, and it’s a wonderful way for the board and senior management to hear his voice and to focus on his wishes.

—Eugene W. Cochrane Jr.
President, Duke Endowment

the directors of the founder’s charitable purpose. Unless time is set aside in the agenda to discuss the entity’s mission, however, it may go unread. Some foundations schedule a portion of each meeting, or at least each annual meeting or annual retreat, to review and discuss founding documents and other relevant materials authored by, or pertaining to, the donor, including legacy statements, interviews, or letters. Others invite past board chairs and senior family members to their meetings to discuss the grantmaking history of the foundation and its founder.

At the Daniels Fund, most of the directors have been video-recorded discussing their relationship with the founder, Bill Daniels, and how they understand his donor intent. Their bylaws require that time is set aside at each annual meeting to reflect on Daniels and his philosophy of giving, and each year a director is asked to prepare a presentation discussing Daniels’ intentions. Other foundations begin each board meeting by sharing a story, correspondence, or testimonial about a grant that is manifestly advancing the foundation’s mission.

The aim of these exercises goes beyond merely transmitting the *words* of the founder to current and future generations. The object is to create a *culture* that honors donor intent within the organization. When staff and grantees see that your board takes time from their busy schedule to review, to understand in light of changing circumstances, and to honor your intentions, it resonates. Such practices instill and reinforce a sense that the founder’s intent should guide every important decision that the organization makes. This kind of culture *within* the organization is transmitted *outside* the organization to grantees and potential grantees. When this happens, those who seek support from your philanthropy will not waste their time, or yours, if they think that their work

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lies outside of your mission. In this way, securing donor intent can become a self-reinforcing activity.

Cultivating Fidelity to Your Intent

In addition to repeatedly referencing a foundation's mission at board meetings, there are other ways to encourage board members to adhere to and to honor donor intent. Recruitment, training, and evaluation of board members are junctures at which members can reflect on their ability to advance a foundation's mission.

Requiring board members to sign a statement

Your board, for example, may simply adopt a code of ethics that stipulates that members honor donor intent. Prospective board members may be required to participate in an orientation regarding the foundation's giving values, and then subscribe in writing to the foundation's mission. The Daniels Fund requires its board members to sign a Statement of Commitment and Understanding. After reviewing a detailed set of documents that describes the life, values, character, and intentions of the founder, directors are asked to sign a statement that reads, in part:

Signing this document affirms your commitment to preserve Bill Daniels' donor intent and his personal style of conducting business (as described in this document). You agree to set aside your personal views or preferences when acting on behalf of the Daniels Fund. It is the Board's responsibility to ensure that the Daniels Fund most effectively fulfills Bill Daniels' intentions and remains true to his ideals. You also acknowledge that you have read this document and understand its importance in guiding the efforts of the Daniels Fund.

Instituting trustee apprenticeships

The Samuel Roberts Noble Foundation in Ardmore, Oklahoma, has adopted the practice of having apprentices or "advisory-trustees." These apprentices to the board attend regular trustees' meetings and receive the same compensation as other board members. They stay abreast of all the activities of the board, rotating off after a one-year period. Some—but not all—apprentice trustees go on to become actual board members. Being an advisor-trustee does not guarantee that one will become a board member. Developing a mechanism for cultivating new trustees or directors through an apprenticeship program is an excellent way to evaluate and identify new board members. Such a mechanism should be a part of any succession planning, especially for perpetual foundations.

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Enacting peer review among board members

It is worth considering a process for evaluating and retaining board members based on their commitment to fulfilling your intent. One way to do so is to create a review process that assesses how the individual director respected donor intent in carrying out his duties. Other director or trustee assessments might evaluate whether the candidate is knowledgeable concerning the foundation's mission and active in carrying it out; whether the candidate devotes ample time, thought, and resources to achieve the mission; whether he has the necessary skills to meet the foundation's mission; and whether he has the necessary relationships with persons and organizations to advance the foundation's mission as the donor intended. Here it is important that your bylaws include provisions for selective turnover of board members, or at least a requirement that each member be "re-elected" to the board after a period of time. A re-election process can compel board members to reflect on their performance and the performance of others, and to be more conscientious in carrying out activities consistent with your intentions.

Creating board member removal powers

Annual reviews are not the only mechanisms, of course, for removing board members who are not faithful to your intent from your board. You might give a supermajority of the board the power to remove any individual director, or you could vest that power in a family member, a family advisor, an independent individual, or an existing entity, such as a public charity with which you wish the foundation to have a close relationship. The Roe Foundation, for example, has given the Mont Pelerin Society and the Philadelphia Society—two organizations in which founding benefactor Thomas A. Roe was involved and that share his philosophical outlook—standing to sue the foundation's board members if they depart from his intent. Be advised, however, that such "watchdog" entities can also take a direction that veers from your intent. (Please see Chapter 7 for further details.)

Grantmaking and Your Intent

Of course, the optimal outcome is to develop a culture that instinctively honors donor intent, one that informs the work not only of your board but also that of your executive director and staff as they go about their day-to-day grantmaking. Nevertheless, it is important as well to take measures to ensure that individual grants fulfill donor intent. It is important, for example, to develop grantmaking guidelines that are in concert with your intent and that clearly communicate the founder's intentions to potential grantees. Such documents also provide meaningful guidance for program officers and others within your organization, illustrating for them how donor intent becomes operational in the grantmaking process.

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The same attention to donor intent should take place in evaluating the performance of grants. At the Arthur N. Rupe Foundation, for example, grant evaluations written by the program officer include a section on how the grant advanced the foundation's mission. These evaluations are reviewed by the board to ensure that the foundation's grantmaking is in line with the founder's intentions.

Board members can also act as important communicators of your charitable intentions to the charitable organizations that your philanthropy supports. In fact at some small and family foundations, board members, rather than staff, cultivate the principal relationships between the foundation and the grantees. In some cases, board members are under considerable pressure from organizations to advance their application for approval with their board, even when it does not fit precisely within the parameters of the donor's intent. This is an unavoidable fact of the philanthropic world. Having clearly articulated donor-intent guidelines makes it much easier for director or trustees simply to say, "I'm sorry, it just doesn't fit what we fund."

Some foundations, in an effort to compensate their trustees and directors for their commitment and to remove the temptation of bringing proposals for pet projects or other proposals that do not align precisely with the foundation's mission to the board, give their directors discretionary grantmaking authority of a pre-determined amount. The John M. Olin Foundation, for example, had a policy of giving its directors what are sometimes called "board" or "chairman" grants, as do many other foundations. At the Olin Foundation, each board member was allowed to make grants of up to \$25,000 (eventually the figure became \$100,000).

Some foundations restrict board discretionary grants to the mission of their foundation. Some leave them open-ended. The argument for board discretionary grants is sometimes advanced based on the pragmatic argument that creating an outlet for modest, discretionary board grantmaking removes the temptation to bring such grants to the full consideration of the board, possibly distracting or even diluting the mission. It also recognizes that board members are often badgered with requests for money, even from organizations that have nothing to do with the charitable purpose of the foundation they serve. As a policy intended to help secure donor intent, board discretionary grants serve the purpose of making sure that such requests do not intrude on the principal business of the foundation.

Trust in the Future

There are many steps you can take to protect donor intent among your directors or trustees. All come with a caveat. Board policies that are intended to encourage loyalty should not be so excessive or overly detailed that they stifle engagement. Trustees must have a sense of what their title suggests—that you have some faith

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in their judgment. Board members who do not believe their contributions are valued may invest time on your board, but they will not invest much effort or imagination, nor will they in fact develop an allegiance to your mission. When possible, therefore, create and adopt policies that inspire and guide board members but that do not call into question their abilities or intentions.

CHAPTER 7

Creating External Safeguards to Protect Your Intent

The focus of this guidebook so far has been on establishing *internal* safeguards for preserving your charitable intentions: choosing the right legal entity; crafting a mission statement and making it operational; selecting strong board members and codifying the means for perpetuating them; and setting up board policies for preserving your intent.

If you set up your foundation early, grow it over time, establish a giving history and an operational framework, and provide for a sunset provision, then your internal safeguards greatly improve the chances that your philanthropic purposes will be secured as you intended. Nevertheless, are there also *external* safeguards for protecting donor intent that you should consider?

Perpetual entities exist for a very long time—“perpetuity is a lot longer than you think,” as the old line goes—with limited safeguards for preserving the intent of a since-deceased donor. Indeed, grantmaking entities have even fewer external oversight controls than public charities. After all, public charities are accountable to the funders who support them. A grantmaking institution whose donor is no longer living lacks even this minimal external corrective mechanism. Who will hold your board members to account if they depart from the charitable mission of your foundation?

By law, a grantmaking entity is held accountable by the Attorney General in the state in which it is domiciled. A state Attorney General typically has the statutory duty to oversee all charitable organizations within his or her state. But the Attorney General may or may not intervene if your charitable entity departs from its mission. For one thing, states spend very little time and resources monitoring grantmakers. For another, they tend only to get involved when there are allegations of fraud or other criminal activity. In other words, while the Attorney General has statutory oversight, it is unlikely that he will intervene if the mission of a grantmaking entity begins to veer off course.

Furthermore, even when an Attorney General does act, there is no guarantee that his intervention will preserve the purpose of a foundation. The record is mixed. The Attorney General serves and acts on behalf of the public interest. It is not inconceivable, or even necessarily unlikely, that an Attorney General could interpret your donor intent restrictions to be contrary to the public interest.

For these reasons, some donors who establish perpetual giving entities have taken additional steps to protect their charitable intentions by creating external,

The Problem of Standing

One complicating factor in creating external donor intent safeguards is the problem of standing. “Standing” is a legal term, signifying that a party has a definable legal interest in a matter. A court will not recognize a party’s ability to bring legal action if that party lacks standing. In some states—Connecticut, for example—the courts have decided that even *donors* do not have standing to bring an action in court to enforce their intent.

As Paul Rhoads argues in *Starting a Private Foundation*, “it is not possible to state categorically that one may grant legal standing to external individuals or organizations.” With private trusts, there are clear beneficiaries who automatically have standing to take action against the trust and trustees. Charitable trusts and corporate entities, however, seldom have named beneficiaries. As such, it is unclear whether a court will grant standing to a third party who is not a beneficiary, even if the trust instrument or corporate document gives someone the authority to go to court to enforce donor intent.

In one instance cited by Rhoads—the Barnes Foundation case—a Pennsylvania court granted standing to a third party in addition to the Attorney General. Standing was given because the third party met the state law’s criteria governing standing: the individual had “relevant origin,” a substantive and legitimate relationship to the foundation, a record of significant contributions to the foundation, and a “real interest” in the issue in being litigated. Standings are fact-specific cases, however, and the Barnes example does not at all suggest a clear path for obtaining third-party standing by donors. States may permit standing for persons with a “special interest” in the issue or to stand in place of the Attorney General as a relator, but courts interpret special interest narrowly and seldom have granted standing for relators.

CREATING EXTERNAL SAFEGUARDS TO PROTECT YOUR INTENT

third-party safeguards. A range of external safeguards may be contemplated. In some instances, donors have incorporated into their governing instrument provisions that give board members standing to bring suit for violations of donor intent. Others have given standing to disinterested third-party organizations that share the donor's principles. Still others have stipulated that their boards include third-party representatives from sympathetic organizations. And finally, at least one major foundation has incorporated regular donor intent audits.

These third-party “watchdogs” assume responsibility to enforce future compliance with your charitable intentions. They can even go so far as to sue your board members, if necessary. For donors planning a perpetual entity, independent safeguards offer another layer of oversight. It is important to keep in mind that few independent safeguards have been put to the legal test. Still, there may be good reasons for creating such safeguards, even if ultimately they do not survive a legal challenge.

While recognizing that simply granting authority to a third party to enforce donor intent may not in itself meet the necessary legal threshold for standing, some foundations have pursued this strategy in conjunction with other measures as a way of protecting donor intent.

Giving Standing to Outside Parties

Thomas A. Roe was a South Carolinian businessman who used his philanthropy to help establish a movement of state-focused, free-market think tanks across the country. Attentive to donor intent, Roe carefully implemented a range of internal mechanisms to protect his intentions when he established the Roe Foundation. He clearly spelled out his foundation's mission, his beliefs, and his general philosophical principles in his founding documents. He carefully chose board members who shared his beliefs and who subscribed in writing to the foundation's mission and to the principles of donor intent. He required the same of his grantees, asking them to pledge in writing to uphold the mission of the foundation and his donor intent.

Finally, Roe named as watchdogs two organizations that he knew well and that shared his philosophical outlook. He granted these two organizations—the Mont Pelerin Society and the Philadelphia Society—and any of their directors standing to challenge the foundation in court, were it to violate donor intent or its announced principles.

Roe also insisted that these two organizations, in addition to being granted standing to sue, remain substantial beneficiaries of the foundation, receiving annual grants. This second provision—giving two organizations meaningful con-

tributions each year—makes them, in effect, quasi-beneficiaries with a special interest in the conduct of the foundation.

There is no guarantee, were litigation ever to be brought by one or both of the two watchdog organizations, that they would be granted standing in court. In a strictly legal sense, neither organization is truly a “beneficiary.” Nevertheless, the example of the Roe Foundation is instructive for those seeking to establish third-party safeguards.

One important thing to remember is that Roe was active in both the Mont Pelerin Society and the Philadelphia Society during his lifetime. He had good reason to believe they share his philosophical outlook and, unlike a grantmaker, would be held accountable to their mission by their membership and other donors. If the foundation ever changed course, presumably the board members of either organization would step in to resolve the issue.

Whether or not a judge would give either organization standing is an open question. Regardless, there are good reasons for establishing third-party oversight. For one thing, their presence alone acts as a safeguard for donor intent, as they are a constant reminder to the board of what Roe meant to accomplish through his charitable giving. They constantly remind those associated with the Roe Foundation: These are the organizations that were meaningful to Roe. Finally, their inclusion in the foundation’s bylaws is a not-so-subtle reminder to the foundation’s board members that they can be held to account by outside parties.

Incorporating Sympathetic Organizations into Your Board

Another strategy for creating independent safeguards for a perpetual grantmaking entity is to make provision in the bylaws (or other establishing documents) for representation on the board by organizations that share the organization’s mission. Under this scenario, board representatives from third-party organizations are supposed to ensure that the grantmaker’s activities support the donor’s intentions as stated in the mission statement. As board members, they have standing to bring suit against the board if it takes a direction contrary to its stated purpose. Some observers have even suggested that donors stipulate that a majority of board members be drawn from one or more charitable organizations that share the foundation’s mission. At minimum, they would act as watchdogs for donor intent.

For example, upon her death, Clare Boothe Luce, the widow of *Time* and *Fortune* founder Henry R. Luce, established through a bequest the Clare Boothe Luce Program at the Luce Foundation. The program today is the single most significant source of private support for women in science, mathematics, and engineering. Knowing how foundations can veer in their missions once the

CREATING EXTERNAL SAFEGUARDS TO PROTECT YOUR INTENT

founder is no longer involved, Luce stipulated that the governing body of the newly formed entity comprise individuals, at least in part, from organizations that she knew and trusted: people whom she knew would carry out her intentions as she wished. As such, she stipulated that three of the representatives on the board come from the Heritage Foundation, an organization in which she was actively involved and whose mission she eagerly supported.

An alternative to appointing a majority of board members from third-party organizations is to make a provision in your bylaws that requires a supermajority to amend the bylaws, particularly to make changes to the foundation's mission or purpose. This would give the minority of board members from third-party organizations, the watchdog directors, the ability to effectively veto any changes in the foundation's mission.

There are, however, serious potential drawbacks to consider in giving third-party organizations influence over your grantmaking entity. First, organizations sometimes drift from their mission in ways that cannot be anticipated. For this reason, it is important to consider carefully the organizations that you involve in your board, including their mission, their history, and their own provisions for ensuring that they pursue their stated purpose. Second, representatives from outside organizations, especially if only one such organization is represented on your board, may try to sway support to their organization. Finally, the representative organization may simply cease to exist. In this instance, a provision may require the foundation's board to choose another representative organization or simply let the position sit vacant, eliminating the influence that you tried to create in setting aside the seat.

Instituting Donor Intent Audits

The John Templeton Foundation provides an additional example of innovative ways to create independent donor intent safeguards.

When John M. Templeton Sr. established the foundation, he took great care in creating internal safeguards to ensure that his intentions for the foundation would be carried out over time. Aside from crafting a well-wrought mission, he stipulated in the foundation's charter and bylaws what the foundation would and would not fund. He required the foundation's board of trustees to read the charter annually, knowing that once he was no longer involved in the foundation that the trustees would be the governing authority. Moreover, the trustees oversee each grant and program specifically to ensure that they comport with donor intent.

Sir John also reportedly stipulated that every five years the trustees must oversee an external audit process to evaluate whether or not the foundation's grantmaking is in keeping with the provisions of the bylaws and charter. If the

audit finds that less than 91 percent of all grants align with donor intent, the directors put the officers of the foundation on probation for one year. If the foundation again fails to meet the 91 percent threshold in a subsequent audit, the trustees are empowered to remove the officers.

The audit is exceptional in that it has actual consequences for those who run the foundation. The audit not only forces the foundation to independently assess its giving in terms of donor intent at regular intervals, it forces staff, officers, and trustees to perpetually ask how a given grant is fulfilling the mission of the foundation. It provides a prudential check on the organization by making donor intent central to its day-to-day grantmaking activities. In other words, it makes donor intent operational, not simply aspirational.

The foundation has yet to undergo a donor-intent audit, as the provision in the charter that stipulates the audit was not triggered until after Sir John's death (in 2008). Like any audit, the outcome of a donor-intent audit is contingent, at least in part, upon the mandate given to, and the competency of, the auditors. Furthermore, assessing whether or not a grant fulfills donor intent is at least in part a subjective enterprise. Perhaps the most ambitious grants, the ones that would best suit the donor's intentions, will prove the most difficult to assess. If an individual grant fulfills 90 percent of the donor's intention, rather than 91 percent, will it be considered a failed grant? How difficult will it be to assign these percentages?

Meaningful Oversight, Not Ongoing Conflict

Creating external safeguards can be an effective way of holding directors and trustees accountable to donor intent in perpetual giving entities. It is important to keep in mind, however, that it is also possible to go too far in creating independent safeguards, undermining your board members or creating a perception that they are either not trusted or not ultimately responsible for the well-being of the foundation. It is probably best to seek a prudent balance between establishing independent safeguards and instilling your trustees with a sense of responsibility. As Paul Rhoads writes, "one wants to encourage future trustees, and establish an esprit de corps that develops loyalty to the foundation's mission."

It is also important to consider establishing external safeguards in conjunction with your tolerance for flexibility. The independent safeguards that you choose should reflect your views on how much or how little flexibility your trustees will have to adapt or modify the mission of the foundation to accommodate future change. Where there is little tolerance for trustee flexibility in this regard, the independent safeguards should be strong. If your trustees are given

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great flexibility in adapting the foundation to changing circumstances, the safeguards that you establish should reflect this fact.

Finally, there is a subjective aspect to donor intent which ought to be considered. While a clearly articulated mission statement can and ought to delineate clearly a donor's purposes and goals, disagreement can and will arise among well-intentioned parties as to whether or not a specific grant or program fulfills a donor's intent, even when that intent is made plain. Donors should take care in creating external safeguards to ensure that they are establishing meaningful oversight rather than ongoing conflict between trustees and third-party interests.

CONCLUSION

When a donor's wishes are compromised, it's frequently the case that the donor did not make his charitable intent clear enough. No document, regardless of how well it is put together, will absolutely guarantee that donor intent will be maintained over time. Indeed, a trust instrument or corporate document that tries too hard to anticipate every future contingency can unwittingly undermine the ability of future directors and trustees to carry out the founder's charitable intent by being too specific and inflexible. At the same time, donors often err by making their directives too open-ended, giving future trustees and directors little guidance in creating an operational strategy.

Beyond that, if you want to preserve your intentions, you will need to be proactive in planning your giving entity. Start early, even if that means starting small. Donors who play an active role in making their philanthropic mission operational in their lifetimes have a better track record in preserving their intentions over time.

As this guidebook explains, you can minimize the deleterious effects that time can have on your intentions by choosing the right giving vehicle for your philanthropy; by limiting the life of your giving entity; by memorializing your intentions through a carefully thought-through mission statement; by choosing and cultivating the right people to perpetuate your philanthropy; by adopting board policies crafted to instill donor intent; and by creating external safeguards to preserve your intentions.

By taking these steps, you can have a reasonable expectation that your philanthropy will serve the purposes that originally inspired you to give.

For more resources and information, please visit

ProtectingDonorIntent.com

ABOUT THE PHILANTHROPY ROUNDTABLE

The Philanthropy Roundtable is a national association of individual donors, corporate giving officers, and foundation staff and trustees. The Roundtable attracts philanthropists who benefit from being part of an organization dedicated to helping them achieve their charitable objectives. In addition to offering expert advice and counsel, the Roundtable puts donors in touch with peers who share similar concerns and interests. Members of the Roundtable gain access to a donor community interested in philanthropic freedom, innovation, and excellence.

Mission

The mission of The Philanthropy Roundtable is to foster excellence in philanthropy, protect philanthropic freedom, help donors achieve their philanthropic intent, and assist donors in advancing liberty, opportunity, and personal responsibility in America and abroad.

Principles

- Voluntary private action offers solutions for many of society's most pressing challenges.
- A vibrant private sector is critical for generating the wealth that makes philanthropy possible.
- Excellence in philanthropy is measured by results, not good intentions.
- A respect for donor intent is essential for philanthropic integrity.
- Philanthropic freedom is essential to a free society.

Services

Annual Meeting

The Roundtable has long been known for the quality of its conferences, foremost among them the Annual Meeting. The Annual Meeting is the Roundtable's flagship event, where leading donors, executives, and trustees from across the country meet to share ideas, strategies, and best practices, and hear from America's foremost experts in private innovation and forward-thinking solutions.

PROTECTING DONOR INTENT

Regional Meetings

The Roundtable's Breakthrough Groups host regular regional meetings and dinners. These conferences are held in different cities throughout the year, bringing together donors to discuss issues of common concern. Many donors find that these smaller, more focused meetings enable them to better network with peers who share similar concerns and interests.

***Philanthropy* magazine**

The Roundtable's publications are essential reading for donors committed to freedom, opportunity, and personal responsibility. Each issue of the Roundtable's quarterly magazine, *Philanthropy*, offers donors insights into topics of significance in the charitable sector, focuses on broad strategic questions in line with our principles, and provides real guidance and clear examples of effective philanthropy.

Guidebooks

The Roundtable's guidebooks are in-depth examinations of the principled and practical aspects of charitable giving. Our guidebooks connect donors with the best information available for achieving philanthropic excellence. The Roundtable publishes new guidebooks every year and provides free copies to qualified donors.

Alliance for Charitable Reform

Through its Alliance for Charitable Reform (ACR), the Roundtable works with legislators, policymakers, and interest groups in support of philanthropic freedom. ACR is dedicated to educating policymakers on contributions of American private philanthropy, its longstanding tradition and the role it plays in their communities. It also works to help members communicate their message effectively, and to encourage thought, discussion, and debate on issues related to charity and public policy.

Consulting and Referral Services

Members of the Roundtable benefit from the insights and experience of their peers. Many of our members have agreed to serve as informal advisors to their Roundtable colleagues. To fulfill donor interests outside of the scope of our mission and activities, the Roundtable collaborates with other philanthropic-service organizations or refers donors directly to other experts.

ABOUT THE AUTHOR

Jeffrey J. Cain is president and executive director of the Santa Barbara, California-based Arthur N. Rupe Foundation. He is also secretary of the Lillian S. Wells Foundation, executive publisher of *Philanthropy Daily*, and founding partner at American Philanthropic. Prior to joining the Rupe Foundation, Mr. Cain served as executive vice president at the Intercollegiate Studies Institute, a national educational nonprofit committed to advancing a traditional liberal arts curriculum and the study of Western civilization. Mr. Cain previously taught in the English department at Washington State University (where he received his M.A. and Ph.D. in English literature), founded a research nonprofit (the Columbia Public Interest Policy Institute), worked on various political campaigns in his native state of Washington, and served in the United States Marine Corps.



John Keel, CPA
State Auditor

An Audit Report on

Grant Management at the Cancer Prevention and Research Institute of Texas and Selected Grantees

SAO Report No. 13-018
January 2013

Overall Conclusion

The Cancer Prevention and Research Institute of Texas (CPRIT) should significantly improve the transparency and accountability of its grant management processes. Weaknesses in CPRIT's processes reduce its ability to properly award and effectively monitor its grants. Specifically, CPRIT should address deficiencies in the following areas:

- Making award decisions.
- Evaluating grant applications.
- Verifying compliance with matching funds requirements.
- Processing payments to grantees.
- Monitoring grantees' expenditures.
- Assessing and measuring research progress.
- Managing contract agreements with grantees.

Making Award Decisions

CPRIT should ensure that all award decisions are free from real or apparent conflicts of interest. The executive director discussed award recommendations with certain members of the oversight committee prior to presenting the recommendations to the full oversight committee. Also, CPRIT's chief scientific officer, chief commercialization officer, and director of scientific review had office locations on the campuses of higher

Cancer Prevention and Research Institute of Texas

In 2007, Texas voters approved a constitutional amendment establishing the Cancer Prevention and Research Institute of Texas (CPRIT), which may receive bond funding of \$300 million on an annual basis to fund its grants and associated operating costs. The total amount of bonds that can be issued for CPRIT cannot exceed \$3.0 billion. From September 1, 2009, through August 31, 2012, approximately \$363.5 million in bond debt was issued to support CPRIT (see Appendix 8 for more information). As of October 1, 2012, the Texas Public Finance Authority had paid debt service that totaled \$30.9 million in principal and interest payments on CPRIT's bond debt.

As of August 31, 2012, CPRIT reported it had awarded 575 grants totaling approximately \$797.8 million, for which it reported disbursing \$104.2 million in reimbursements and \$40.2 million in advance payments (see Appendices 2 and 4 for more information on grants and payments, respectively).

CPRIT awards three categories of grants:

- **Prevention Grants** - These grants fund prevention services such as outreach, screenings, and training of health professionals. CPRIT is statutorily limited to awarding no more than 10 percent of its funds for prevention grants during any year.
- **Research Grants** - These grants support various types of cancer research projects, including basic research, translational research, and clinical applications. In addition, research grants support the recruitment and retention of distinguished researchers, enhancements to research facilities, and the acquisition of major research equipment.
- **Commercialization Grants** - These grants finance the development of products and services for cancer treatments by new or existing businesses.

For fiscal year 2012, CPRIT was appropriated 24 full-time equivalent (FTE) positions. For the quarter ending August 31, 2012, CPRIT had 23.3 FTE employees. CPRIT is governed by an oversight committee that consists of the following 11 members:

- Three members appointed by the Governor.
- Three members appointed by the Lieutenant Governor.
- Three members appointed by the Speaker of the House of Representatives.
- The Comptroller of Public Accounts or the Comptroller of Public Accounts' designee.
- The Attorney General or Attorney General's designee.

education institutions that received CPRIT awards. The chief scientific officer, the chief commercialization officer, and the director of scientific review are responsible for managing the peer review process for grant applications in their respective areas. In addition, auditors identified two members of CPRIT's commercialization review council with financial and personal interests in certain grantees. Specifically:

- One member of the commercialization review council was also a member of the board of directors for a grantee that received a \$25.2 million research award from CPRIT. According to CPRIT's records, that individual did not participate in the review of the grant application for that grantee.
- Another member of the commercialization review council provided consulting services to two applicants applying for Texas life sciences incubator commercialization grants. That individual was not listed as participating in the review of grant applications for incubator grants, and neither applicant ultimately submitted a formal application for an incubator grant.

CPRIT also reported that it does not receive financial information about donors to the CPRIT Foundation or the amounts of the donations. Without that information, CPRIT has no assurances that it is not awarding grants to the CPRIT Foundation donors, which could create a conflict of interest. The General Appropriations Acts (81st and 82nd Legislatures) state that an individual; an organization; or an employee, officer, or director of an organization that makes a contribution to the CPRIT Foundation, or a person who has second-degree consanguinity or affinity to an employee of CPRIT, is not eligible to receive grants from CPRIT.

CPRIT's lack of controls for ensuring there are not any business and professional relationships between its peer reviewers and grantees impairs CPRIT's ability to assure the public that its award decisions are not improperly influenced.

Evaluating Grant Applications

CPRIT should ensure that its policies and procedures for evaluating grant applications are up to date and consistently followed. In addition, CPRIT should maintain records of all reviews that are performed.

Auditors could not verify that CPRIT consistently followed its process for withdrawing grant applications from the peer review process. CPRIT did not have reliable data to support grant applications that were withdrawn (see Chapter 1-B for more information).

Auditors identified the following significant issues for three grant applications tested:

- The Statewide Clinical Trials Network of Texas (CTNeT) received a \$25.2 million research grant from CPRIT even though CTNeT did not exist at the time the grant was awarded. The CTNeT grant was the largest single grant that CPRIT had awarded as of June 2012. CPRIT originally awarded the grant to the University

of Texas M.D. Anderson Cancer Center in June 2010. Subsequent to the award, CTNeT was formed and registered to become a Texas-based non-profit company in August 2010 and CPRIT executed a grant agreement with CTNeT in September 2010. It is unclear what allowed CPRIT to transfer the award from the University of Texas M.D. Anderson Cancer Center to CTNeT. CPRIT also did not have documentation to support that the scientific review council recommended the original application for a grant.

- CPRIT awarded a \$20.0 million commercialization grant to the Houston-Area Translational Research Consortium (HATRC) and the Institute for Applied Cancer Science (IACS). Neither the HATRC grant application nor the IACS research proposal received scientific, due diligence, or intellectual property reviews. CPRIT reported that it rescinded the award in May 2012 after IACS requested to resubmit its research proposal for commercialization and scientific reviews.
- CPRIT awarded an \$11.0 million commercialization grant to Peloton Therapeutics Inc. (Peloton, formerly Damascus Pharmaceuticals), whose application did not receive scientific, commercialization, due diligence, or intellectual property reviews.

Auditors reviewed the peer review scores for 218¹ (5.9 percent) of the 3,698 grant applications CPRIT reported receiving from September 2009 through June 2012 through the CPRIT Application Receipt System. Auditors identified four applications for which the peer review scores were not consistent with receiving a grant recommendation. CPRIT also did not have documentation to support the factors that peer reviewers used in making grant recommendations to CPRIT's executive director.

In addition, CPRIT did not document its review of recruitment grant applications or maintain records of those reviews in its Peer Review Management Information System. Recruitment grants are for the recruitment of investigators with the ability to make outstanding contributions to the field of cancer research, promote inquiry into new areas, foster collaboration, and stimulate growth in the field. Select scientific review council members manually review the recruitment grant applications; however, the only documentation maintained was a one-page summary statement that recommends the award of a recruitment grant. As of August 2012, CPRIT had awarded 60 recruitment grants totaling \$184.9 million.

By not ensuring that all grant applications are properly evaluated and documented, CPRIT weakens its ability to ensure that its award decisions best align with the agency's mission.

¹ Auditors reviewed 159 research grant applications, 49 prevention grant applications, and 10 commercialization grant applications.

Verifying Compliance with Matching Funds Requirements

CPRIT should verify the accuracy and availability of the matching funds its grantees report. The Texas Constitution, Article III, Section 67 (a)(3)(i), requires that before CPRIT awards a grant, the grantee must have funds equal to one-half the amount of the grant dedicated to the research that is the subject of the grant. CPRIT requires grantees to certify the amount of matching funds available for research at (1) the time of contract execution and (2) on an annual basis thereafter. However, CPRIT did not verify the accuracy and availability of the matching funds reported. In addition, during site visits to five grantees, auditors identified two methodologies, permitted by CPRIT, that allow a grantee to report funds that were not used on a CPRIT-funded research project as matching funds. Specifically:

- During interviews with auditors, staff at the University of Texas M.D. Anderson Cancer Center, the University of Texas Southwestern Medical Center, and the Baylor College of Medicine reported that the matching funds those institutions reported to CPRIT were based on the total amount of funding available to them for cancer research, excluding CPRIT funding. However, those reported matching funds were not dedicated to CPRIT-funded research projects. As of August 2012, those three institutions had received a combined 331 awards totaling \$402.4 million.
- CTNeT, which received a \$25.2 million research grant, did not dedicate \$12.6 million in matching funds as required. Instead, CPRIT accepted certifications that the University of Texas M.D. Anderson Cancer Center and the Baylor College of Medicine would fulfill CTNeT's matching funds requirements for the first and second year of the grant agreement term, respectively. However, CTNeT did not receive those reported matching funds. For the first year of the CTNeT grant, CTNeT reported that the CPRIT grant accounted for 98.0 percent of its total revenue.

Processing Payments to Grantees

CPRIT should establish requirements to help ensure the appropriateness of advance payments and reimbursements it makes to grantees. Specifically:

- **Advance payments.** CPRIT's policies and procedures specify that CPRIT will distribute funds on a reimbursement basis. However, it made advance payments that totaled \$40.2 million to 10 grantees from September 2008 through August 2012.
- **Reimbursements.** CPRIT relies on quarterly financial status reports and supporting documentation that grantees submit for reimbursement payments. However, CPRIT did not always obtain sufficient documentation from grantees to support the appropriateness of the reported expenditures. For 85 (84.1 percent) of the 101 reimbursements tested, or \$9.4 million in reimbursements, CPRIT did not obtain documentation such as time sheets, invoices, contracts, and bill

records to support the reimbursed expenditures. For those 85 reimbursements, grantees typically provided CPRIT with spreadsheets that summarized the expenditures.

Monitoring Grantees' Expenditures

CPRIT should improve its processes for monitoring grantee expenditures. CPRIT requires grantees to submit quarterly financial reports on research expenditures associated with awarded grants. In addition, CPRIT established a desk review process to assess grantees' financial controls and reported expenditures. However, CPRIT did not ensure that all grantees submitted financial reports in a timely manner, did not maintain a complete record of all the financial reports it received from grantees, and had not performed any desk reviews of 487 grants totaling approximately \$683 million as of June 2012.

Assessing and Measuring Research Progress and Compliance with Grant Milestones

CPRIT should ensure that grantees submit all required annual progress reports by required due dates, and it should review those reports and document those reviews. While CPRIT developed monitoring tools for tracking the due dates and submissions of annual progress reports, CPRIT lacked documentation to support that it followed up with grantees for past due reports. For a sample of 20 grant agreements that auditors reviewed, CPRIT had not received 12 (60 percent) of 20 annual progress reports that were due from September 2011 through June 2012. CPRIT's records indicated that it had started following up with grantees about past due reports beginning in May 2012. In addition, CPRIT has not developed review criteria for evaluating and measuring a grantee's reported progress. Although CPRIT used its peer reviewers to evaluate the eight annual progress reports it received, the peer reviewers did not document whether a grantee's reported progress met grant milestones or whether any problems had been identified that could affect the grantee's ability to complete the research project. CPRIT reported that it received emails from the peer reviewers indicating that a review was complete and that no issues had been reported by reviewers.

CPRIT should improve its management of the CTNeT research grant and other administrative practices.

Auditors identified significant weaknesses in CPRIT's award decision and management of the \$25.2 million research grant to CTNeT (see Chapter 3 for more information about this grant). Specifically:

- CTNeT's grant application did not receive a favorable peer review score. CPRIT evaluated grant applications on a scale of 1 to 9, with 1 being the highest. The CTNeT grant application received a peer review score of 4.64. Auditors reviewed the peer review scores for 44 other applications and identified 9 applications that were not awarded grants that received peer review scores ranging from 3.93 to 4.40.

- CPRIT has a role in CTNeT's business operations. CPRIT's oversight committee chair, vice-chair, and executive director interviewed and hired CTNeT's chief operating officer before the contract was executed. In addition, CPRIT's executive director, chief scientific officer, and a member of CPRIT's commercialization review council are members of CTNeT's board of directors.
- CPRIT made \$6.8 million in advance payments to CTNeT even though its grant agreement with CTNeT allowed only reimbursement payments.
- CTNeT did not comply with matching funds requirements and annual progress reporting requirements.

CPRIT's relationship with CTNeT and its lack of enforcing contract requirements impair CPRIT's ability to ensure that CTNeT is properly using grant funds and complying with grant requirements.

CPRIT also should improve certain procurement and payment practices for vendors and other professional services.

CPRIT should strengthen its vendor procurement and payment practices to ensure that the services and costs for grant management services and virtual management company services are reasonable and necessary. Specifically:

- The costs for a five-year contract for grant management services increased from \$15.7 million to \$21.2 million (35.2 percent) within the first three years of the contract. The cost increases were based on amendments to the contract that increased the workload of the grant management services contractor and the development of a grant management system.
- The costs for the first two years of a four-year contract for virtual management company services increased from \$1.5 million to \$4 million, approximately 166.7 percent. The cost increases were based on amendments to include services management, an entrepreneur-in-residence program, salaries for additional executive positions that were added to the contractor's staff, and other direct costs.

CPRIT also did not consistently obtain sufficient documentation to support the appropriateness of honorarium payments it made to its peer reviewers. From September 2009 through June 2012, honorarium payments to peer reviewers were approximately \$6.7 million. In addition, CPRIT lacked documentation to justify increases in honorarium payments to officers of its peer review committees. Also, auditors identified honorarium payment amounts for certain peer reviewers that may be significantly higher than the payment amounts that the National Cancer Institute pays its peer reviewers.

Auditors communicated other, less significant issues to CPRIT's management separately in writing. Those issues were related to administrative reporting discrepancies, the forms grantees use for reporting, reporting practices for certain

grantees' payment practices, performance feedback to grantees, executing grant agreements, and management of peer reviewer rosters.

The Legislature should consider amending statutory requirements to improve the transparency and accountability of CPRIT.

The Legislature should consider statutory requirements to:

- Allow peer reviewers to provide their grant recommendations to the executive director and members of the CPRIT oversight committee at the same time.
- Clarify what funds can be used and the intended use of matching funds reported by grantees.
- Clarify whether contributions made by non-profit foundations affiliated with grantees are appropriate.
- Prohibit an interlocking directorate between CPRIT and the CPRIT Foundation.
- Prohibit CPRIT employees from serving on a grantee's board of directors and related foundations.
- Clarify the positions of the oversight committee's presiding officer and other officers, including the responsibilities and specific term of service for those positions.
- Allow members of the oversight committee to affirmatively vote to approve the executive director's recommendations.
- Remove the Attorney General and the Comptroller of Public Accounts from CPRIT's oversight committee so that their statutory duties and responsibilities would not be impaired.
- Allow the executive director to provide CPRIT's oversight committee, along with grant recommendations, documentation of the other factors that the executive director considered when making grant recommendations.
- Require the CPRIT Foundation to make its records, books, and reports available to the public.

Summary of Management's Response

CPRIT management generally agreed with the recommendations in this report. CPRIT's detailed management responses are presented immediately following each set of recommendations in the Detailed Results section of this report.

Summary of Information Technology Review

Auditors did not assess the reliability of the data provided by CPRIT's Peer Review Management Information System and the CPRIT Application Receipt System. Both information systems are proprietary systems supported by CPRIT's grant management services contractor and were physically located outside of Texas. CPRIT had not examined the controls over those two systems. As a result, CPRIT had not obtained assurances that the data and reports from those two systems were sufficiently reliable to support management decisions for awarding and managing grants. Auditors were unable to determine whether the data in CPRIT's Peer Review Management Information System and the CPRIT Application Receipt System were sufficiently reliable for purposes of this audit.

Auditors assessed the reliability of accounting data based upon prior audit work performed for the Uniform Statewide Accounting System (USAS) and determined that the data in that system was reliable for purposes of this audit. Auditors also performed a general controls review of logical security of CPRIT's applicable networks and network folders and determined that data maintained on the CPRIT network was reasonably secured.

Summary of Objectives, Scope, and Methodology

The objectives of this audit were to:

- Determine whether CPRIT has processes and related controls to help ensure that grantees perform in accordance with the terms of their grants.
- Determine whether CPRIT has processes and related controls to help ensure that grants are awarded in accordance with state law, rules, and CPRIT policies and procedures.

The scope of this audit covered the period from September 1, 2008, through June 30, 2012. Auditors collected financial information related to the revenues and expenditures of the CPRIT Foundation and conducted interviews with the CPRIT Foundation management and staff. However, the CPRIT Foundation was not audited as part of this audit of CPRIT.

The audit methodology included collecting information and documentation related to CPRIT, performing selected tests and other procedures, analyzing and evaluating the results of the tests, and conducting interviews with CPRIT management and staff. Auditors also performed site visits at five grantees. Those visits included performing physical inspections of laboratories and equipment purchases, testing samples of research expenditures and matching funds certifications, and conducting interviews with grantee staff. See Appendix 1 for detailed methodology information.

1. Title

Delegation to Act on Behalf of the Board

2. Rule and Regulation

Sec. 1 Background

- 1.1 Identification of Significant Contracts or Documents. Institutional presidents and executive officers at U. T. System Administration are responsible for identifying contracts, agreements, and other documents of such significance to require the prior approval of the Board of Regents. Each such matter so identified shall be presented to the Board by the Chancellor as an agenda or Consent Agenda item at a meeting of the Board.
- 1.2 Assurance of Authority to Act. The officer or employee executing any document on behalf of the Board of Regents shall be responsible for assuring that he or she has authority to act on behalf of the Board and that such authority is exercised in compliance with applicable conditions and restrictions. Documents executed on behalf of the Board pursuant to authority granted under these *Rules and Regulations* shall not require further certification or attestation.
- 1.3 Delegation Process. The primary delegate identified in these *Rules and Regulations* or in an official Board action may further delegate his or her delegated authority to a secondary delegate unless otherwise specified. Any such further delegation of authority must be made in writing and the primary delegate shall permanently maintain, or cause to be maintained, evidence of all such delegations. A secondary delegate of the primary delegate may not further delegate such authority.
- 1.4 Delegate's Responsibilities. The primary delegate identified in these *Rules and Regulations* as authorized to execute and deliver on behalf of the Board of Regents various types of contracts, agreements, and documents shall maintain, or cause to be maintained, necessary and proper records with regard to all contracts, agreements, and documents executed and delivered pursuant to such delegated authority, in accordance with any applicable

records retention schedule or policy adopted by the Board, the U. T. System Administration, or the institution. The primary delegate must also maintain, or cause to be maintained, sufficient accounting systems and procedures to assure that contracts, amendments, and renewals for the purchase of goods and services are presented to the Board for approval if required by these *Rules and Regulations*.

- 1.5 Actions of the Board as Trustee. Authority delegated by the Board of Regents in these *Rules and Regulations* includes actions that may be taken by the Board in its capacity as trustee of any trust to the extent such delegation is permitted by law.
- 1.6 Power to Establish Policies. No employee of the U. T. System or any of the institutions, as an individual or as a member of any association or agency, has the power to bind the System or any of the institutions unless such power has been officially conferred in advance by the Board of Regents. Any action which attempts to change the policies or otherwise bind the System or any of the institutions, taken by any individual or any association or agency, shall be of no effect whatsoever until the proposed action has been approved by the president of an institution concerned, if any, the appropriate Executive Vice Chancellor, and the Chancellor, and ratified by the Board.

Sec. 2 Delegation

- 2.1 Compliance with Special Instructions. All authority to execute and deliver contracts, agreements, and other documents is subject to these *Rules and Regulations* and compliance with all applicable laws and special instructions or guidelines issued by the Chancellor, an Executive Vice Chancellor, and/or the Vice Chancellor and General Counsel. Special instructions or guidelines by the Chancellor, an Executive Vice Chancellor, or the Vice Chancellor and General Counsel may include without limitation instructions concerning reporting requirements; standard clauses or provisions; ratification or prior approval by the Board of Regents or the appropriate Executive Vice Chancellor; review and

approval by the Office of General Counsel; and recordkeeping.

- 2.2 Contracts Not Requiring Board Approval. The following contracts or agreements, including purchase orders and vouchers, do not require prior approval by the Board of Regents regardless of the contract amount.
 - 2.2.1 Construction Projects. Contracts, agreements, and documents relating to construction projects previously approved by the Board of Regents in the Capital Improvement Program and Capital Budget or Minor Projects.
 - 2.2.2 Construction Settlements. All settlement claims and disputes relating to construction projects to the extent funding for the project has been authorized.
 - 2.2.3 Intellectual Property. Legal documents, contracts, or grant proposals for sponsored research, including institutional support grants, and licenses or other conveyances of intellectual property owned or controlled by the Board of Regents as outlined in [Rule 90105](#) of these Rules.
 - 2.2.4 Replacements. Contracts or agreements for the purchase of replacement equipment or licensing of replacement software or services associated with the implementation of the software.
 - 2.2.5 Routine Supplies. Contracts or agreements for the purchase of routinely purchased supplies or equipment.
 - 2.2.6 Approved Budget Items. Purchases of new equipment or licensing of new software or services associated with the implementation of the software, identified specifically in the institutional budget approved by the Board of Regents.
 - 2.2.7 Group Purchases. Purchases made under a group purchasing program that follow all

applicable statutory and regulatory standards for procurement.

- 2.2.8 Loans. Loans of institutional funds to certified nonprofit health corporations, which loans have been approved as provided in The University of Texas System Administration Policy [UTS166, *Cash Management and Cash Handling Policy*](#) and The University of Texas System Administration Policy [UTS167, *Banking Services Policy*](#) concerning deposits and loans.
- 2.2.9 Certain Employment Agreements. Agreements with administrators employed by the U. T. System or any of the institutions, so long as such agreements fully comply with the requirements of *Texas Education Code Section 51.948* including the requirement to make a finding that the agreement is in the best interest of the U. T. System or any of the institutions.
- 2.2.10 Energy Resources. Contracts or agreements for utility services or energy resources and related services, if any, which contracts or agreements have been approved in advance by the Chancellor or the Chancellor's delegate.
- 2.2.11 Library Materials and Subscriptions. Contracts or agreements for the purchase or license of library books and library materials.
- 2.2.12 Athletic Employment Agreements. Contracts with head coaches and athletic directors except those with total annual compensation of \$250,000 or greater, as covered by Rule 20204.
- 2.2.13 Bowl Games. Contracts or agreements related to postseason bowl games, subject to a requirement that the contract or agreement has been submitted to the Executive Vice Chancellor for Academic Affairs and is in a form acceptable to the Vice Chancellor and General Counsel.
- 2.2.14 Property or Casualty Losses. Contracts or agreements with a cost or monetary value to the

U. T. System or any of the institutions in excess of \$1 million but not exceeding \$10 million associated with or related to a property or casualty loss that is expected to exceed \$1 million may be approved, executed, and delivered by the Chancellor. The Chancellor shall consult with the institutional president, if applicable.

2.2.15 Health Operations. Contracts or agreements for the procurement of routine services or the purchase or lease of routine medical equipment, required for the operation or support of a hospital or medical clinic, if the services or equipment were competitively procured.

2.2.16 Increase in Board Approval Threshold. An institution's dollar threshold specified in Section 3.1 may be increased to up to \$5 million by the Vice Chancellor and General Counsel, after consultation with the General Counsel to the Board of Regents, if it is determined that the institution has the expertise to negotiate, review, and administer such contracts. Unless approved in advance by the Vice Chancellor and General Counsel, any increase will not apply to contracts or agreements designated as Special Procedure Contracts by the Vice Chancellor and General Counsel.

2.2.17 Group Employee or Student Benefits. Contracts or agreements for uniform group employee or student benefits, including those offered pursuant to [Chapter 1601](#), *Texas Insurance Code*.

2.3 Delegation of Other Matters.

2.3.1 Institutional Agreements for Dual Credit. The Board of Regents delegates the authority to approve and execute dual credit partnership agreements for the academic institutions to the Executive Vice Chancellor for Academic Affairs.

- 2.3.2 Construction Settlements. The Board of Regents delegates authority to execute all documents necessary or desirable to settle claims and disputes relating to construction projects to the System Administration or institution official designated in the construction contract to the extent funding for the project has been authorized.
- 2.4 Signature Authority. The Board of Regents delegates to the Chancellor or the president of an institution authority to execute and deliver on behalf of the Board contracts and agreements of any kind or nature, including without limitation licenses issued to the Board or an institution. In addition to other primary delegates the Board assigns in the Regents' *Rules and Regulations*, the Board assigns the primary delegate for signature authority for the following types of contracts.
- 2.5 System Administration and Systemwide Contracts. The Board of Regents delegates to the Executive Vice Chancellor for Business Affairs authority to execute and deliver on behalf of the Board contracts or agreements:
- (a) affecting only System Administration,
 - (b) binding two or more institutions of the U. T. System with the concurrence of the institutions bound, or
 - (c) having the potential to benefit more than one institution of the U. T. System so long as participation is initiated voluntarily by the institution.
- 2.6 Contracts Between or Among System Administration and Institutions. The Board of Regents delegates to the Executive Vice Chancellor for Business Affairs authority to execute on behalf of the Board contracts or agreements between or among System Administration and institutions of the U. T. System for resources or services. Any such contract or agreement shall provide for the recovery of the cost of services and resources furnished.
- 2.7 Contracts with System Administration or Between or Among Institutions. The Board of Regents delegates to

the president of an institution authority to execute on behalf of the Board contracts or agreements with System Administration or between or among institutions of the U. T. System for resources or services. Any such contract or agreement shall provide for the recovery of the cost of services and resources furnished.

2.8 Contracts for Legal Services and Filing of Litigation. The Board of Regents delegates to the Vice Chancellor and General Counsel authority to execute and deliver on behalf of the Board contracts for legal services and such other services as may be necessary or desirable in connection with the settlement or litigation of a dispute or claim after obtaining approvals as may be required by law. Litigation to be instituted under these contracts on behalf of the Board, System Administration, or an institution of U. T. System must have the prior approval of the Vice Chancellor and General Counsel.

2.9 Settlements of Disputes. Except as provided in Section 3.6 below, the Board of Regents delegates to the Vice Chancellor and General Counsel authority to execute and deliver on behalf of the Board agreements settling any claim, dispute, or litigation. The Vice Chancellor and General Counsel shall consult with the institutional president and the appropriate Executive Vice Chancellor or Chancellor with regard to all settlements greater than \$150,000 that will be paid out of institutional funds. Settlements greater than \$1,000,000 will require the approval of the Board as outlined in Section 3.6 below. The Vice Chancellor and General Counsel shall consult with the Office of External Relations with respect to settlement of will contests and other matters relating to gifts and bequests administered by that Office.

Sec. 3 Matters Not Delegated. The following contracts or agreements, including purchase orders or vouchers and binding letters of intent or memorandums of understanding, must be submitted to the Board for approval or authorization:

3.1 Contracts Exceeding \$1 Million.

3.1.1 All contracts or agreements, with a total cost or monetary value to the U. T. System or any of the institutions of more than \$1 million, unless

exempted in Section 4 below. The total cost or monetary value of the contract includes all potential contract extensions or renewals whether automatic or by operation of additional documentation. For purposes of this Rule, any contract with unspecified cost or monetary value with a term of greater than four years is presumed to have a total value of greater than \$1 million.

- 3.1.2 Any amendment, extension, or renewal that increases the cost or monetary value of the original contract to more than \$1 million must be submitted to the Board for approval or authorization. Any amendment, extension, or renewal with a cost or monetary value that exceeds 25% of the cost or monetary value of the original contract approved by the Board must be submitted to the Board for approval.
- 3.2 **Contracts with Foreign Governments.** Contracts or agreements of any kind or nature, regardless of dollar amount, with a foreign government or agencies thereof, except affiliation agreements and cooperative program agreements, material transfer agreements, sponsored research agreements and licenses, or other conveyances of intellectual property owned or controlled by the Board of Regents prepared on an approved standard form or satisfying the requirements set by the Office of the General Counsel, or agreements or contracts necessary to protect the exchange of confidential information or nonbinding letters of intent or memorandums of understanding executed in advance of definitive agreements each as reviewed and approved by the Vice Chancellor and Office of General Counsel.
- 3.3. **Contracts Involving Certain Uses of Institution Names, Trademarks, or Logos.** Except as specifically allowed under existing contracts entered into between the Board of Regents and nonprofit entities supporting a U. T. System institution, agreements regardless of dollar amount that grant the right to a non-U. T. entity to use the institutional name or related trademarks or logos in association with the provision of a material medical-related service or in association with physical

improvements located on property not owned or leased by the contracting U. T. System institution.

- 3.4 Contracts with Certain Officers. Agreements, regardless of dollar amount, with the Chancellor, a president, a former Chancellor or president, an Executive Vice Chancellor, a Vice Chancellor, the General Counsel to the Board, or the Chief Audit Executive are subject to the applicable provisions of *Texas Education Code Section 51.948*.
- 3.5 Insurance Settlements.
- (a) Settlements in excess of \$1 million must have the approval of the Board.
- (b) Settlement claims from insurance on money and securities or fidelity bonds of up to \$1 million shall be approved by the Executive Vice Chancellor for Business Affairs.
- (c) If a loss is so extensive that partial payments in excess of \$1 million are necessary, the Chancellor is delegated authority to execute all documents related to the partial payment or adjustment. Final settlement of claims in excess of \$1 million will require approval by the Board.
- 3.6 Settlement of Disputes. Settlements of any claim, dispute or litigation for an amount greater than \$1 million require approval. The settlement may also be approved by the appropriate standing committee of the Board of Regents. The Vice Chancellor and General Counsel shall consult with the institution's president and appropriate Executive Vice Chancellor, or Vice Chancellor with regard to all settlements in excess of \$150,000 that will be paid out of institutional funds.
- 3.7 Power to Authorize Expenditures. No expenditure out of funds under control of the Board shall be made and no debt or obligation shall be incurred and no promise shall be made in the name of the System or any of the institutions or of the Board of Regents by any member of the respective staffs of the U. T. System or any of the institutions except:

- 3.7.1 In accordance with general or special budgetary apportionments authorized in advance by the Board of Regents and entered in its minutes; or
- 3.7.2 In accordance with authority specifically vested by the Board of Regents in a committee of the Board; or
- 3.7.3 In accordance with authority to act for the Board of Regents when it is not in session, specifically vested by these *Rules and Regulations* or by special action of the Board.

Sec. 4 Exceptions. This Rule does not apply to any of the following:

- 4.1 UTIMCO. Management of assets by UTIMCO, which is governed by contract and the provisions of [Rule 70101](#), [70201](#), [70202](#), and [70401](#) of these *Rules and Regulations*.
- 4.2 Acceptance of Gifts. The acceptance, processing, or administration of gifts and bequests, which actions are governed by [Rule 60101](#), [60103](#), [70101](#), and [70301](#) of these *Rules and Regulations* and applicable policies of the Board of Regents.
- 4.3 Statutory. Any power, duty, or responsibility that the Board has no legal authority to delegate, including any action that the Texas Constitution requires be taken by the Board of Regents.

3. Definitions

Settlement – the amount of the settlement shall mean the amount that might be reasonably expected to be recoverable by the U. T. System or any of the institutions but not received pursuant to the settlement or, in the case of a claim against the U. T. System, the total settlement amount to be paid by the U. T. System.

Group Purchasing Program – for purposes of this Rule, a purchasing program established by (1) a state agency that is authorized by law to procure goods and services for other state agencies, such as the Texas Procurement and Support Services Division of the Texas Comptroller of Public Accounts and the Texas Department of Information Resources, or

any successor agencies, respectively; or (2) a group purchasing organization in which the institution participates, such as Novation, Premier, Western States Contracting Alliance, and U.S. Communities Government Purchasing Alliance; or (3) the U. T. System Supply Chain Alliance.

4. Relevant Federal and State Statutes

Texas Education Code [Section 51.928\(b\)](#) – Written Contracts or Agreements Between Certain Institutions

Texas Education Code [Section 51.948](#) – Restrictions on Contracts with Administrators

Texas Education Code [Section 65.31\(g\)](#) – Delegation by the Board

Texas Government Code [Section 618.001](#) – Uniform Facsimile Signature of Public Officials Act

Texas Government Code [Sections 669.001 - 669.004](#) – Restrictions on Certain Actions Involving Executive Head of State Agency

Texas Insurance Code, [Chapter 1601](#) – Uniform Insurance Benefits Act for Employees of The University of Texas System and The Texas A&M University System

5. Relevant System Policies, Procedures, and Forms

The University of Texas System Administration Policy [UTS166, Cash Management and Cash Handling Policy](#)

The University of Texas System Administration Policy [UTS167, Banking Services Policy](#)

The University of Texas System Administration Policy [UTS 145, Processing of Contracts](#)

Regents' *Rules and Regulations*, [Rule 20204](#) – Determining and Documenting the Reasonableness of Compensation

Regents' *Rules and Regulations*, [Rule 60101](#) – Acceptance and Administration of Gifts

Regents' *Rules and Regulations*, [Rule 60103](#) – Guidelines for Acceptance of Gifts of Real Property

Regents' *Rules and Regulations*, [Rule 70101](#) – Authority to Accept and Manage Assets

Regents' *Rules and Regulations*, [Rule 70201](#) – Investment Policies

Regents' *Rules and Regulations*, [Rule 70202](#) – Interest Rate Swap Policy

Regents' *Rules and Regulations*, [Rule 70401](#) – Oversight Responsibilities for UTIMCO

[Litigation Approval Request Form](#)

[Special Procedure Contracts](#)

6. Who Should Know

Administrators

7. System Administration Office(s) Responsible for Rule

Office of the Board of Regents

8. Dates Approved or Amended

Editorial amendment to Section 2.2.17 made May 10, 2012

Editorial amendment to Section 1.1 made April 12, 2012

Editorial amendment to Section 2.9 made April 11, 2012

August 25, 2011

Editorial amendments to rearrange the Rule made April 15, 2011

Editorial amendment to Section 4.12 made December 1, 2010

February 5, 2010

November 12, 2009

August 20, 2009

Editorial amendment to add Subsection 4.17 (Group Employee Benefits) back into the Rules made August 6, 2009

Editorial amendment to Number 4 made January 5, 2009

November 13, 2008

May 15, 2008

Editorial amendment to Sec. 3.3 made March 17, 2008

Editorial amendment to Number 3 made January 28, 2008

May 10, 2007

February 8, 2007

May 12, 2005

December 10, 2004

9. Contact Information

Questions or comments regarding this Rule should be directed to:

- bor@utsystem.edu

APPENDIX M

U. T. System Trademark Licensing Policy



THE UNIVERSITY OF TEXAS AT AUSTIN WHAT STARTS HERE CHANGES THE WORLD

Office of Trademark Licensing

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Office of Trademark Licensing

TRADEMARK POLICY

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To fully protect The University of Texas System trademarks so that they remain valuable assets for years to come, System registers the marks and manages them through licensing. These two steps would not be sufficient, however, if System licensed the marks for any and every proposed use. For example, some uses would harm the very reputation that the marks represent. In other cases, the nature of goods and services may pose such significant legal risks that they should not be licensed, and some uses may potentially harm the marks unless they are carefully controlled. To protect its marks, System has developed the following use restrictions:

General

Only an Officially Licensed Vendor may produce merchandise bearing UT System Trademarks. "Officially Licensed Vendors" and "Store Vendors" or other University vendors may not always be the same. For a current list of Officially Licensed Vendors contact the Office of Trademark Licensing or go to the [Forms & Lists](#) page to download.

Any trademark which identifies or is associated with the UT System may not be used without prior expressed written permission from the Office of Trademark Licensing. To obtain this permission, submit a written request via e-mail (preferable) to the Office of Trademark Licensing at trademarks@athletics.utexas.edu, or fax (512-232-7080.) [Questions](#) have been developed to assist you with providing pertinent information so that your request can be considered. For Internal Requests on products bearing trademarks, see [Campus Entities](#) section below.

We are committed to the concept that all items incorporating UT Trademarks (including names of departments and any recognized club and organization affiliated with UT System or its institutions) are manufactured by companies whose labor policies insure that their employees are safe from abusive labor practices. The Office of Trademark Licensing in connection with our licensing agents [Collegiate Licensing Company ([CLC](#)), Strategic Marketing Affiliates ([SMA](#))] and the Fair Labor Association ([FLA](#)) have adopted Labor Code Standards which require licensees to disclose the locations of their factories it owns or contracts with and authorize announced and unannounced inspections/monitoring of the factories.

Merchandise bearing UT Trademarks and produced without proper written authorization may be considered counterfeit or infringing and subject to all available legal remedies, including, but not limited to, seizure of the merchandise.

Licensing

Any person, business, or organization desiring to use trademarks of The University of Texas System in any manner and for any purpose must be licensed to do so. The UT System has arranged for licenses to be issued by the Collegiate Licensing Company ([CLC](#)) and Strategic Marketing Affiliates ([SMA](#)) on the institutions behalf. A separate license must be obtained for each institution within the System.

The CLC Consortium offers the following licenses to companies interested in producing licensed merchandise. All license applications are subject to the approval of the individual institutions (Austin & El Paso). SMA offers two types of agreements, the Standard and Restricted (Arlington, Brownsville, Dallas, Pan American, Permian Basin, San Antonio, Tyler, Southwestern Medical Center at Dallas, Medical Branch at Galveston, HSC-Houston, and HSC-San Antonio).

Standard License: A Standard License is available to companies that wish to manufacture collegiate product for six or more institutions, and is typically reserved for larger manufacturers with well-established production, distribution, and marketing capabilities.

Local License: A Local License is available to smaller companies that wish to manufacturer collegiate product for up to five in-state institutions, and do not have plans to expand significantly beyond those local institutions.

Restricted License: A Restricted License is available to companies that wish to produce non-resale merchandise for "internal consumption" by institutions in the local area.

NCAA/Bowl/Conference Licenses: These are special licenses that are available to companies that wish to obtain rights to use the trademarks of the NCAA, bowl games, or athletic conferences for use on licensed merchandise, either alone or in conjunction with an institution's trademarks. Licensing rights to these properties can be more expensive to obtain, depending on the event and the extent of the rights and product categories.

Please Note: Some Colleges and Universities may offer a license called a "Crafter's License;" however this is not a type of license any of the UT System Institutions have.

To download an application or obtain more detailed information about these types of licenses, please visit the Licensing Info menu at www.clc.com or www.smaworks.com/license-application/.

Royalties

General guidelines have been set up to determine if a request is royalty or non-royalty bearing. That being said, each request is reviewed on a case by case basis to ensure that the trademark policies are implemented in a consistent manner. These guidelines are, but not limited to the following:

1) Any item, including those sold to a University-owned entity are generally subject to royalty fees if a UT Trademark is utilized and the product is for resale. 2) The inclusion of a corporate name or "sponsor" may require the payment of royalties. This is usually the case with promotional, corporate sponsored items. 3) There are times when an item being given away will be royalty bearing. This is when the design is considered "generic" (ie: not dept, program, or event specific.)

Use Limitations

System Marks requested for the following uses are limited and described in the upcoming highlighted sections. As always, prior written approval from the Office of Trademark Licensing for permission to use marks in the following ways:

Publications

Use of trademarks/logos on the cover or within the text of a magazine when there is an article about the University, its officers, students, or alumni.

Sports publications approved by the institutional chief administrative officer or designee, providing the publisher agrees to include the following disclaimer in the publication: "Not an Official Publication of The University of Texas (@ institution)".

Literary works that generally provide historical information about and promote the goodwill of the U.T. System or component institution. System marks may be licensed for such use by permission letter after review by the appropriate institutional officers.

Internal publications that incorporate UT Trademarks should conform to each component institutions guidelines.

Advertisements

System marks may be used in the following kinds of advertising, so long as the uses also conform to the special requirements of the Office of General Counsel contained in guidelines, checklists and interactive electronic forms applicable in each case. These are designed to help component institutions conform their agreements to standard expectations regarding both the form and substance of the agreements and the approval of ad copy and layout design.

A commercial entity that is a "licensee" of the University may utilize certain marks in an ad but only when there is an underlying related product, which is licensed and only when the licensed product is being advertised.

Those entities not licensed may utilize certain marks in ads that are of an informational, **congratulatory** or in team spirit nature (academic/athletic achievements) as determined by the Trademark office. These ads may not contain solicitation for the sale of their products or services but the company name/logo may appear.

Corporate advertisements that utilize appropriate System trademarks in official programs sold or distributed at Intercollegiate Athletic events, pursuant to the terms of an Advertising Agreement.

Promotional activities utilizing appropriate System trademarks, pursuant to the terms of a Sponsor/Promotional License Agreement. Promotional activities are activities such as advertising or offering promotional products to further the growth, development, acceptance and/or sale of goods or services.

For companies that have done work for the University, the company may list the component name with other customers. These companies may include photographs of the actual work area provided that it is generic to the location.

Campus Entities (Student Groups, Schools, Departments)

An official request must be submitted by providing a Student and Internal Request Form, which can be downloaded from the **Forms & Lists** page of this site or obtained from the Office of Trademark Licensing. Products utilizing University trademarks must be produced under a licensing agreement. A list of Officially Licensed Companies (vendors) can also be found on the **Forms & Lists** page. The completed form should then be returned to this office along with the entire proposed design. Once all the information pertaining to the request is received, the review process can begin. This request process typically takes between 3-5 business days; however if more information is needed, this time could be extended. *The internal request process for System Institutions other than Austin are individual to that institution and must follow their internal and visual guidelines.

Only organizations that are "officially sponsored" may use the marks, but may not use the marks in a manner that in any way would constitute an endorsement, approval, or underwriting of any organization, product, activity, service, or contract by The University of Texas System. For a UT Austin student group to become officially sponsored, contact **Student Activities** in the Dean of Students Office. For all other UT System Institutions, contact that System Institution's respective Dean of Students Office and follow their process for being recognized as an official student group. The Office of Trademark Licensing must approve artwork and merchandise must be purchased from a licensed manufacturer. Use of University logos/names may also be used when there is a clear identity with official operation or approved academic programs of the institution.

Periodically, campus organizations solicit funding from outside entities to support fundraising efforts. It is possible to acknowledge a corporate entity for its support, providing there is no logo usage and no mention of products or services of that corporate entity. For example, "This mailing made possible by ---" or similar statement may be used. The company name should be in the same size, color, and typeface as the rest of the statement.

Student organizations that represent themselves on the internet should follow the guidelines here on this *sample site* when creating their sites. **This site** illustrates the correct and incorrect website layout which can be used as a guide in creating compliant organizational web sites.

Corporate Partners

Those corporations that have executed agreements either with the University or its representative and have been granted the rights to use the marks must have all use of the marks approved by the Office of Trademark Licensing. Corporate Sponsorship agreements are limited to athletic events or other University activities that are co-sponsored by the University.

Corporations that are working together with a System Institution on a project, each contributing equally may use their name/logo with the University names/logos. An association where there is not an equal partnership is limited to stating as a fact what the University's role is in the project, rather than placing the University's logo/name next to the corporation's. Projects in which the University provides informal assistance may not include reference to the University at all.

The following will not be licensed:

- Stationery--business-size, letterhead paper using the name or seal of a component institution of The University of Texas System.
- Alcoholic Beverages--distilled alcohol liquors, wines and malt liquors.
- Inherently Dangerous Products--such as firearms, explosives, and fuels.
- Obscene or Disparaging Products--including, but not limited to, nude photographs, caricature poster art or designs that would tend to lower the reputation or degrade the goodwill of the University as represented by the trademarks.
- Sexually Suggestive Products--including, but not limited to, inappropriate slogans imprinted on clothing and the configuration of certain novelty items.
- Health/Beauty Related Products--all types.
- Staple Foods, Meats and Natural Agricultural Products--all types.
- Business Names and or Logos--all types.

- Services--except in accordance with the special requirements of the Office of General Counsel applicable to services.

Expediting Your Request

When submitting your written request it is important to state the Who, What, Why and Where's. To assist you, the following questions are provided *:

1. What is the presentation, including what reference will be made to the institution?
2. Where will the trademark be used and how?
3. Why is the logo being included?
4. Who will be producing the item which will be bearing the trademark? Provide complete contact information.
5. When will the logo be used? (Duration of use.)
6. Who is the audience?

*Provide a copy of the material on which the logo will appear (artwork, etc.) to help illustrate the overall impression of the use.

*If request is internal, Campus or Departmental Contact information and approval for is necessary. (For example, at times our office is contacted by an outside manufacturer who is requested to produce items such as signs, doors, etc by a campus entity and we will need to know who exactly that University contact is.)

Please provide as much information as possible. This will help expedite your request. You may forward any information/materials via **email**, facsimile (512-232-7080), or US mail to the **Office of Trademark Licensing**.