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When to Say No (or Yes!) to a Gift



Date: February 7, 2019
 Time: 1:00 – 2:30 Eastern
 Presenter: Jeff Lydenberg
 Vice President, Consulting
 PG Calc

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Agenda


- Basic considerations in accepting complex assets
- Danger signals of bad gifts
- Drafting acceptance policies to stay out of trouble
- Due diligence guidelines
- Risk control strategies
- When to say yes or no to particular assets

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Basic Considerations

- Assets that are hard to value, hard to liquidate
- Size matters
 - ✓ Larger the gift, likely greater the risk
 - ✓ Charities large and small must follow same process
 - ✓ Is the gift worth the resources/risk?
- Charity's reputation at risk
- Use risk control strategies to facilitate complex gifts



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Danger Signals of Bad Gifts


- Unknown prospect
 - ✓ Charitable gifts express donor emotions, values and, life story
 - ✓ Is prospect known to charity or in community?
- Any connection to your organization?
 - ✓ Best indicator of interest in **your** charity is history of giving
 - ✓ Alumni? Volunteer? Member? Subscriber?
 - ✓ Part of your natural constituency?

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Danger Signals of Bad Gifts

- Too good to be true
 - ✓ Six and seven figure gifts
 - ✓ Complex terms
 - ✓ "Legal" opinions
 - ✓ Obligations on the part of charity
 - ✓ Charity will benefit "eventually"
 - ✓ Could you explain the gift to your grandmother?



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Danger Signals of Bad Gifts

- Trust your instincts
- Have you or colleagues heard of the gift plan before?
- Post a question to CGP-Link
- Do terms of the "great" gift violate basic tax rules as you understand them?
- Engage professionals to evaluate a too good to be true gift

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Danger Signals of Bad Gifts

- Charity/Gift shopping
 - ✓ "I tried to sell this asset without success."
 - ✓ "Another charity passed on this gift as well."
- American Council on Gift Annuities (ACGA)
 - ✓ Sets standard sustainable gift annuity rates
 - ✓ Sets a level playing field for charity
 - ✓ Higher gift amount does not justify higher rate
 - Larger the gift, greater the risk

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Drafting Good Gift Acceptance Policies

- Drafting gift acceptance policies
 - ✓ Collaborative effort development, finance, general counsel
- Initial considerations
 - ✓ Rules of the road as to acceptable assets and vehicles
 - ✓ Framework for evaluating risk and reward
 - ✓ CGAs, CRTs, CLTs, retained life estates, oil and gas interests



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Drafting Good Gift Acceptance Policies

- Donor advised funds
 - ✓ No more than incidental benefit from DAF
 - ✓ Bifurcated gifts prohibited
 - ✓ Can satisfy legally enforceable pledge (Notice 2017-73)
- Restricted gifts
 - ✓ Restrictions must be within charity's mission and for purposes likely to exist in the future
 - ✓ Include variance clause for changed circumstances

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Drafting Good Gift Acceptance Policies

- Appraisals
 - ✓ Assets valued in excess of \$5,000 require qualified, independent appraisal
 - ✓ Appraiser must sign a Form 8283 for countersignature by charity accepting asset
 - ✓ If property disposed of within 3 years, charity files 8282
- Yes Virginia, the donor should pay for the appraisal!
 - ✓ If charity pays for appraisal, donor should reduce deduction by amount of appraisal

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Drafting Good Gift Acceptance Policies

- Donor advisors
 - ✓ Encourage donor's independent counsel
- Counting and crediting
 - ✓ Uniform policies with room for exceptions
- Stewardship
 - ✓ Describe giving societies, amounts, who is in and out
 - ✓ How to steward is a matter of procedure, no policy
- Pledges
 - ✓ Uniform policies with room for exceptions
 - ✓ Consider terms of pledges backed with estate gift

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Drafting Good Gift Acceptance Policies

- The gift acceptance committee
 - ✓ The critical component to make informed decisions
 - ✓ Ad hoc group charged with evaluating risky and complex gifts
- Composition of committee will change depending on particular gift
 - ✓ Core members: chief development officer, CEO, CFO
 - ✓ Other members may be invited based on their expertise
 - ✓ Committee may engage legal, accounting, or other experts to evaluate different situations



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Due Diligence

- Process is not just evaluation of financial and legal risk
 - ✓ Consider reputational risk
 - ✓ Would you be happy to see this on front page of your local paper?
- Don't get carried away!
 - ✓ People get excited by big numbers
- Due diligence is equal opportunity process
 - ✓ Insiders not exempt from close scrutiny
 - ✓ There will be (not maybe) donor relations issues

Your Charity
Name Here


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Risk Control Strategies-Single Member LLC

- **Single member limited liability company (LLC)**
 - ✓ IRS notice 2012-52
 - ✓ Gifts to charity owned LLC tax deductible as if made to parent charity
- LLC owned by single charity disregarded entity for tax purposes
 - ✓ Activities of the LLC treated as if by parent charity
 - ✓ Liability of LLC limited to assets of LLC


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Risk Control Strategies-Single Member LLC


- Charity not in chain of title or ownership of LLC assets
 - ✓ LLC liable for title defects, premises liability, environmental contamination and other risks of real estate ownership
 - ✓ Consider LLC for many risky assets
- Parent charity responsible for taxable activities of LLC
 - ✓ LLC must only furthers tax-exempt purposes
 - ✓ LLC earning income on S corporation stock or capital gain on sale of S stock generates Unrelated Business Income (UBI)
 - ✓ UBI earned by LLC reported on tax return of parent charity

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Risk Control Strategies-Donor Advised Funds

- Most DAFs equipped to accept risky, hard to value, hard to sell assets
- DAF may be captive arm of financial services firm or community foundation



- DAFs minimums funded with complex assets subject to higher minimums
 - ✓ Vanguard: \$25,000 to open DAF with cash or securities
 - ✓ Vanguard: \$750,000 minimum to accept gifts of closely held assets, hedge funds, or other private equity assets

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Risk Control Strategies - Donor Advised Funds

- How can a DAF help with difficult assets?
 - ✓ DAF accepts asset
 - ✓ Manages acceptance, fronts carrying costs (taxes, maintenance, attorney's fees, due diligence experts)
 - ✓ DAF converts to cash
 - ✓ DAF reimburses itself from proceeds of sale
- Where's the gift?
 - ✓ Net proceeds of asset fund donor's DAF
 - ✓ Donor could immediately grant entire account to charity after sale
 - ✓ Or not! Charity may lose control of donor

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Cash and Publicly Traded Securities


When to say yes? Almost always

When to say no? Well...



- What/who is the source of the gift?
- Is there a reputational risk?
- Will the gift run afoul of foreign currency restrictions?
- China limits conversion of Renminbi (RMB) to foreign currency to the equivalent of \$50,000 U.S.


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Gifts of Real Estate

- Two primary concerns:
 - ✓ Liabilities: environmental, carrying costs, premises liability
 - ✓ How to convert property to cash
- Phase I environmental audit, title search, liens, lawsuits, marketability study
- Charity appraisal
- Engage professionals to assist

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Gifts of Real Estate

When to say yes? It depends

- Could property advance charitable mission?
- Are donor and property known to charity?
- Does property pass due diligence tests?

When to say no?

- If the value of the property not worth the cost of evaluation
- If the property is unmarketable and overvalued
- If donor wants charity to assume a mortgage
- If the gift would be a pre-arranged sale

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Closely-Held Business Assets

When to say yes?

- **C corporation's** easiest business asset with least risk
 - ✓ What is plan to convert to cash? Stock redemption?
- **S corporations**
 - ✓ Single largest source of wealth in U.S.
 - ✓ Consider gift of corporate assets instead
- **Pass-through entities**
 - ✓ Greatest flexibility in how to structure
 - ✓ Not subject to UBI as a passive investment

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Closely-Held Business Assets

When to say no?

- **C corporation** gifts to private foundations and CRTs
- Subject to private foundation rules
 - ✓ Considered self-dealing if stock sold to disqualified persons
- Charity liable for tax on income and capital gain from **S corporation** as UBI - Deal breaker!
- **Passthroughs** difficult to market
 - ✓ Partnerships may require charity to give cash
 - ✓ LLC liability generally limited to initial investment

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Gifts of Life Insurance

When to say yes?

- **Transfer Ownership of Paid-Up Policy**
 - ✓ Could be cashed in immediately
 - ✓ Could be carried as an investment
- **Name Charity as Beneficiary of Donor's Policy**
 - ✓ Charity not liable for premium payments
 - ✓ Donor could change their mind, but not a net loss


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Gifts of Life Insurance

When to say no? (Probably)

- **Gift of Policy with Premiums Due**
 - ✓ Donor could make annual tax deductible gift of premium
 - ✓ What if donor loses interest or fails to pay premiums?
 - ✓ Present value of premiums higher than death benefit
- **Purchase New Policy, Name Charity as Owner**
 - ✓ Commissions are economically inefficient to charity
 - ✓ See points above



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Oil and Gas Interests

When to say yes?

- **Fee and Royalty interests, Non-operating Interests**
 - ✓ Engage oil and gas professionals working for charity
 - ✓ Potential liability, but assets can be quite valuable

When to say no?

- **Working Interests**
 - ✓ All liability, environment, compliance, safety on the owner of the working interest
 - ✓ Not your core business, stay away

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Tangible Personal Property

When to say yes?

- **When property can be put to a related use**
 - ✓ Related use if of type normally used in mission and charity intends to use property in its mission
 - ✓ Donor entitled to a fair market value deduction
 - ✓ Form 8283 and qualified, independent appraisal required if value over \$5,000
 - ✓ Form 8282 (Tattletale form!) if sold within 3 years


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Tangible Personal Property

When to say no?

- **Property unrelated to charitable mission**
 - ✓ Donor's deduction limited to cost basis
 - ✓ Donor relations issues
- **Disposition and carrying costs are prohibitive**
 - ✓ Moving
 - ✓ Storage
 - ✓ Insurance
 - ✓ Fragile property



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Gifts from IRAs

When to say yes?

- **Charitable IRA rollover** (qualified charitable distribution)
 - ✓ When it is 100% deductible (no bifurcation!)
- **Beneficiary of IRA at death**
 - ✓ Almost always say yes!
 - ✓ But see next slide

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Gifts from IRAs

When to say no?


- **Charitable IRA rollover** (qualified charitable distribution)
 - ✓ Can't be used for tickets, auction items, or if more than minimal quid pro quo benefits
 - ✓ Can't be made to DAF, supporting org, or private foundation
- **Beneficiary of IRA at death**
 - ✓ Get ready, process is complex, intrusive, and lengthy
 - ✓ Consider advising donor to make DAF beneficiary of IRA

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Cryptocurrency

- Educate your self
- Bitcoin is only one of hundreds of virtual currencies, but most popular
- Unresolved legal, tax, and regulatory issues
- Treated as gift of property
 - ✓ Appraisal required if claimed value over \$5,000
 - ✓ Short term v. long term



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Cryptocurrency

When to say yes or no?

- **Don't say yes or no until infrastructure in place to accept (or not!)**
 - ✓ See paper for resources
 - ✓ Risk is fluctuation in value, sell immediately like stock
- **Consider reputational risk**
 - ✓ Know your donor
 - ✓ How and why are they trading in virtual currency
 - ✓ Associated with illegal activity

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Timeshares

- Timeshare ownership interests take several forms
 - ✓ Shared deeded interest
 - ✓ Shared leased ownership
 - ✓ Timeshare owner (even charity) liable for portion of annual expenses
 - ✓ Resale market is glutted and sale price can exceed annual maintenance fees
- When to say yes? Almost never
- When to say no? Almost always

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Questions?



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Still Have a Question?

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