

# Gift Acceptance Policy<sup>1</sup>

## 1. Policy and Purposes<sup>2</sup>

This Policy represents the policy of [**Insert Name of Nonprofit Organization**] (the “Organization”) governing the solicitation and acceptance of gifts by the Organization. The purpose of this Policy is to provide guidance for the Organization’s board, officers, and staff with respect to their responsibilities concerning gifts to the Organization.<sup>3</sup> The provisions of this Policy shall apply to all gifts received by the Organization. Notwithstanding the foregoing, the Organization reserves the right to revise or revoke this Policy at any time, and to make exceptions to the Policy.

The mission of the Organization is to [**insert description of mission**].

## 2. General Policy

The primary consideration of gift acceptance or solicitation will be the impact of the gift on the Organization. When considering whether to solicit or accept gifts, the Organization will evaluate the following factors:

- i. Values – whether the acceptance of the gift compromises any of the core values of the Organization
- ii. Compatibility – whether there is compatibility between the intent of the donor and the Organization’s use of the gift
- iii. Public Relationships – whether acceptance of the gift damages the reputation of the Organization
- iv. Primary Benefit – whether the primary benefit is to the Organization, versus the donor
- v. Consistency – whether acceptance of the gift is consistent with prior practice
- vi. Form of Gift – whether the gift is offered in a form that the Organization can use without incurring substantial expense or difficulty
- vii. Effect on Future Giving – whether the gift will encourage or discourage future gifts.

The Organization shall not accept gifts that:

- i. Violate the terms of the Organization’s organizational documents<sup>4</sup>; or
- ii. Would jeopardize the Organization’s status as a 501(c)(3) tax exempt organization under federal and state law.

## 3. Use of Legal Counsel

The Organization shall seek the advice of legal counsel in matters relating to acceptance of gifts when appropriate. Review by legal counsel is recommended for:

- i. Closely held stock transfers that are subject to restrictions or buy-sell agreements;
- ii. Documents naming the Organization as trustee;
- iii. Gifts involving contracts such as bargain sales, partnership agreements, or other documents requiring the Organization to assume an obligation;
- iv. Transactions with potential conflict of interest;<sup>5</sup>

- v. Gifts of real estate;
- vi. Oil, gas, and mineral interests; and
- vii. Gifts of any amount with unusual restrictions (e.g. gifts requiring the Organization to do work it is not already doing and/or gifts requiring the Organization to expand work it is already doing).

The Organization cannot serve as both the donor's adviser and the recipient of the donor's gift. Therefore, the Organization will urge all prospective donors to retain appropriate independent tax and legal counsel.

#### **4. Gift Definition**

A gift is defined as a voluntary transfer of assets from a person or an organization to the Organization. A gift is an irrevocable transfer of assets, motivated by charitable intent. Gifts are not generally subject to an exchange of consideration or other contractual duties between the Organization and the donor, except for certain split-interest gifts as set out in this Policy, although objectives may be stated and funds may be restricted to a specific purpose. A gift is not completed until it has been accepted by the Organization.

#### **5. Approval of Gifts**

Subject to Section 6 below, all final decisions on the acceptance or refusal of a gift shall be made by the [*Board of Directors/Gift Acceptance Committee/Executive Committee/Other Body*] ("Governing Body").<sup>6</sup>

#### **6. Types of Gifts**

- A. Outright Gifts:** An outright gift involves the donor's voluntary and intentional transfer of money or assets to the Organization without expectation of receiving a benefit related to the value of the transfer. Although the donor may place restrictions on the use of the gift, the donor may not retain control over the money or property transferred to the charity. The following criteria govern the acceptance of each form of outright gift:
  - i. **Unrestricted Gifts of Cash:** The Organization will accept unrestricted gifts of cash without prior review by the Governing Body, provided that, for donations of [**insert amount**] or more, the identity of the donor has been vetted by the [*Executive Director, Chief Executive Officer/Managing Supervisors/Governing Body/Other Person or Group of Persons*] with respect to potential conflicts of interest or the appearance of conflicts of interest. Unrestricted gifts of cash are acceptable in any form. Checks shall be made payable to the Organization.
  - ii. **Publicly Traded Securities:** The Organization will accept unrestricted publicly traded securities without prior review by the Governing Body. Publicly traded securities may be transferred electronically to an account maintained at one or more brokerage firms or delivered physically with the transferor's endorsement or signed stock power (with appropriate signature guarantees) attached. The [*Director of Development/Executive*

*Director/Other Individual*] should ask the donor to notify the Organization in advance about the securities being transferred, the number of shares, and the intended gift date. All publicly traded securities will be sold promptly upon receipt unless otherwise directed by [**insert body appropriate to make decision, e.g., investment committee or finance director**]. In some cases, publicly traded securities may be restricted, for example, by applicable securities laws or the terms of the proposed gift; in such instances the decision whether to accept the restricted securities shall be made by the Governing Body.

- iii. **Tangible Personal Property Retained for Use by Organization:** Tangible personal property for use by clients (e.g., [**clothing or insert other relevant item**]) may be accepted if approved by a supervisor. A supervisor may refer the decision whether to accept a gift of tangible personal property for use by clients to the Executive Director or Governing Body. All other tangible personal property for use by the Organization may only be accepted if approved by [*the Executive Director/Governing Body*].<sup>7</sup> In determining whether to accept gifts of tangible personal property for use by the Organization, supervisors, the Executive Director, and Governing Body shall consider whether the property furthers the mission of the Organization, whether the donor has requested any restrictions on the use or display of the property, and whether the donor is willing and able to finance the packing, shipping, insurance, and other costs associated with transferring the gift to the Organization.<sup>8</sup>
- iv. **Tangible Personal Property Accepted with Intent to Sell:**<sup>9</sup> The Organization may accept gifts of tangible personal property with the intent to sell only upon approval of the Governing Body. The minimum value of such gift shall be [**insert value**]. The donor must provide proof of ownership and a qualified appraisal performed within sixty days of the gift proposal date. Gifts of tangible personal property shall only be accepted if they are readily marketable and are free and clear of encumbrances. Prior to accepting the gift, the Organization should inform the donor that it intends to sell the property.
- v. **Intellectual Property/Other Intangible Interests:** The Organization will consider gifts of intellectual property such as royalties, copyrights, patents, contract rights, and similar intangible interests only upon approval by the Governing Body. The Governing Body shall consider the appraised value of the intangible property, the administrative costs involved in accepting such a gift, and whether the donor agrees to assign all rights related to the intangible property. Prior to acceptance of the gift, the donor must provide proof or statement of ownership of the intangible property.
- vi. **In-Kind Gifts of Services:** The Organization will accept an in-kind gift of services if approved by a supervisor.
- vii. **Closely Held Securities or Business Interests:** Closely held securities or business interests, including debts and equity positions in non-publicly traded companies, interests in LLPs and LLCs, or other ownership forms, may be accepted subject to the approval of the Governing Body. The Organization will not accept an interest in a

general partnership.<sup>10</sup> The following documentation must be provided to the Organization before a gift of closely held securities will be considered for acceptance:

- A qualified independent appraisal
- Copies of any shareholder buy/sell agreements
- Copies of restrictions on the transfer contained in the bylaws and/or reflected on the stock certificates

In deciding whether to accept a gift of closely held securities or business interests, the Governing Body should consider and evaluate any restrictions on the security or business interest that would prevent the Organization from ultimately converting the securities to cash, the marketability of the security, and whether the security or business interest would generate any undesirable tax consequences.<sup>11</sup>

- viii. **Real Estate:**<sup>12</sup> Gifts of real estate may include developed property, undeveloped property, or gifts subject to a prior life interest. Upon approval of the Governing Body, the Organization may accept ownership of outright gifts of real estate. Gifts of real estate may be used for sale, to generate cash flow, or for exempt purposes. If used for exempt purposes, the Organization should consider applying for property tax welfare exemption.

*Environmental Review.* Prior to acceptance of real estate, the Organization shall require an initial environmental review of the property to ensure that the property has no environmental problem. If the initial inspection reveals a potential problem, the Organization shall retain a qualified inspection firm to conduct an environmental audit. The cost of the environmental audit shall be an expense of the donor.

*Title Binder.* A title binder shall be obtained by the Organization prior to the acceptance of the real property gift when appropriate. The cost of this title binder shall be an expense of the donor.

*Appraisal.* The Organization shall obtain an independent appraisal prior to the acceptance of the real property gift.

*Factors for Acceptance.* The Governing Body and legal counsel shall review and decide whether to accept real property based on the following factors:

1. Whether the property is useful for the purposes of the Organization;
2. The marketability of the property;
3. Any tax consequences that may result from the sale or lease of the property;
4. Any encumbrances, leases, restrictions, reservations, easements, or other limitations associated with the property;
5. Any carrying costs associated with the property, including insurance, property taxes, mortgages, notes or other costs;
6. Any concerns which the environmental audit revealed.

*Acceptance with Intent to Sell.* If the Organization plans to accept a gift of real estate

with the intent to sell, it should inform the donor of its intent to sell prior to accepting the gift.

- ix. **Remainder Interests in Property:** The Organization will accept a remainder interest in a personal residence, farm, or vacation property subject to the provisions of this Paragraph 6. The donor or other occupants may continue to occupy the real property for the duration of the stated life. At the death of the life tenant(s), the Organization may use the property or reduce it to cash. Expenses for maintenance, real estate taxes, and any property indebtedness shall be paid by the donor or primary beneficiary. Proof of payment and certificates of insurance may be required by the Organization.
  
- x. **Oil, Gas, and Mineral Interest:**<sup>13</sup> The Organization may accept oil, gas, and mineral interests upon approval of the Governing Body, and if necessary, by the Organization's legal counsel, subject to the following limitations:
  - 1. Gifts of surface rights should have a value of \$\_\_\_\_\_ or greater
  - 2. Gifts of oil, gas, and mineral interests should generate at least \$\_\_\_\_\_ per year in royalties or other income) as determined by the average of the three years prior to the gift)
  - 3. The property should not have extended liabilities or other considerations that make receipt of the gift inappropriate
  - 4. A working interest should only be accepted after consideration of potential liability and tax consequences
  - 5. The property should undergo an environmental review to ensure that the Organization has no current or potential exposure to environmental liability.
  
- xi. **Restricted Gifts:**<sup>14</sup> The Organization will accept gifts for specific programs and purposes, provided that such gifts are not inconsistent with the Organization's stated mission and purposes. The Governing Body reserves the right to review, accept, or reject any conditions or obligations proposed by a donor prior to the Organization's acceptance of a gift. The Governing Body may determine that the proposed conditions or limitations of a gift are too restrictive and reject such gift for any lawful reason, including, but not limited to, if such gift violates the charitable trust of the Organization, if the gift is accompanied by an improper economic benefit to the donor, if the gift provides too much control to the donor, or if the gift requires the Organization to take any action deemed inappropriate by the Governing Body.
  
- xii. **Named Funds:** A donor, or group of donors, may contribute and name a fund and restrict the use of the income or principal of the fund. Named funds are subject to Governing Body approval.

## B. Estate Gifts

- i. **Bequests and Beneficiary Designations under Wills, Revocable Trusts, Life Insurance Policies, Commercial Annuities, and Retirement Plans:** Donors are encouraged to make bequests to the Organization under their wills, and to name the

Organization as the beneficiary under trusts, life insurance policies, commercial annuities, and retirement plans. A bequest or designation will not be recorded as a gift until the gift is irrevocable. When the gift is irrevocable, but is not due until a future date, the gift will be recorded in accordance with GAAP.

The Organization encourages donors to disclose their bequest and beneficiary designation intentions to the [*Director of Development/Executive Director/Other Individual*] in writing to ensure that the Organization is able to carry out their wishes and that the gifts conform to the principles in this Gift Acceptance Policy.<sup>15</sup> Gifts from estates of deceased donors that do not conform to the Organization's policies may be accepted or rejected by the Governing Body, and such decision communicated to the legal representative of the estate. If possible, a mutually agreeable plan shall be negotiated between the Organization and the representative to make the gift acceptable.

- ii. **Life Insurance:**<sup>16</sup> Gifts of life insurance may only be accepted upon approval of the Governing Body. The Organization must be named as both beneficiary and irrevocable owner of an insurance policy before a life insurance policy can be recorded as a gift. In determining whether to accept the gift, the Organization should consider the life expectancy of the insured and whether the policy has been fully paid. The gift shall be valued in accordance with GAAP rules by the Organization's Finance Department. If the donor contributes future premium payments, the Organization will include the entire amount of the additional premium payment as a gift in the year that it is made. If the donor does not elect to continue to make gifts to cover premium payments on the life insurance policy, the Organization, upon approval of the Governing Body, may:
  - 1. Continue to pay the premiums;
  - 2. Convert the policy to paid up insurance; or
  - 3. Surrender the policy for its current cash value.

### C. Life Income Gifts

- i. **General:**<sup>17</sup> The Organization accepts donations of life income gifts subject to the terms of this Section 6.C. If a donor desires to make a life income gift, the directors, officers, and senior staff of the Organization shall not offer advice on any income tax consequences of such a gift. The Organization should advise the donor to seek independent counsel on any tax consequences.
- ii. **Charitable Remainder Trusts:**<sup>18</sup> The Organization may accept designations as remainder beneficiary of a charitable remainder trust [*optional: subject to approval by the Governing Body*]. The Organization [*may/shall not*] accept fiduciary responsibility for management of investments of the trust assets prior to the distribution of the remainder interest.
- iii. **Charitable Lead Trusts:**<sup>19</sup> The Organization may accept designations as income beneficiary to a charitable lead trust [*optional: subject to approval by the Governing*

*Body*]. The Organization shall not accept fiduciary responsibility for management of investments of the trust assets.

- iv. **Charitable Gift Annuities:**<sup>20</sup> [The Organization does not offer charitable gift annuities at this time due to the necessary financial and administrative preparation required to administer these annuities. This Gift Acceptance Policy may be revised in the future to offer charitable gift annuities if and when the Organization has the financial and administrative capacity to provide such annuities and the Governing Body approves.]

OR

[The Organization may offer charitable gift annuities, subject to approval by the Governing Body. The minimum gift for funding is **[insert amount]**. The minimum age for life income beneficiaries of a gift annuity shall be **[insert age]**. Where a deferred gift annuity is offered, the minimum age for life income beneficiaries shall be **[insert age]**. No more than **[insert number]** life income beneficiaries will be permitted for any gift annuity. The Governing Body may make exceptions to these minimums.

Annuity payments may be made on a quarterly, semi-annual, or annual schedule.

The Organization will not accept real estate, tangible personal property, or any other illiquid assets in exchange for current charitable gift annuities. Subject to approval by the Governing Body, the Organization may accept real estate, tangible personal property, or other illiquid assets in exchange for the deferred gift annuities so long as there is at least a five-year period before the commencement of the annuity payment date, the value of the property is reasonably certain.

Funds contributed in exchange for a gift annuity shall be set aside and invested during the term of the annuity payments. Once those payments have terminated, the funds representing the remaining principal contributed in exchange for the gift annuity shall be transferred to the Organization.]

**D. Other Gifts:** All other types of gifts or assets will only be accepted upon approval of the Governing Body.

## **7. Additional Provisions**

**A. Gift Agreements:** Where appropriate, the Organization shall enter into a written gift agreement with the donor, specifying the terms of any restricted gift, which may include provisions regarding donor recognition.

**B. Pledge Agreements:** Acceptance by the Organization of pledges by donors of future support of the Organization (including by way of matching gift commitments) shall be contingent upon the execution and fulfillment of a written charitable pledge agreement specifying the

terms of the pledge. If the Organization intends for the pledge agreement to be legally binding, there must be consideration either in the form of the donor receiving something in return (such as recognition) or reliance by third parties of the Organization.<sup>21</sup> All pledge agreements require prior approval of the Governing Body.

- C. Fees:** The Organization will not accept a gift unless the donor is responsible for (1) the fees of independent legal counsel retained by donor for completing the gift; (2) appraisal fees; (3) environmental audits and title binders (in the case of real property); and (4) all other third-party fees associated with the transfer of the gift to the Organization.
- D. Valuation of Gifts:** The Organization shall record gifts received at their valuation on the date of gift, except that, when a gift is irrevocable, but is not due until a future date, the gift may be recorded at the time the gift becomes irrevocable in accordance with GAAP by the Organization's Finance Department.
- E. Appraisal and Legal Fees.**<sup>22</sup> It will be the responsibility of the donor to secure a qualified appraisal (where required) and independent legal counsel for all gifts made to the Organization. The [*Chief Executive Officer/Chief Financial Officer/Other Officer*] shall promptly after request from the donor, complete and sign Part IV, Donee Acknowledgment, of IRS Form 8283 for donated property (except publicly traded securities) with a value over \$5,000.
- F. IRS Filings upon Sale of Gifts:**<sup>23</sup> To the extent applicable, the Organization shall file IRS Form 8282 upon the sale or disposition of any charitable deduction property sold within three (3) years of receipt by the Organization. "Charitable deduction property" means any donated property (other than money and publicly traded securities) if the value claimed by the donor exceeds \$5,000 per item or group of similar items donated by the donor to one or more donee organizations (e.g., the property listed in Section B on Form 8283). The Governing Body shall file this form within 125 days of the date of sale or disposition of the asset.
- G. Written Acknowledgement:**<sup>24</sup> The Organization's Development Department shall provide contemporaneous written acknowledgement of all gifts made to the Organization and comply with the current IRS requirements on acknowledgement of the gifts.
- H. Changes to or Deviations from the Policy:** This Policy has been reviewed and accepted by the Organization's [*Governing Body/Board of Directors*]<sup>25</sup>, which has the sole power to change this Policy. In addition, the [*Governing Body/Board of Directors*] must approve in writing any deviations from this Policy.

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<sup>1</sup> **HOW TO USE THIS FORM:** This sample gift acceptance policy has been developed for use by California nonprofit public benefit corporations exempt from taxation under section 501(c)(3) of the Internal Revenue Code for educational purposes only. The endnotes discuss the applicable law, recommended practices, and why we have included certain language. **Bold** and *italicized* bracketed language in this form indicates that information specific to the corporation adopting the gift acceptance policy must be inserted.

***Important Note:*** In order for an organization to make a truly informed choice about the procedures that will govern its operations, this sample should not be used “as is.” Rather, it should be used as a starting point and be modified after consideration of the explanations in the endnotes and after review of and reconciliation with any provisions relating to gift acceptance that may be contained in the organization’s bylaws or other governing documents. **It is very important that anyone creating a gift acceptance policy for a nonprofit organization fully understand the mechanics of such a policy, and choose provisions that fit the scope of the corporation’s specific operations. Therefore, each user of this form should think through every provision carefully, and should not draft any provisions that will be too burdensome for the organization to follow under its circumstances.** Further, all directors and officers should be provided with a copy of the policy, and should be fully oriented as to its content in order to understand their respective responsibilities.

The endnotes discuss relevant provisions of law, in effect as of September 2017. The primary sources of law described in these endnotes are (a) the California Nonprofit Corporation Law (California Corporations Code sections 5000 et seq.), (b) the California Business and Professions Code, (c) the California Probate Code, (d) the California Financial Code, (e) the California Insurance Code, and (f) the Internal Revenue Code of 1986, as amended (U.S. Code Title 26), which is referred to in these endnotes as the “Code.”

<sup>2</sup> **Why adopt a Gift Acceptance Policy?** Gift acceptance policies assist nonprofit development programs in maintaining discipline in gift acceptance and administration. Such policies inform a nonprofit organization's staff and board about the types of gifts that may cost the organization too much time or money to administer, by drawing attention to issues surrounding acceptance of certain gifts and by delineating the types of assets that an organization may welcome as gifts. Gift acceptance policies encourage consistency in acceptance of gifts, which can be crucial to both maintaining good donor relations and long-term, strategic development.

Although gift acceptance policies are not required, Form 990, Schedule M, Part I, line 31, asks whether the organization has a “gift acceptance policy that requires the review of any non-standard contributions.” Schedule M must be filed by organizations that either: (1) reported more than \$25,000 in aggregate non-cash contributions on Form 990, Part VIII, Statement of Revenue, Line 1g; or (2) during the year received contributions of art, historical treasures, or similar assets, or qualified conservation contributions (regardless of whether it reported any revenues for such contributions in Part VIII).

Gift acceptance policies should be tailored to the needs of the organization, based on the types of gifts it has received in the past and anticipates receiving in the future, as well as its staffing

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structure, ability to administer certain gifts, etc. For example, not all organizations may need to specify a policy position on oil, gas and mineral interests, either based on the likelihood of receiving such a gift or the ability to address the administrative burden related to holding such interests. As circumstances change over time, the gift acceptance policy should change (as needed) as well. For more on gift acceptance policies and the various considerations related thereto, *please see Kathryn W. Miree & Associates, Inc., Understanding and Drafting Nonprofit Gift Acceptance Policies (2003)*, available at <http://www.kathrynmireeandassociates.com/PDF/understanding.pdf>.

<sup>3</sup> As written, this form policy is designed to be an internal policy to provide guidance to the organization's board and staff. However, should the organization so choose, the policy could be shared with donors. In some cases, organizations make their gift acceptance policies publicly available in order to provide potential donors guidance on what types of gifts the organizations are likely to accept. This can be a beneficial practice for an organization, especially if the organization anticipates receiving unusual gifts. The tone and phrasing of this sample policy may need adjustment if the policy is intended to be made publicly available. Additionally, if this policy is to be made public, the organization should include a disclaimer that it is not providing tax, legal, or accounting advice and that the policy is being provided for general informational purposes only.

<sup>4</sup> Under the charitable trust doctrine, the assets of a nonprofit corporation may only be used for the specific charitable purposes set forth in the corporation's articles of incorporation. [*See In re Metro. Baptist Church of Richmond, Inc., 48 Cal. App. 3d 850, 857 (1975); see also Cal. Bus. & Prof. Code § 17510.8*]. A charity's acceptance of assets "establishes a charitable trust for the declared corporate purposes...as though the assets had been accepted from a donor" who has expressly limited their use to those declared charitable purposes. [*See Pac. Home v. City of Los Angeles, 41 Cal.2d 844, 852 (1953)*]. Accordingly, it is important that an organization (i) pay close attention to any conditions on or potential uses of a gift that would result in the organization violating its articles of incorporation and (ii) reject gifts that would require such a violation if accepted by the organization. If a nonprofit changes its purposes such that its new programs and activities are outside the scope of the purposes outlined in its articles, the nonprofit should only use funds acquired after the articles have been amended to fund the new programs and activities.

<sup>5</sup> A nonprofit corporation exempt from taxation under section 501(c)(3) should have a conflict of interest policy to guide the board of directors in making decisions which pose or appear to pose a conflict of interest. For an annotated sample conflict of interest policy, please see Public Counsel's Annotated Form of Conflict of Interest Policy, available at <http://www.publiccounsel.org/publications?id=0061>.

<sup>6</sup> The policy should prescribe which body has the ultimate authority to accept gifts on behalf of an organization. If a gift acceptance committee, executive committee or body other than the board of directors has ultimate power, then such body must have the power to act on behalf of the board of directors. If such body has the power of the board, it must be established by resolution of the board, and all members of such committee or body must also be members of the board. If such committee or body does not have the power of the board and is simply an advisory

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committee, its members need not be members of the board, but in such case the board should ultimately approve acceptance of gifts by the organization. [*See Cal. Corp. Code § 5212*].

<sup>7</sup> This provision defines the acceptance procedure for gifts an organization plans to retain for use, rather than gifts the organization intends to sell upon receipt. The provision should be revised based on an organization's history and practice. If the organization routinely accepts gifts for use by its clients, the most logical approach may be to have the supervisors approve the acceptance of these types of gifts. If acceptance by an organization of gifts for use by an organization's clients is rare, the organization may choose to require the approval of its board or executive director (or comparable executive officer).

<sup>8</sup> In addition to defining the acceptance procedures for personal property retained for use, an organization may wish to detail any safety requirements with regards to such gifts or to stipulate that certain types of gifts, such as vehicles or livestock, will never be accepted. These decisions should be based on the needs, goals and capabilities of the organization.

<sup>9</sup> In general, when a donor makes a charitable contribution of property, the donor may be able to claim an income tax deduction equal to the fair market value of the property. [*Code § 170*]. However, there are situations in which the income tax deduction is reduced by the amount of appreciation inherent in the property. [*Code § 170(e)(1)*]. This reduction generally applies where appreciated tangible personal property is contributed to a charity and not used by the charity for a "related use."

"Related use" generally refers to use by the charity for the purpose that is the basis of the charity's tax exemption. [*See Treasury Regulation §1.170A-4(b)(3)(i)*]. Selling or otherwise disposing of the contributed tangible property may not be considered a "related use." Thus, if the charity sells the property within the same taxable year of the donation, the donor's deduction may be reduced by the built-in appreciation of the property. [*Code § 170(e)(1)(B)(i)(II)*]. If the charity sells the property in a subsequent year, but within three years of the contribution, the donor may be required to include as ordinary income in the tax year in which the disposition occurs an amount equal to the difference between (i) the amount of the deduction previously claimed by the donor and (ii) the donor's tax basis in the property at the time of the contribution. [*Code § 170(e)(7)(A)-(B)*]. Because the donor's deduction may depend upon the charity's use of the property, the charity should notify the donor if it intends to sell donated tangible personal property.

<sup>10</sup> In a general partnership, (i) each partner is personally liable for all obligations and debts incurred by the partnership and (ii) each partner owes fiduciary duties towards the partnership and the other partners. [*Cal. Corp. Code §§ 16306 & 16404*]. Under California law, unless the partnership agreement otherwise provides, a partner in a general partnership can only transfer his, her, or its interest in the profits, losses and distributions of the partnership but not such partner's obligations and duties under a partnership without the formal admission of such transferee as a general partner through the consent of all the other partners. [*Cal. Corp. Code §§ 16401, 16502, 16503, 16103*]. However, it is strongly recommended that the gift acceptance policy prohibit the acceptance of an interest in a general partnership to avoid any possibility of an organization being exposed to liability or undertaking duties to another entity, entities or one

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or more individuals that could, among other possibilities, conflict with its preexisting duties and obligations. At the very least, the gift acceptance policy should provide that the organization will not accept an interest in a general partnership without (i) an opinion or written analysis provided by outside legal counsel indicating that the organization will undertake no duties or incur any liabilities through acceptance of the interest in the general partnership and (ii) a written agreement with the transferor and the general partnership to that effect.

<sup>11</sup> When a tax-exempt organization regularly carries on a trade or business that is unrelated to the purposes for which the organization obtains tax exemption, income generated from such activities generally is subject to taxation as unrelated business taxable income ("UBTI"), subject to certain exceptions. [*Code § 512(a)(1)*]. An organization with UBTI is also required to file a UBTI tax return. Securities or business interests in certain entities such as partnerships or S corporations may give rise to UBTI.

Under the UBTI rules for a tax-exempt organization holding a partnership interest, because such organization that is a partner in a partnership is treated as directly carrying on the activities of the partnership, the organization must report as UBTI its share of partnership income generated from any unrelated trade or business the partnership regularly engages in. [*Code § 512(c)*]. Generally, investment income – such as dividends, interest, and royalty income – is excluded from this calculation of UBTI. [*Code § 512(b)(1)*]. However, investment income is not generally excluded from UBTI if it is derived from the use of borrowed funds. [*Code § 514(a)(1)*].

The UBTI rules for a tax-exempt organization holding S corporation stock are even more stringent. A charity must include in its calculation of UBTI any items of income, loss, or deduction that it receives as a result of being an S corporation shareholder including any gain or loss from the disposition of the stock in the S corporation. [*Code § 512(e)*].

<sup>12</sup> A gift of real estate, although often very much desired, can generate legal liability and practical difficulties for nonprofits organizations. A major legal risk is environmental liability. Even if a charity did not cause or know about environmental damage on a property it owns, it may still be responsible for removal of hazardous material and restoration of the property. Therefore, prior to acceptance, a nonprofit should conduct an environmental review of the property and, if a potential issue arises, a more thorough environmental audit, paid for by the donor. Ownership of real property may also subject a charitable organization to liability if a visitor were to injure him or herself on the property – a charity should take into account the cost of insurance.

The board of directors should thoroughly discuss the factors for acceptance listed in Section 6.A.iii (and other factors, if appropriate) in order to determine whether the real estate will be useful to the organization and its mission or whether it will create a financial and/or administrative burden for the organization and its staff, directors, and officers. If an organization intends to sell a potential gift of real estate, it must obtain an independent appraisal of the property prior to acceptance in order to determine marketability.

<sup>13</sup> **General:** The term "Oil, Gas, and Mineral Interests" encompasses a variety of different types of interests. If an organization is unfamiliar with these types of gifts, it is highly recommended

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that it consult with an attorney prior to acceptance to ensure that the gift would not generate unrelated business income or create an administrative burden for staff that is not justified by the value of the gift.

<sup>14</sup> This provision sets forth an organization's policy on acceptance of gifts coupled with restrictions on use and provides the organization with flexibility to reject such gifts. This provision should be tailored to the specific practices and needs of an organization. For example, an organization may choose to give its executive officers the authority to accept gifts containing restrictions on use under a certain dollar value and require approval of its board of directors for restricted gifts above that dollar value.

<sup>15</sup> Although it is best for the organization to communicate with the donor before the donor has died to ensure that the gift is acceptable to the organization, the organization may reject a gift made by bequest by filing a disclaimer as provided in sections 275-288 of the California Probate Code. As a general matter, any donee can refuse a gift (even in the absence of a disclaimer statute such as the one provided in the California Probate Code) within a reasonable amount of time after learning of it. [*Restatement of Property 3d. §6.1 cmt. i*].

<sup>16</sup> An organization may desire to create criteria for the acceptance of life insurance as a gift, including whether such insurance has been paid, the face value of the insurance, and the life expectancy of the insured. For example, an organization may decide to accept life insurance policies which are not fully paid only if certain criteria regarding face value and insured's life expectancy are met.

<sup>17</sup> Life income gifts refer to various instruments which provide a donation to a charitable organization while also providing a tax donation to the donor and an income stream or remainder gift to the donor or other beneficiary. A description of common life income gifts is discussed below in Notes 18-20. Since the rules governing life income gifts are complex, the staff of nonprofit organizations should refrain from providing tax advice with regard to a proposed life income gift.

<sup>18</sup> Charitable Remainder Trusts ("CRTs") are irrevocable trusts that allow donors to provide distributions to non-charitable beneficiaries for a defined period of time. Once such a period has expired, the remainder of the trust principal is payable to a charitable organization. CRTs may be annuity trusts, which calculate annual distributions to non-charitable beneficiaries as a fixed dollar amount or percentage of the contribution's initial fair market value, or unitrusts, which calculate such distributions based on a fixed percentage of the contributed asset's fair market value as valued each year. [*See § 15.48 Advising California Nonprofit Corporations pp. 15-34*]; *see also 3-116 California Wills & Trusts § 116.02*].

CRTs require the donor to choose a trustee to manage the investments of the trust. Although it is unlikely that a charitable organization would be nominated by a donor as the trustee of a trust for the benefit of such organization, it is generally recommended that an organization not agree to act as trustee or participate in investment decisions on behalf of a trust. As trustee, the organization would owe fiduciary duties to the trust and have the risk of liability to other beneficiaries of the trust. At a minimum, acceptance of a trusteeship should be limited to certain

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tailored circumstances and/or be subject to approval by the governing body of the organization. Some examples of limitations on the acceptance of trusteeships include only accepting the fiduciary responsibilities of being a trustee when the organization is the sole beneficiary of the relevant trust and defining minimum non-charitable beneficiary ages, maximum number of lives, and maximum distribution amounts.

Further, in California, nonprofit corporations can only serve as trustees in limited circumstances. A nonprofit corporation may act as trustee under any trust incidental to the principal objects of the nonprofit corporation (meaning that the trust's administration can only be an insubstantial part of the nonprofit corporation's overall activities). [*Cal. Corp Code §§ 5140, 7140, 9140.*] However, no nonprofit corporation can engage in a trust business in California as its primary activity without meeting the specific requirements prescribed by California law generally applicable to for-profit trust company businesses. [*Cal. Fin. Code §§ 1550-1613.*] If an organization does provide trustee services, the Professional Fiduciaries Act is applicable to employees of the organization who perform the functions of a trustee, subject to certain exceptions. [*Cal. Bus. & Professions Code §§ 6500-6592*]

<sup>19</sup> Charitable Lead Trusts (“CLTs”) are irrevocable trusts that allow donors to provide distributions to charitable beneficiaries for a defined period of time. Once such a period has expired, the remainder of the trust principal passes to non-charitable beneficiaries. CLTs are thus the inverse of CRTs. Like CRTs, CLTs may be annuity trusts or unitrusts. [*Source: § 15.56 Advising California Nonprofit Corporations p. 15-42*]

The trustee of a CLT has a dual fiduciary responsibility. A CLT trustee must both seek to maximize income for the charitable beneficiary and to protect the non-charitable beneficiary’s interest. For these reasons, a nonprofit organization should not accept a trusteeship of a charitable lead trust.

<sup>20</sup> A charitable gift annuity obliges an organization to pay an annuity to the donor or another party in exchange for a donation. Under California law, only certain kinds of nonprofit corporations are permitted to offer charitable gift annuities. It must be a charitable, religious, benevolent or educational nonprofit organization that has been in active operation for at least ten years. The ten-year requirement is waived for (1) nonprofit corporations organized and controlled by a hospital licensed by the State Department of Health Services as a general acute care hospital, and (2) incorporated educational institutions offering courses of instruction beyond high school, which have been qualified for at least one year to issue diplomas or degrees.

If the organization meets the above criteria and wishes to offer gift annuities, it must then obtain a Certificate of Authority as a Grants and Annuities Society from the California Department of Insurance. [*Cal. Ins. Code §§ 11520-11524.*]

Further, the organization should note that gift annuities carry a component of risk that other gifts do not because the agreed upon income payment from the organization to the donor is a legal and financial obligation on the books of the organization. Additionally, the organization must decide whether to “self-insure” the annuity payments, which requires in-house administrative and

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investment capabilities, or whether to use the gift to purchase a commercial annuity for itself as “insurance,” which adds complexity by introducing a third party.

<sup>21</sup> For a pledge agreement to be deemed enforceable, California courts require a charitable organization to have provided consideration (i.e., something in return) to the donor, even if it is *de minimis*, or that the organization demonstrate that it acted in reliance on the pledge. [See *Univ. of S. Cal. v. Bryson*, 103 Cal. App. 39, 51 (Cal. Ct. App. 1929); *Bd. of Home Missions v. Manley*, 129 Cal. App. 541, 544 (Cal. Ct. App. 1933); *Calvary Presbyterian Church v. Brydon*, 4 Cal. App. 2d 676 (Cal. Ct. App. 1935); and *First Trust & Sav. Bank v. Coe Coll.*, 8 Cal. App. 2d 195 (Cal. Ct. App. 1935).] Additionally, the written pledge agreement should include provisions that state the donor’s intent for the pledge to be binding on the donor, the donor’s executors, administrators, heirs, successors, and assigns, and the personal representative of the donor’s estate. Further, it should memorialize the charity’s acceptance of the pledge with a signature from both the donor and a representative of the donee organization.

<sup>22</sup> In order for a donation (other than a donation of marketable securities) valued at more than \$5,000 per item or group of similar items to be permitted as a charitable deduction for federal income tax purposes, a donor generally must have the donation appraised by a qualified appraiser, subject to certain exceptions. In connection with such a contribution, a donor must record the contribution and the appraisal on an IRS Form 8283. The donor must sign the Form 8283 and file it with the donor’s income tax return. The receiving organization must sign the Form 8283 and affirm that in the event it sells, exchanges, or otherwise disposes of such contributed property within 3 years after the date of receipt, it will file Form 8282 with the IRS and give the donor a copy of that form. The gift acceptance policy should designate an individual responsible (e.g., an officer) for completing Form 8283. For gifts valued at less than \$5,000, an appraisal and acknowledgment from the organization is not required – the donor simply completes and submits Part A of the Form. For further information on when an IRS Form 8283 is required, see Instructions for Form 8283, available on the IRS website at <https://www.irs.gov/pub/irs-pdf/i8283.pdf> and IRS Publication 526, *Charitable Contributions* on the IRS website at <https://www.irs.gov/pub/irs-pdf/p526.pdf>.

<sup>23</sup> In the event that a charitable organization disposes of all or any portion of contributed charitable deduction property (defined as property, other than money and publicly traded securities, valued at over \$5,000 per item or group of similar items donated by the donor to one or more donee organizations – this property is listed in Section B of IRS Form 8283 that is signed by the donee organization as described in endnote 22 above) within three years of receiving such contributed property and does not qualify for certain exceptions, the organization must file Internal Revenue Service (IRS) Form 8282 (and provide a copy to the donor), reporting, among other items, the disposition of the property and describing whether the organization used the property and if any such use of the property by the organization was substantial and related to its exempt purpose or function. For further information on when an IRS Form 8282 is required, see IRS Form 8282, available on the IRS website at <https://www.irs.gov/pub/irs-pdf/f8282.pdf> and IRS Publication 526, *Charitable Contributions* available on the IRS website at <https://www.irs.gov/pub/irs-pdf/p526.pdf>.

<sup>24</sup> To claim a tax deduction for a monetary gift under \$250, a donor must maintain a record of the contribution in the form of either a bank record (such as a cancelled check) or a written

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communication from the charity (such as a receipt or letter) showing the name of the charity, the date of the contribution and the amount of the contribution.

To claim a tax deduction for a non-monetary gift under \$250, a donor generally needs a contemporaneous receipt given by the charity showing the name of the charity, the date and location of the contribution, and a description of the contributed property in detail reasonably sufficient under the circumstances, unless the circumstances make it impracticable to obtain such receipt. Recipient organizations should thus provide this receipt if practicable. The receipt/acknowledgement must be contemporaneous. The receipt is considered contemporaneous if the donor obtains it on or before the earlier of the date the donor files its yearly tax return or the due date for filing the tax return. Typically, organizations send the receipt/acknowledgement no later than January 31 of the year following the donation. Donors may also be required to keep reliable written records that include how the donor determined the fair market value of the property on the date of the contribution, the adjusted tax basis of the property, the computation of any reductions for capital gain property, and any conditions attached to the gift. For more information, see Instructions for Schedule A, Form 1040, available on the IRS website at <https://www.irs.gov/pub/irs-pdf/i1040sca.pdf>.

For any single contribution (monetary or non-monetary) of \$250 or more, donors cannot claim a tax deduction unless the donor obtains a contemporaneous, written acknowledgment from the recipient organization. The acknowledgment should include: the name of the charity; the amount of cash contribution; a description (but not necessarily the value) of non-cash contribution; a statement that no goods or services were provided by the organization in return for the contribution, if that was the case; a description and good faith estimate of the value of goods or services, if any, that an organization provided in return for the contribution; and a statement that goods or services, if any, that an organization provided in return for the contribution consisted entirely of intangible religious benefits, if that was the case. Donors may be required to keep additional written records. For more information on the details that must be included, see IRS Publication 526, *Charitable Contributions* on the IRS website at <https://www.irs.gov/pub/irs-pdf/p526.pdf> and IRS Publication 1771, *Charitable Contributions—Substantiation and Disclosure Requirements* on the IRS website at <https://www.irs.gov/pub/irs-pdf/p1771.pdf>.

Although failure of a recipient organization to provide proper acknowledgement of a gift may not necessarily result in a direct penalty to such organization, providing the written acknowledgement is important in helping the organization maintain its appeal as a donee. If the donor is not able to claim an income tax deduction, the organization may risk losing the donor's goodwill, and of course, future donations.

This provision of the gift acceptance policy may need to be tailored for organizations that expect to receive vehicle donations or provide goods or services (known as “quid pro quo”) in return for donations, because special substantiation requirements apply to such donations. For further information on vehicle donations, see IRS Publication 4302, *A Charity's Guide to Vehicle Donation*, available on the IRS website at <https://www.irs.gov/pub/irs-pdf/p4302.pdf>. Failure to provide written acknowledgements for such vehicle donations may result in direct cash penalties on the organization. For further information on disclosure requirements for providing quid pro

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quo goods or services in return for donations, see IRS Publication 1771, *Charitable Contributions—Substantiation and Disclosure Requirements*, on the IRS website at <https://www.irs.gov/pub/irs-pdf/p1771.pdf>.

For further information on fundraising, donations and various related matters, see Public Counsel's publication *Anatomy of a Fundraiser*, available on the Public Counsel website at <http://www.publiccounsel.org/tools/publications/files/0246.pdf>.

<sup>25</sup> If the Governing Body in Section 5 of this policy is not the organization's gift acceptance committee or its equivalent, this provision should specify that only the organization's board of directors has the authority to change or deviate from the policy.