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GIFT ACCEPTANCE POLICIES

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<h2>INTRODUCTION</h2> <ul style="list-style-type: none">• Important for charities to develop and/or update a gift acceptance policy on the acceptance and receipting of gifts in order to have an effective planned giving program• Each policy should be customized to the needs and circumstances for each charity• This presentation reviews:<ul style="list-style-type: none">– Purposes of a gift acceptance policy– How to develop a gift acceptance policy– Key topics to be included in a gift acceptance policy	
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A. PURPOSES OF A GIFT ACCEPTANCE POLICY

- Facilitates gift solicitation and management
 - When and how to accept and receipt various types of gifts
 - Keeps up with new developments of new and hot gifts in the sector (e.g. gifts of cryptocurrencies) and be ready to respond to donors
 - How to track and manage gifts and gift restrictions
 - When and how to decline a gift

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- Ensures legal compliance and risk management
 - Ensures compliance with the law in Canada, including case law and the requirements of the *Income Tax Act* (Canada)
 - Evidences due diligence as a defence in the event of litigation
 - Avoids unexpected surprises and costs
- Manages donor relations
 - Ensures transparency of process and policy
 - Ensures compliance with donor restrictions
 - Assures donors of sound management of their gifts
 - Avoids misunderstanding with donors
 - Manages donor expectations
 - Have answers “ready” to respond to donor’s enquiries

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- Effective operational management
 - Ensures consistent administration of policies and procedures
 - Avoids case-by-case subjective scenarios
 - Assists staff and volunteer training
 - Sets out code of conduct for staff and volunteers
 - Promotes credibility of the charity
 - Manages expectation of directors, staff and volunteers

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B. APPLICATION OF THE POLICY

- Be consistent with the charity's charitable purposes and mission statement
- Reflect the requirements of the *Income Tax Act* (Canada), CRA, and common law principles concerning gifts
- Reflect due diligence best practices
- Provides general guideline, not comprehensive or exhaustive
- Seek legal and accounting advice where the application of the policy to a particular scenario is not clear

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C. PROCESS INVOLVED WHEN DEVELOPING THE POLICY

- Review the charity's current planned giving program
- Review the charity's current procedures for gift acceptance
- Review the charity's planned giving goals
- Review the charity's future gift planning objectives
- Undertake staff consultation
- Seek legal advice
- Circulate draft policy to staff for comments and inputs
- Review current legal requirements relating to gift acceptance, for example
 - When is a gift not a gift?
 - How to properly document a gift?

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- Review current legal requirements relating to gift management because these may affect how gifts are to be accepted and managed, for example:
 - Effective tracking of restricted gifts and compliance with the gift restrictions
 - No comingling of restricted funds with unrestricted/general funds
 - Investments must comply with provincial trustee act requirements
 - Tracking gift restrictions that are either impossible or impractical and what to do with them
 - Determining whether total return investment strategy may be used when investing endowed gifts
 - How to deal with donors' advice and amendments of gift agreements

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- Develop a written policy, instead of tradition or practice
- Key drafting issues
 - Organize the policy into sections by topics
 - Outline step-by-step process for staff and volunteers to follow
 - Develop templates for bequest language and gift agreements to be attached to the policy or as a schedule
 - Use user-friendly and practical language
 - Develop a detailed version for use in-house
 - Develop a user-friendly high-level version for public communications (such as website and donor communications)

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- Consider policy vs procedures
 - Policy – general considerations and guidelines
 - Procedure – detailed step by step process
- Certain sections or topics can be included in other accompanying documents, for example
 - Policies to accept various types of gifts – easy to keep updated as new types of gifts arise
 - CRA receipting rules and requirements – to be used as resource, reference and training materials for staff and volunteers
 - Template bequest language and gift agreements

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- Need to ensure gift acceptance policy is coordinated with other policies of the charity to ensure consistency of management, for example
 - Investment policy
 - Fund financial accounting and tracking
 - Privacy policy
 - Fundraising policy
 - Social media policy
 - Anti-spam (CASL) policy
 - Anti-terrorism policy
 - Intellectual policy

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D. WHAT TO DO AFTER HAVING DEVELOPED A POLICY

- Need approval by the board of directors
- Thorough implementation with regular reviews and evaluation by senior management and the board
- Staff and volunteer training
- Coordinate with other departments of the charity to ensure consistent implementation, e.g. marketing department, public communications department
- Regularly review, evaluate and update the policy to reflect current law and practice of the charity – it is a living document that grows with the charity
- Have one person or a committee responsible for constant monitoring – internal performance and donor satisfaction

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E. GIFT PLANNING COMMITTEE

- Consider establishing a Gift Planning Committee to oversee the gift planning program
- Examples of possible duties of the committee
 - Develop guidelines for the gift planning program
 - Oversee the gift planning program
 - Oversee the implementation of the gift acceptance policy
 - Regularly review and update the gift acceptance policy
 - Assist in developing a gift planning marketing plan, and review marketing and other publications promoting the gift planning program

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- Establishing the committee will require
 - Preparation and board approval of terms of reference for the committee
 - Regular meetings of the committee
 - Regular reports from the committee
 - Regular communication between the committee with gift planning staff
 - Regular report to the full board of directors

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F. KEY TOPICS TO BE INCLUDED IN A GIFT ACCEPTANCE POLICY

- Outline duties of the directors regarding charitable gifts
- Outline the role of parallel foundation (if applicable)
- Explain basic rules that apply to receipting for reference by staff and volunteers
- Explain the nature of restrictions that may be imposed by donors on gifts and the implications arising from those restrictions

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- Explain endowment and long term funds and donor advised funds
- Explain policies for various types of gifts
- Special issues
- Gift agreements, gift acknowledgement, and other donor related issues
- Declining and returning a gift

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1. Outline Duties Of The Directors Regarding Charitable Gifts

- To apply the assets of the charity to further its charitable purposes
- To protect charitable property and invest surplus funds
- To comply with legal requirements involving receipting and management of gifts
- To comply with directions or other restrictions imposed by the donors

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2. Outline The Role Of Parallel Foundation (If Applicable)

- Is the foundation to be the exclusive source of fundraising?
- How is the foundation and the charity to co-ordinate their fundraising initiative?
- What is the protocol for inter-charity transfer of gifts?
- Is there an agreement between the charity and the foundation?
- Is there a US Friend's of tax-exempt entity? What are its roles?

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3. Explain Basic Rules That Apply To Receipting For Reference By Staff and Volunteers

- Split-receipting rules
- *De minimis* rule on receipting
- Intention to donate
- How to establish fair market value
- When and how to obtain appraisals
- Deeming of fair market value
- Due diligence in determining the eligible amount of a gift

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- Preparation and contents of receipts
- Control of receipts
- Lost, spoiled or stolen receipts
- Facsimile signatures on receipts
- Date of issue and date of donation
- Computer generated receipts
- Name on receipts

These issues may be set out in an accompanying procedure document

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4. Explain Restrictions That May Be Imposed By Donors On Gifts

- Donors may impose restrictions on a gift at the time when the gift is made, but cannot impose additional restrictions or remove the restrictions after having made the gift
- Restrictions can include:
 - Purpose and how the gift may be used and managed (use restriction)
 - When the gift may be used (time restriction)
- Restrictions imposed on a gift should be set out in a written document (e.g. deed of gift or gift agreement)

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- Charities must comply with the restrictions imposed by donors
- Before accepting the gift, the charity must review whether the restrictions imposed by the donor are reasonable, and whether the charity is able to comply with them
- Charities must carefully track restrictions that apply to each gift to ensure compliance
- A gift that is subject to donor restrictions will need to be held as an externally restricted fund, and be managed in accordance with the common law and applicable legislation, e.g., regulations under the Ontario *Charities Accounting Act* concerning when restricted gifts can be comingled for investment purposes

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5. Explain Endowment and Long Term Funds and Donor Advised Funds

- Endowment and long term funds are created where the donor imposes a restriction on when the gift may be used
- Perpetual endowment funds - the capital of the fund donated be held in perpetuity, with the income to be used at the discretion of the board of directors or for a specific purpose designated by the donor
- Long term funds - the capital to be held for a long period of time, rather than to be held in perpetuity with income in the interim to be used at the discretion of the board of directors or for a specific purpose

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- Policy considerations for endowed and long-term gifts
 - Should have written gift agreements
 - Minimum amount required to set up a named endowment fund or long term fund?
 - How much income to pay out to apply towards the charitable purpose?
 - Right to encroach on realized capital gains?
 - Right to encroach the capital for an endowed gift?
 - Right to charge a reasonable administrative fee to fund the cost of its administration?
 - Right to apply gift to another purpose if the stated charitable purpose is not possible?
 - How to make future contributions to the fund?

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- Donor advised funds
 - After having made a gift, the donor may provide non-binding advice (but not control) on how the charity may apply and/or manage the gift
 - Gift agreement may set out how advice is to be provided by the donor, e.g. periodic consultation, periodic reporting, etc.
 - Essential that records of the charity evidence that control over the fund lies with the board of the charity, not the donor
 - Important to also consider succession with the right to advise
 - Promotional documents for donor advised funds should not give impression that a donor advised fund is an “account” controlled by the donor

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6. Explain Policies For Various Types Of Gifts

- For each type of gift, set out the charity’s policy on
 - Gift acceptance requirements
 - Gift processing and management
 - Donor acknowledgment
 - Receipting
- Set out the types of gifts the charity is not prepared to accept
- These issues may be set out in an accompanying procedure document
- The following is a list of possible types of gifts, with an explanation of a few for illustration purposes because they are “up and coming” new types of gifts

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- **Cash and near cash**
 - Online donation issues, e.g. privacy and security
- **Bequests**
 - Sample language in wills for donors and their advisors
- **Registered retirement plans**
 - Includes direct designation of a charity as a beneficiary to receive the proceeds of RRSPs or RRIFs on the death of the donor
 - Also can gift to a charity the proceeds of RRSPs or RRIFs on the death of the donor by way of bequest

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- **Cryptocurrencies**
 - Cryptocurrencies are “virtual currencies” that work as a medium of exchange through cryptographically secured digital records stored on a public, decentralized, distributed digital ledger such as Blockchain (said to make the data permanent and tamper-resistant)
 - Receipting issues
 - They are considered a commodity for income tax purposes (not “money” or “currency”)
 - Donations in cryptocurrencies are, therefore, subject to the rules for gifts-in-kind and determination of fair market value (FMV) on the date of the donation for receipting purposes, including the deemed FMV rule

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- Cybersecurity issues
 - Possible increased risk of hacking and real world crime (extortion and violence), due to “privacy” afforded by Blockchain technology to criminals
 - Costly mistakes if incorrect transfer because transactions are not reversible
 - Potential greater exposure of directors and officers to liability
- Anti-money laundering and anti-terrorist financing
 - *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (“Act”) provides that regulations may be enacted to define “virtual currency” and “dealing in virtual currencies”
 - *Criminal Code* was amended to criminalize reckless concealment of the origin of funds

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- **Life insurance**
 - A donor may name a charity as a beneficiary of a life insurance policy
- **Publicly-listed securities**
 - No capital gains tax on donation of publicly-listed securities to registered charities
- **Private securities and other business interests**
 - Complicated rules on when receipts may be issued
 - Rules on non-qualifying securities and loan backs

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- **Flow-through shares**
 - Flow-through shares are tax-based financing incentives to the oil and gas & mining sectors
 - Complicated rules
- **Gifts-in-kind**
 - Gift of property other than cash
 - Does not include a gift of services
- **Real estate**
 - Gifts of real estate may include
 - Outright gifts
 - Residual interest in a property

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- **Gifts for social investments/financing**
 - Charities may establish a fund or receive gifts intended to undertake “social investments” or “social financing”, also known as “impact investments” or “program related investments”
 - However, before doing so, it is important that the charity understands the legal issues that need to be considered in undertaking social investments
 - for example
 - Difference between regular investments (prudent investment standard) and social investments

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- Requirement for social investments under the Ontario *Charities Accounting Act*
 - e.g. dual purpose of achieving a charitable purpose and a financial return
 - Duties of board members in making a social investment
- Difference between a social investment under the Ontario *Charities Accounting Act* and a program related investment under the *Income Tax Act*
- What is the liability of directors in making a social investment and how to mitigate against such risk

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- **Other gifts**
 - Gifts that involve special gifting considerations and new types of gifts that may come up from time to time
 - Need to decide whether the charity would like to accept them and the acceptance process and issues
 - For example:
 - Charitable gift annuities
 - Charitable remainder trusts
 - Airline points
 - Time-share property

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7. Special Issues

- Disbursement quota rules
- Gifts from other registered charities
- Corporate sponsorships
- Donation of inventory by businesses
- Gift certificates – CRA's policies
- Donation of services
- Donation tax shelters issues
- Appraisals

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8. Gift Agreements, Gift Acknowledgement, and Other Donor Related Issues

- Gift agreements
 - When to enter into gift agreement with donors?
 - What are the provisions to be included in gift agreements?
 - Attach sample gift agreements to policy
 - Periodic legal review and update to ensure comply with changes in the law
 - Track versions of agreements when templates are updated

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- Gift acknowledgment and donor recognition
 - When and how to acknowledge gifts?
 - What are the rationale and objectives of recognition?
 - Who to acknowledge gifts?
 - What process and timing to follow?
 - Type of donor recognition
 - e.g. Named gifts, donor wall, appreciation dinners
 - May affect receipting (e.g. naming rights)
 - Minimum level of donation required for different types of recognition
 - Naming issues, for example
 - What can be named – e.g. buildings, chairs, research, programs, scholarships
 - Perpetual or for a period of time
 - What if building under renovation or needs to be demolished?

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- Donors encouraged to obtain independent legal, tax, and accounting advice
- Set out internal process
 - Timely deposit of donation cheques and preparation of receipts
 - Donor communications – who, when, how?
 - Tracking and monitoring compliance with gift restrictions
 - Maintaining data base – privacy, confidentiality and security issues
 - Keep proper gift documentation

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9. Declining A Gift

- Needs to establish a process to review gifts that the charity may wish to decline
- Needs to establish a process to communicate with donors why a certain gift is declined
- Set out in the policy a non-exhaustive list of circumstances under which the charity intends to decline a gift, e.g.
 - Restrictions imposed by the donor are not reasonable
 - Restrictions imposed by the donor that are contrary to the objectives, values, and goals of the charity

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- Gift or terms of a gift is illegal, discriminatory or violates any federal, provincial or municipal laws or regulations
- Gift may expose the charity to liability or embarrassment
- Gift may require any action on the part of the charity which is unacceptable to the charity
- Donor relies on an appraised value that is inaccurate or unreliable and differs from the appraised value obtained by the charity
- Pass through gifts – i.e., donor asks charity to act as a conduit to pass funds to third parties to which Canadian donors could not directly make a gift eligible for tax relief, such as forward the gifted property to non-qualified donees or to specific individuals

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- The gift is made by an individual, corporation or organization whose philosophy and values are inconsistent with the overall philosophy and values of the charity
- The value of the gift cannot be determined
- The gift could improperly benefit any individual that is not permitted under the *Income Tax Act* or by CRA
- Once a gift has been received by a charity and a charitable donation receipt issued, the property becomes a charitable asset and cannot be returned to the donor without a court order

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10. Returning A Gift

- Sometimes a charity may want to return a gift for different reasons, e.g. because of a request by a donor or for reputational reasons of the charity
- No one-size-fits-all solution when dealing with policy issues involving return of a gift
- As a general rule, a valid gift at common law may not be returned even if it is not a gift for ITA purposes
- Returning a valid gift could be a breach of trust for directors of a charity
 - To do so could result in the charity risking being challenged for paying charitable property to non-qualified donees for a non-charitable purpose and the directors being exposed to liability that may arise as a result of breach of trust

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- The circumstances under which a gift may be returned and the consequences faced by the charity and its directors involve a complex area of law
- There must be a clearly identifiable basis at law before a gift can be returned - e.g.
 - Gift was in fact not a valid gift
 - Gift restriction cannot be fulfilled by the charity and there is no gift over to another charity that can fulfil the gift restriction
 - Gift has a negative value to the charity
 - Gift involves aspects of criminality, such as terrorism

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- If a gift needs to be returned
 - Charity's board of directors must carefully consider all options
 - Legal advice should be sought
 - Communications with donors need to be carefully planned and documented
 - CRA would need to be contacted, information return filed (if donation receipt was issued for the original property, and if the FMV of the returned property is more than \$50), and copy of return provided to donors
 - Charity should monitor and control public communications about the return of the gift

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CONCLUSION

- A gift acceptance policy can
 - Facilitate gift solicitation and management
 - Ensure legal compliance and risk management
 - Manage donor relations
 - Enhance effective operational management
- A gift acceptance policy is a living document that needs to be constantly up-dated

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