

Operating a Higher Education Foundation



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Fundraising Options for Higher Education

- Planned Giving Committees
- Endowment Funds Management
- Establish a Separate 501(c)(3) (“Foundation”)

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Why Establish a Foundation

- Foundations handle the administration of major gifts, distribution of funds, overall coordination of the fundraising effort, in-service training to help staff, volunteers to raise funds
- As entities separate from a university, a Foundation can focus solely on strategy, long-term goals, and sophisticated efforts to bring in the most money possible
- An independent 501(c)(3) would support the university's funding by allowing charitable deductions
 - RE estate development

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Legal Issues to Consider

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Board Composition/Governance

- Independence
 - Especially important for public college and university foundations
 - Sunshine Laws
- Commitment and Composition
 - Mostly volunteers
 - Important to look for diversity and sophistication
- Fiduciary Duty
 - Social Media Issues
 - Board owes a duty to Board and Organization
 - Communications outside boardroom must be protected
 - Policies/Procedures

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Endowment Spending and Investment Practices

- Uniform Prudent Management of Institutional Funds Act (“UPMIFA”)
 - UPMIFA has enabled institutions to provide on-going support for endowed purposes during periods of financial hardship
- Establishing Investment Guidelines

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UPMIFA

- UPMIFA applies only to “institutional funds”
 - An “institution” includes an entity organized and operated solely for charitable purposes
- A charitable trust is *not* an institutional fund when:
 - The trustee is *not* an institution or charity; or
 - There is a *noncharitable* beneficiary
 - But the beneficiary’s interest cannot arise upon violation or failure of the fund’s purposes
 - A charitable lead trust (CLT) or charitable remainder trust (CRT) is excluded because a *noncharitable* interest exists

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“Old UMIFA”

- Utilized “historic dollar value” (HDV)
- Authorized prudent spending above HDV
- Prohibited spending of capital gains if fund below HDV
- Authorized spending of ordinary income at all times

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Use UPMIFA to Maintain Spending Levels

- UPMIFA Legal Rules
 - Focuses on total return rather than income
 - Removed to HDV concept
 - Permits a charity to make prudent expenditures after considering seven factors:
 - Duration/preservation of the fund
 - Purposes of the fund and institution
 - General economic conditions
 - Possible effect of inflation/deflation
 - Expected total return from investments
 - Other resources
 - Institution’s investment policy

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- UPMIFA Legal Rules (continued)
 - Charity can make a prudent appropriation even if the fund is:
 - Already underwater
 - Further reduced by the appropriation
 - Spending rates
 - Historic common practice – 4 to 5%
 - Excess reinvested
 - Spending rate can continue when fund is underwater if prudent

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Interaction Between Higher Education Institution and Foundation

- Important to keep roles and responsibilities separate
 - Especially for public institutions
- Sometimes there is a legal contract (MOU) that defines the working relationship between institutions and foundations

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Items a Contract Should Address

- Summarize relationships, responsibilities and clarify Foundation's role
 - Public institutions should stress independence
- Overview on how funds will be transferred between Foundation and institution
- Staffing/Office Issues
- Donor/Alumni lists and use of lists

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Public Institutions: Issue of Independence

- Foundation should have board of independent trustees
- Payment of expenses – how/what entity pays
- Staffing Issues
- Separate Legal Counsel
- Releasing information about public funds (to protect private funds)

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Public Institutions: Disclosure Issues

- **State Open Meeting Laws**
 - Sunshine Laws may require nonprofit groups to open their meeting to the public.
 - Generally these laws apply to governmental or quasi-governmental groups, but in certain circumstances, these laws may apply to private nonprofit organizations.
 - If an organization is subject to these laws, all of its meetings, votes and records are available for disclosure.

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Kansas

- **Kansas has two Sunshine Laws that may apply:**
 - **Kansas Open Meeting Act (“KOMA”);**
 - Requires that meetings must be open to the public.
 - **Kansas Open Records Act (“KORA”)**
 - Requires public agencies to make their records available for inspection by the public.

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- Private nonprofit organizations may fall within the purview of the KORA and the KOMA under certain circumstances
 - If it is supported by governmental funds and is subject to the control of a governmental entity; and/or
 - If it acts as a governmental agency by providing governmental services.
 - While the mere receipt of public funds does not generally trigger the application of either KOMA or KORA, private nonprofit entities need to be cautious

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Missouri

- Missouri Sunshine laws apply to governmental bodies and quasi-governmental bodies. This includes private nonprofits that has its primary purpose:
 - entering into governmental contracts; or
 - perform a public function as evidenced by statute (issuing tax credits); or
 - an association that directly accepts appropriated money from public

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What Documents Must be Produced?

- **Missouri** – Unless otherwise provided by law, records of public governmental body are open to the public. Emails may also be subject to public review if sent to a majority of members.
- **Kansas** – KORA requires disclosure of records.
 - Each nonprofit that receives public funds in the aggregate of \$350 or more per year shall be required to document the receipt and expenditure of such funds and make available such information otherwise, all documents subject to disclosure.

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Excess Benefit Issues: The Foundation

- Must take steps to avoid an excess benefit with disqualified persons
 - Types of Transactions
 - Compensation
 - Contracts with Donors
 - Land Sale/Purchase
 - Conflict of Interest Policy

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Excess Benefits / Self-Dealing

- Private Inurement
 - Harsh remedy - revocation
- Intermediate Sanctions – To address enforcement disparity with private inurement, Congress enacted Excess Benefit Transaction Legislation
- Transactions between nonprofits and disqualified persons must be handled with care
- Penalties of excess benefits
- Rebuttable presumption test – shifts burden to IRS

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Rebuttable Presumption Test

- The compensation arrangement is approved in advance by an independent committee or board
- The Board must rely upon appropriate data that supports the reasonableness and comparability of the transaction
- The basis for the determination is adequately and concurrently documented

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Fundraising

- State Charitable Fundraising Rules
- Donor Interaction / Stewardship
- Social Media

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Charitable Fundraising Registration

- Is your college/university registered?
 - Institutions that solicit or raise money outside its state may be required to register with the state
 - Many nonprofits are not properly registered
- 39 states plus the District of Columbia require nonprofits that solicit funds to register
- Higher education institutions are exempted in many states but they may be required to prove they are exempt
- The registration rules are complex and filing can be costly
- Failure to register may subject the institution to penalties

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Why Register Now?

- Although these rules have been on the books for many years, most institutions did not know the rules applied to them

Three Big Reasons

- The IRS – New 990 Form (Part IV, Line 17) requires disclosure of providing copy to states
- The Donor – Donors or fundraisers will ask
- The States – The states have budget problems

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Website and Registration

- If you have a “DONATE” button, you need to make sure it doesn’t inadvertently trigger registration
 - Does it allow you to accept contributions or complete the transaction on-line?
 - Need to review and consider whether it is interactive with donors from the state

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Donor Intent

- Goal – Creating “Positive Gifts” Rather than “Problem Gifts”
 - Recently, more and more conflicts between donors and their charitable beneficiaries are being reported
 - Disagreements between donors and donees can arise in a number of different ways, and for a variety of reasons

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Categories of Potential “Problem Gifts”

- Ambiguous Gifts
- The Restrictive – “Too Many Strings” Gifts
- The “Naming Rights” Gifts
- The Large or Unusual Gifts – (Too Big – may need to fail)
- The Future or Deferred Gifts

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The Ambiguous Gift

- The ambiguous gift is one of the most prevalent problem gifts
- Ambiguities can be created in a variety of ways
- The gift agreement is a perfect tool to alleviate this problem

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How to Avoid Ambiguous Gifts

- Outline the terms of gift purpose
 - Who is to benefit
 - How must the gift be used
 - What guidelines should be followed
- Describe how the effectiveness of the gift will be evaluated and who will make the determination
- Determine whether there should be a panel to evaluate annually
- Is the gift to be spent over a term or held in endowment?
- Can Principal be Used – or Income Only

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The Restrictive Gift: Too Many Strings

- Issues relating to restrictive gifts will not reveal its dark side for many years after the gift has been made
- In most situations, circumstances will change that will cause the restrictive terms to no longer be practical
- Foundations must evaluate overly burdensome restrictions donors want to place on gifts before accepting the gift

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Suggestions to Avoid the Problem with Restrictive Gifts

1. Consider whether the restriction is practical. Know your organization. Can you realistically comply with the restrictions?
2. Provisions must be placed in the Gift Agreement to allow the terms of the gift to be altered for changed circumstances
 - Also need to include who should decide
3. If the gift requires for expenses of administration for the gift agreement, the use of funds for such administration should be provided

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The Naming Rights Gifts

- Donors often request recognition for a charitable gift
- Recognition often includes naming something after the donor
- From organization's view, naming rights are a great way to increase contributions
- If not properly structured, a naming rights gift can easily become a problem gift

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Hall of "Name Shame"

- Brown University. In the 1980's, Alfred Taubman donated money to Brown University. In return, Brown University created the Alfred Taubman Center of Public Policy. Alfred Taubman was later convicted of price fixing.
- Seton Hall. At Seton Hall, there are two "name shame" instances. There is a recreation center named for Robert Brennan. Mr. Brennan was convicted of Bankruptcy fraud. Not far away from the recreation center on Seton Hall's campus is Kozlowski Hall, named for Tyco's former Chairman Dennis Kozlowski. Dennis Kozlowski was indicted for tax evasion.
- University of Arizona. Louise Marshall was one of the university's contributors. A building was named after her. One night Louise shot and killed her husband because he was having an affair. She claimed she thought he was an intruder trying to enter the house. Her name is still on the building.

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How to Avoid These Problems

- Determine under what circumstances can a name be removed
- Consider including a “bad boy/girl” provision
- The agreement should address the time periods associated with the naming rights. Is it perpetual or does it expire after a certain period of time?
- The agreement should also address changed circumstances with respect to the right – what if the building is torn down?

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Future or Deferred Gifts

- A foundation may need to deal with the future or deferred gifts
 - Testamentary Gift or Pledges
- Sometimes a donor will notify a university/foundation of its intent to make a gift in the future or at death, but they want some current recognition for the gift

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Issues for Future Gifts

- There are generally two issues:
 - Can the charity rely on the gift and take affirmative steps?
 - Should the foundation give current recognition?

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Can the Gift be Enforced?

- Most gifts are not enforceable unless there is consideration. This can be in the form of detrimental reliance.
- If the charity has taken affirmative steps in reliance on the gift or if the agreement satisfied the contractual requirements, then an agreement could be made that the gift is enforceable.
- The agreement should provide a statement that the school is relying on the gift and describe the steps that are being taken.

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Problems with Enforcing a Gift

- Even if the gift is enforceable, a foundation should think twice before proceeding with litigation against one of its donors.
- This could decrease goodwill among other donors
- For this reason, the foundation needs to decide whether it would proceed against the donor before relying on a gift.
- Note – Gifts from DAF cannot be binding gifts

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Suggestions to Avoid Problems with Future/Deferred Gifts

- The foundation should have a gift acceptance policy as to recognition
- If the foundation agrees to give recognition, need to make sure the agreement is clear. If the gift is testamentary, a copy of it should be attached (as well as amendments).

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Accepting Gifts: Lessons Learned

- Proper planning is essential for long-term effect
- Develop standard gift agreements
- Review existing gifts with living donors – make “problem gift” a “positive gift”
- Keep agreement in safe place
- Avoid crisis management

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Thank you!

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