

**28th Annual**  
**“THIS YEAR IN NONPROFIT LAW”**  
**8:30 a.m. – 3:45 p.m.**

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- 8:30 a.m.      Arrival, registration, and breakfast
- 9:00 a.m.      Welcome  
**Donald W. Kramer**, Chair, Nonprofit Law Group, Montgomery McCracken  
Editor, *Nonprofit Issues*®
- 9:15 a.m.      "This Year In Nonprofit Law"  
**Karl E. Emerson**, Montgomery McCracken  
**Catherine H. Gillespie**, Montgomery McCracken  
**Donald W. Kramer**, Montgomery McCracken  
**Clifford Scott Meyer**, Montgomery McCracken  
**John M. Myers**, Montgomery McCracken  
**Stephen G. Rhoads**, Montgomery McCracken  
**Mara I. Smith**, Montgomery McCracken
- 10:45 a.m.      Mission-Aligned Investing  
**Sidney Hargro**, Executive Director of Philanthropy Network Greater  
Philadelphia
- 12:00 p.m.      LUNCH
- 1:00 p.m.      *Breakout Sessions*  
Critical Policies for Nonprofits: Conflict of Interest, Whistleblower, Document  
Retention, Confidentiality, Gift Acceptance, and Public Policy  
**Catherine H. Gillespie**, Montgomery McCracken  
**Donald W. Kramer**, Montgomery McCracken  
**William W. Keffer**, Montgomery McCracken  
**Stephen G. Rhoads**, Montgomery McCracken
- Employment Law Update  
**William K. Kennedy**, Montgomery McCracken  
**Renee Nunley Smith**, Montgomery McCracken
- 2:30 p.m.      *Breakout Sessions*  
Ethical Issues for Nonprofit Lawyers and Executives  
**Stephanie K. Benecchi**, Montgomery McCracken  
**Catherine H. Gillespie**, Montgomery McCracken  
**Donald W. Kramer**, Montgomery McCracken  
**Clifford Scot Meyer**, Montgomery McCracken  
**John M. Myers**, Montgomery McCracken
- Protecting Your Intellectual Property and Cyber Security  
**Shawn S. Li**, Ph.D., Montgomery McCracken  
**Richard L. Moss**, Montgomery McCracken

## Speaker Bios

**Sidney Hargro** is a philanthropy strategist, speaker, and advocate for reimagining approaches to sustainable social change. Hargro became the Executive Director of Philanthropy Network Greater Philadelphia in July 2017. Philanthropy Network supports funders and social investors in greater Philadelphia as a hub for learning, knowledge-sharing, and partnership. Philanthropy Network works to integrate policy, equity, and social innovation in philanthropy to help to increase regional impact.

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**Stephanie K. Benecchi** is an associate in the firm's Litigation Department. Stephanie's practice focuses on commercial litigation, including class action defense, as well as white collar defense and government investigations. Stephanie has experience with litigation matters at all stages, from pre-suit investigations through resolution and settlement.

**Catherine H. Gillespie** serves as of counsel in the firm's Nonprofit Law group. She focuses on higher education law, health care, and corporate and tax law issues generally affecting nonprofit and tax-exempt organizations.

**William W. Keffer** is the co-chairman of the Business Succession Planning group. He serves as outside general counsel to nonprofit and for-profit companies in connection with their general operations, structure, governance, compliance, mergers, acquisitions and succession planning. Bill represents a number of family owned and nonprofit businesses involved in the fields of education, camping and athletics.

**William K. Kennedy** is vice-chair of the firm's Labor and Employment practice. For his entire career, Bill's practice has been devoted to representing management in employment-related litigation; legal advice, training, and policy development concerning labor and personnel issues; and labor arbitrations, collective bargaining negotiations, and unfair labor practice disputes.

**Donald W. Kramer** serves as chair of Montgomery McCracken's Nonprofit practice group. Don has more than 40 years of experience dealing with the concerns of nonprofit organizations, not only as a lawyer, but also as a teacher, writer, publisher and board member. He has worked with nonprofits of all types and sizes, helping structure startup situations and restructure multiorganizational health and educational systems. He counsels on a wide range of nonprofit corporate structure and governance, private and community foundations, continuing care retirement communities, exempt organization taxation, low-income housing tax credit transactions, real estate, charitable giving and other nonprofit issues. Don serves as the editor and publisher of Don Kramer's Nonprofit Issues®, a national newsletter of "Nonprofit Law You Need to Know," which he founded in 1989.

**Shawn S. Li** is a partner and member of the firm's Intellectual Property Department. He has developed global protection strategies, drafted and prosecuted U.S. and international patent applications, prosecuted patent reexaminations and negotiated and prepared complex licenses and related agreements.

**Clifford Scott Meyer** diverse practice includes financial and tax Monte Carlo modeling of sophisticated transactions, domestic asset protection, tax reformation of instruments and

transactions, closely held business succession planning, technical support for planned giving departments of major institutions and individual tax planning.

**Richard L. Moss** serves as of counsel in Montgomery McCracken's Intellectual Property Department. He focuses his practice on U.S. and foreign patent prosecution matters in electrical, electromechanical, general mechanical, medical device, computer software, and process technology areas.

**John M. Myers** is chair of the firm's Higher Education practice group. John has more than 35 years of experience in complex commercial litigation, including as chief deputy city solicitor, Special Litigation, for the City of Philadelphia. John's experience includes partnership and closely held business claims and disputes, and claims involving employment, real estate, lender liability, joint venture issues, securities industry disputes, contract negotiation, and general business counsel including contractual and employment matters.

**Stephen G. Rhoads** is a partner in the firm's Litigation Department. He concentrates his practice in the areas of professional and general liability defense, construction disputes, commercial litigation, and advising educational and non-profit institutions on risk-management.

**Mara I. Smith** is an associate in the firm's Litigation Department. Prior to joining Montgomery McCracken, Mara served as a law clerk for the Honorable Lynne A. Sitarski in the United States District Court, Eastern District of Pennsylvania. She also served as a legal extern in the Office of General Counsel at Thomas Jefferson University Hospitals. During her time there, she reviewed contracts, conducted legal research and investigated HIPAA breaches. In addition, Mara previously worked for the Eviction Defense Collaborative in San Francisco, where she provided legal rental assistance for low-income tenants.

**Renee Nunley Smith** serves as Of Counsel in the firm's Litigation Department and is a member of the Labor and Employment practice. Renee represents national, regional, and local employers in employment litigation involving claims under federal and state law. Her practice also focuses on counseling employers on a wide range of employment issues and conducting workplace investigations.



# READY REFERENCE PAGE

NO. 92  
FOR YOUR FILE

## What Do We Mean When We Say “Nonprofit”?

*Terminology obscures distinctions that are critical  
to understanding the rules that apply to organizations*

We often start our lectures by quizzing the participants on their understanding of “nonprofits.”

By show of hands, how many think the following organizations are nonprofits?

The Bill Gates Foundation; your church, synagogue, or mosque; the local United Way; the local community foundation; a major local university such as Harvard; a local social service organization; the Sierra Club; the local private golf club; the National Football league; the New York Stock Exchange.

A whole lot of people do not raise their hands very often. The hands particularly start to drop after the United Way or the community foundation. Yet all of these organizations are nonprofits except the New York Stock Exchange. And even the New York Stock Exchange was a nonprofit until 2006.

We all think we know what we mean when we say “nonprofit.” But the key to understanding nonprofits is to understand that there are many different types of nonprofits. Different rules apply, depending upon the type of organization. An understanding of the difference is critical to understanding the world of nonprofit organizations.

### Nonprofit

“Nonprofit” is a concept of state law, which means that an organization may not pay dividends or otherwise pass any surplus revenue, or “profits,” from the enterprise on to shareholders, members, or other individuals. Although a nonprofit may pay reasonable compensation for services actually rendered to it, in general, any surplus generated by the organization must stay within the organization and be used for its stated purposes.

(New York Attorney General Eliot Spitzer’s suit against Richard Grasso, former President of the New York Stock Exchange, was based on the provision of the New York Not-for-Profit Corporation Law which, like most nonprofit corporation laws, permits payment of reasonable compensation only. There is no corresponding limitation in the business corporation law. ([See Ready Reference Page: “Spitzer Challenges Grasso Salary as ‘Objectively Unreasonable’.”](#)))

A nonprofit corporation is not “owned” by anyone. It may be controlled by individuals or other entities, but those who control the nonprofit do not have an ownership interest in the organization. ([See Ready Reference Page: “The Key Question: Whose Organization Is It?”](#))

### Tax Exempt

When we say “nonprofit” we are usually thinking of an organization that is exempt from taxation. Most, but not all, nonprofit organizations are exempt from paying *federal* income tax on their earnings.

Section 501(c) of the Tax Code now spells out 29 separate categories of exempt organizations. These categories include:

Section 501(c)(2) title holding companies ([See Ready Reference Page: “Title Holding Companies Have Limited Uses.”](#)); Section 501(c)(4) social welfare and advocacy organizations like the Sierra Club or the new organizations set up to participate in political campaigns; Section 501(c)(5) agricultural or labor organizations; Section 501(c)(6) business leagues, professional and trade associations, like the National Football League (until it voluntarily gave up its exempt status in 2015); Section 501(c)(7) social clubs; Section 501(c)(8) and (10) fraternal organizations; cemetery organizations ((c)(13)); veterans organizations ((c)(19)) and so on down to (c)(29).

## **Charities**

The largest category, and the one most people usually think of when they think of “nonprofit” or “tax exempt,” is Section 501(c)(3) “charitable” organizations. Virtually all charities are nonprofits; but not all nonprofits are charities.

Under the Tax Code definition, a Section 501(c)(3) charitable organization is one which is “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.”

In addition, no part of the net earnings may inure to the benefit of any private shareholder or individual, no substantial part of the activities may consist of carrying on propaganda, or otherwise attempting, to influence legislation, (“lobbying”), and the organization may not participate in any political campaign for or against any candidate for public office (“electioneering”). (See Ready Reference Pages on [Requirements for Federal Tax Exemption](#), and on [Lobbying and Electioneering](#).)

When the U.S. Supreme Court decided in the *Citizens United* case in 2010 that corporations could spend unlimited amounts on “uncoordinated” political campaign advertising, many existing and newly created 501(c)(4) advocacy groups and 501(c)(6) trade associations significantly increased their electioneering activity, as they are permitted to do under the law. Unfortunately, in much of the media discussion of the expenditures, the media referred to spending by “nonprofits,” without distinguishing between those allowed to participate in elections and charities that are not so permitted. While the media was not wrong in calling these organizations nonprofits, the use of the term was hugely confusing because many people equate “nonprofit” with “charitable” and charities cannot participate in election campaigns.

The other critical distinguishing feature of charities, as opposed to almost all other types of federally exempt organizations, is that individuals and corporations may make charitable contributions to charitable organizations and claim a charitable contribution deduction on their own federal income tax returns.

## **Public charities and private foundations**

Section 501(c)(3) charities are further subdivided under Section 509(a) of the Tax code between “public charities” which receive broad public support and “private foundations” which receive the great bulk of their income from a very limited number of contributors and investment income. All charities are deemed to be private foundations unless they show the Internal Revenue Service that they qualify as public charities. ([See Ready Reference Page: “Calculating Public Support.”](#))

Section 509(a)(1) describes publicly supported organizations such as churches, hospitals, and schools, which are considered publicly supported by virtue of what they do, and also organizations that receive

a specified percentage of their revenue from a broad range of contributions such as the United Way, or a community foundation.

Section 509(a)(2) describes those that are deemed publicly supported because they receive a broad range of public support from contributions and fees for service, such as many social service organizations or a nursing home.

Section 509(a)(3) describes those organizations that are deemed publicly supported because they are “operated, supervised, or controlled by or in connection with” a publicly supported charity or governmental unit. ([See Ready Reference Page: “Supporting Organizations Are Public Charities.”](#))

Charities that don’t meet the criteria of Section 509(a) are considered private foundations. Like the Gates Foundation, essentially all of their income has come from a single or limited number of individuals, families, or corporations and income on their investments. Private foundations are subject to more stringent regulation. ([See Ready Reference Pages on Private Foundations.](#))

### **Nonexempt nonprofits**

Although rare, there are nonprofit organizations that are not tax-exempt, like the New York Stock Exchange immediately before it converted to a for-profit so that it could sell stock to provide an ownership interest to investors. A “nonprofit” organization partakes of some of the “halo effect” of the term, even though most people do not understand that the term is not completely descriptive.

Some state nonprofit corporation laws make distinctions between charitable, mutual benefit, religious and other types of nonprofit corporations, and apply different rules for each, but many nonprofit corporation laws have only a single classification that includes all nonprofits.

### **State tax exemption**

State tax exemption in most states is an entirely separate matter. Although most nonprofits are likely to be exempt from state corporate income taxes, if any, many states have separate criteria, often more stringent than the federal 501(c)(3) criteria, for real estate or state sales tax exemption.

If you can’t identify the category in which a nonprofit fits, you can’t know the rules by which it is regulated.



# READY REFERENCE PAGE

NO. 137  
FOR YOUR FILE

## Tax Bill Not Good for Nonprofits, But Not as Bad As It Might Have Been

*Johnson Amendment remains to prevent electioneering,  
incentives for charitable giving eliminated for most taxpayers*

The “[Tax Cuts and Jobs Act](#)” ultimately passed by Republicans in Congress and signed by President Trump is not good for most nonprofit organizations, but is not as bad as it might have been.

It eliminates tax incentives for charitable contributions for all but about 5% of U.S. taxpayers who will continue to itemize deductions, a number significantly less than the 30% of taxpayers who itemize currently. The National Council of Nonprofits has argued that this provision will reduce charitable contributions by about \$13 billion a year.

The Act eliminates the “individual mandate” for individuals to obtain health insurance under the Affordable Care Act, which the Congressional Budget Office estimates will cause 13 million people to lose their health insurance over the next 10 years, and will raise insurance costs for others.

It will create additional federal debt of more than \$1 trillion over the next 10 years, which will put severe pressure on Social Security, Medicare, and Medicaid and funding for social service programs. And it will impose new taxes on many nonprofits.

The one major provision opposed by most charitable organizations that did not make the final bill was the repeal of the Johnson Amendment, which was passed by the House in its version of the bill. The House provision would have allowed charities, particularly intended to include churches, to make statements in support of or in opposition to political candidates so long as it was within their normal course of their activities and required only incidental additional costs. Critics of the proposal said it would remove the political protection that charities now enjoy and would introduce tax-deductible “dark money” into politics for the first time. ([See Ready Reference Page: “Keep Charities Out of Politics”](#)) The proposal was eliminated entirely in the final Conference Report and the Act.

Many of the impacts on nonprofits will arise indirectly. The final Act doubles the point at which federal estate tax is imposed on individuals from \$5 million (indexed for inflation from 2010 and about \$5.49 million in 2017) to \$10 million per individual and \$20 million for a married couple (both figures also indexed to about \$11 million and \$22 million). The final version applies to deaths occurring after December 31, 2017 and before January 1, 2016. Many charities fear that this will reduce the incentive for testamentary gifts to charity for many taxpayers.

(Like many of the tax cuts affecting individuals, this provision is not made permanent. It will apply only until January 1, 2026. The tax cuts for business were made permanent. If the individual tax cuts are reinstated later, as many Republicans predict they will, the addition to the deficit over ten years will be significantly greater.)

### Tax on compensation over \$1 million

A new section 4960 of the Tax Code imposes a 21% excise tax on compensation of more than \$1 million paid by organizations exempt from tax under section 501(a), which includes 501(c)(6) trade associations

and 501(c)(4) social welfare organizations as well as 501(c)(3) charities, section 115(1) governmental units, farmers' coops and section 527 political organizations. The tax is imposed on the compensation of any "covered employee" who is one of the five highest paid employees for the year or any person who was in such category for any year starting after December 31, 2016. Compensation includes wages (other than Roth IRA contributions) and deferred compensation included in gross income under section 457(f), but specifically excludes remuneration received by licensed medical or veterinarian professionals for their medical services.

Compensation is aggregated with compensation received from any "related organization," defined as any person or governmental entity that controls or is controlled by the organization, is controlled by one or more persons that controls the organization, or is a supporting defined in section 509(a)(3) or certain supported organizations defined in section 509(f)(3) with respect to the organization. Where multiple organizations contribute to the total compensation, their tax liability is proportionate to their contribution to such compensation.

The 21% tax is based on the new tax rate for business corporations and is intended to mimic the point at which business can no longer deduct compensation. (The business corporation exception for performance based pay and stock options has been repealed in the Act.) It will particularly hit highly-paid athletic coaches as well as top executives of colleges and medical systems.

The tax is in addition to any tax that may be due for payment of an excess benefit tax for unreasonable compensation under section 4958. Interestingly, the compensation excise tax is due even if the compensation is not deemed an excess benefit under section 4958, but the provision may put a higher premium on obtaining comparable salary studies to obtain the rebuttable presumption that compensation of more than \$1 million is reasonable.

### **Tax on "excess parachute payments"**

The same new section 4960 adds a separate new tax on "excess parachute payments" received by covered employees. A parachute payment is considered an "excess parachute payment" if it equals or exceeds three times the employee's base compensation for the five years prior to separation, with certain exceptions.

The taxes on compensation and excess parachute payments are both payable by the organization and not the individual and apply to taxable years beginning after December 31, 2017.

### **Tax on net investment income of colleges and universities**

The Act imposes a totally new 1.4% excise tax on the net investment income of large and wealthy private colleges and universities (section 4968). It covers those with at least 500 full time "tuition paying" students, more than half of whom are located in the U.S., and where the aggregate fair market value of its assets (other than those "used directly" in their educational function) are at least \$500,000 per student. The tax is estimated to cover only about 30 institutions, but the effect on Harvard University has been estimated to be \$43 million if the tax had been in effect for 2017.

Congress had for many years considered imposing a tax on endowment income for particular purposes ([See Ready Reference Page: "Congressional Research Service Lists Options to Regulate University Endowments"](#)), but this provision is imposed without purpose other than to raise revenue from the wealthier schools. It was modified during the legislative process to exempt Berea College (in Sen. Mitch McConnell's home state of Kentucky) because most of its students attend tuition free.

Net investment income will be determined in the same way it is determined for private foundations under section 4940. The tax is imposed on the aggregate investment income of the specific college or uni-



versity and any “related” organization. A related organization is one that controls or is controlled by the institution, is controlled by one or more persons who also control the institution, or is a supporting organization or supported organization with respect to the institution.

The tax applies to taxable years beginning after December 31, 2017.

### **Computation of UBIT separately for each line of business**

Previous law required nonprofits to pay unrelated business income tax (“UBIT”) on their net unrelated business taxable income (“UBTI”) over \$1000. They were permitted, however, to offset losses in one line of business against profits in another line of business. Under the Act, nonprofits operating more than a single line of business will not be permitted to offset losses in one line of business against profits in another line. The Act adds a new section 512(a)(6) providing that an exempt organization must calculate UBTI separately for each “trade or business.” The IRS is supposed to issue guidelines on distinguishing different trades or businesses in order to make the proper calculations.

Because the tax rate is dropped from the old corporate rate of 35% to the new corporate rate of 21%, an organization is likely to pay less total tax than it would have under the old rules but will have more difficulty in determining the separate lines of business.

The provision applies to taxable years beginning after December 31, 2017 but net operating losses from years prior to 2018 can be carried over to offset any UBTI.

### **Inclusion of fringe benefits in calculation of UBTI**

A new section 512(a)(7) attempts to put nonprofits on a parity with business corporations that may not deduct certain fringe benefits by increasing UBTI by any amount paid or incurred for those fringe benefits such as qualified transportation benefits, use of qualified parking facilities and on-premises athletic facilities. Some nonprofits may want to avoid the UBIT by increasing salaries to cover the costs of these benefits.

This provision applies to payments made or incurred after December 31, 2017, not just to payments made in the years commencing thereafter.

### **Repeal of deduction for payments for right to buy college athletic tickets**

The Act repeals the old provision of section 170(l) that allowed an 80% charitable contribution deduction for payments to colleges and universities that grant the right to purchase athletic tickets in return for the payment. The specific deduction had been added in 1990 because of concern about quid pro quo rules concerning a deduction when something of significant value was received in return. The change could have an adverse impact on some college and university booster clubs where tickets are not so hard to get or the teams are not as good as they once were.

The provision applies to contributions in taxable years beginning after December 31, 2017.

### **Increased deduction limit for charitable gifts**

In another temporary benefit for individual taxpayers, the Act provides that cash contributions to public charities, private operating foundations and certain governmental units may be deducted up to 60% of the taxpayer’s contribution base, essentially adjusted gross income, by the 5% of taxpayers who continue to itemize their deductions. (Section 170(b)(1)(A).) It also repealed the so-called “Pease limitation” which reduced the amount of itemized deductions certain high earning taxpayers could take. Both of these provisions last only until January 1, 2026.

## **Repeal of substantiation by donee**

The Act repealed the alternative provision for substantiation of charitable contributions based on reporting by the recipient charity directly to the IRS. Although the IRS had recently proposed rules that would have effectuated the provision, it was quickly shot down by charities that did not want to release the social security numbers of their donors and has never been implemented. The IRS and donors will have to rely on the basic and traditional substantiation from the charities to their donors. ([See Ready Reference Page: “IRS Requires Substantiation of Contributions”](#))

## **Provisions that were not included**

The final Act did not include:

- A provision from the House Bill that would have indexed for inflation the standard 14 cents a mile deduction for charitable volunteers.
- A provision from the House Bill that would have essentially eliminated private activity bonds that many charities utilize to finance facility construction and rehabilitation at tax-exempt bond interest rates. Authority to refinance such bonds was severely limited, however.
- A provision in the House Bill that would have reduced the 2% (or 1% under certain circumstances) excise tax on net investment income of private foundations to a single tax of 1.4% under all circumstances.
- A provision of the House Bill limiting the exclusion from UBTI for research income only if the research is made publicly available.
- A provision of the Senate Bill that would have applied UBIT to revenue from the sale or licensing of name and logo, which would have particularly hurt higher educational institutions.
- A provision of the House Bill that would have required private operating foundations operating art museums to be open to the public for at least 1000 hours a year.
- A provision of the Senate Bill imposing additional reporting requirements on sponsors of donor advised funds.
- A provision of the Senate Bill that would have imposed a 10% excess benefit tax on the organization in addition to the tax on the beneficiary and possibly a foundation manager.
- A provision of the Senate Bill that would have extended the excess benefit tax rules to 501(c)(5) agricultural associations and labor unions and to 501(c)(6) trade associations.

## **Newman’s Own Provision**

The final Act also did not include a provision from the House Bill that would have eliminated the requirement for Newman’s Own Foundation to divest its 100% interest in the Newman’s Own food company because of the excess business holdings limitation in the law for private foundations.

But a special provision (section 4943(g) of the Tax Code) was included in the Bipartisan Budget Act of 2018 to allow the Foundation to continue to hold the stock. A private foundation may now hold 100% of the shares of a business if it acquired the shares other than by purchase, the business distributes all of its net operating income except for “reasonable reserves” within 120 days of the end of each quarter, and the business is operated independently of the foundation. The rule is not applicable to donor advised funds or non-functionally integrated Type III supporting organizations, which are still subject to the regular excess business holding limits.



# READY REFERENCE PAGE

NO. 136  
FOR YOUR FILE

*Commentary:*

## Keep Charities Out of Politics

*Don't put more "dark money" into elections —and make it tax-deductible*

President Donald J. Trump has promised to “destroy” the so-called “Johnson Amendment” that prohibits 501(c)(3) charities from participating in election campaigns. Several Republicans in Congress have introduced bills to do just that.

And yet, the National Council of Nonprofits, the Independent Sector, the Council on Foundations and many operating charities have taken strong positions against a change. Is this an issue that makes much of a difference? Is it really something to get worked up about?

We think it is. It would undermine the trust in the charitable sector and make them less effective in pursuing their missions. But equally important, it would put more unaccountable “dark money” into our political system —and make it *tax-deductible*!

The impetus to eliminate the prohibition has come primarily from religious organizations that argue that their freedom to promote their religious views is impaired by not being able to support candidates who will promote their views in legislation and oppose those who won't. But the principal legislative proposals presently pending in Congress do not limit the change to churches and other religious organizations. They cover all organizations exempt under Section 501(c)(3).

There are many reasons important to the charitable sector for keeping the current limitation in place. It has been effect for more than 60 years, and, as described by the National Council of Nonprofits, “has a proven track record of working well to protect against politicization.”

Ironically, a provision that was allegedly passed to protect politicians like Lyndon Johnson from attack by charities is now being defended as a provision to protect charities from an onslaught by politicians.

Charities like the rule because it protects them from demands by candidates for campaign contributions that would divert limited funds from mission-related work. Many charity leaders want to avoid appearing partisan because they know that their issues are likely to outlast any incumbents in office and they want to be able to deal with all elected officials on the basis of the public interest, not narrow political interest. They recognize how hard it might be to get a sympathetic audience with someone they had unsuccessfully opposed in the last election.

They view their nonpartisan role as a “safe haven” in a sea of partisan rancor, where parties of all beliefs can work together to resolve community problems. Some point out that public trust in charities is usually higher than the public trust in politicians.

They recognize that the Tax Code allows them to advocate on issues, and also allows individual officers or directors of charities to endorse or oppose candidates on their own time and in their private capacity. But the organizations try to avoid the partisan taint that would come with putting the organization behind or against specific candidates.

There would be even broader implications for our society if the rule were to be repealed, however. It would allow more unaccountable “dark money” in politics and would make it tax-deductible, unlike any other political contributions.

One of the pending bills ([H.R. 172](#)) would eliminate the restriction entirely. Two other bills ([S. 264](#) and [H.R. 781](#)) would provide that an organization would not be deemed in violation of the prohibition if a statement is made “in the ordinary course” of “regular and continuing activities” and requires “not more than *de minimis* incremental expense.”

If the provision were eliminated entirely, it would have a significant impact on politics in the country. We have already seen the rush of political money into 501(c)(4) social welfare organizations since the Supreme Court’s decision in the *Citizens United* case allowed corporations to spend unlimited amounts of money in political campaigns so long as it is not coordinated with a candidate. This rush of money is not because (c)(4) organizations don’t have to pay tax on their income. Political parties and political action committees are likewise exempt. The rush is because (c)(4) organizations do not have to reveal the names of their donors.

As a result, this kind of “dark money” is totally unaccountable and not subject to the disclosure requirements for candidates, political parties and political action committees. The IRS has not even ruled on the question of how much political activity is permitted within the social welfare exemption ([See Ready Reference Page: “IRS Proposes New Regulations for 501\(c\)\(4\) Social Welfare Organizations”](#)) and was prohibited by Congress from making such a ruling before the last election. ([See Nonprofit Issues®, 1/1/16](#))

If charities are released from their prohibition on participation in political campaigns, they are likely to see a flood of new unaccountable money, not only because the donors don’t have to be disclosed to the public, but also because the “charitable” contributions to 501(c)(3)s would be tax-deductible, unlike contributions to (c)(4)s and political organizations. It would be a seismic change in our tax policy of keeping tax-deductible charitable money entirely separate from non-deductible political money. The opportunities for abuse, through the creation of new “charities” or the capture of existing ones, would be huge.

The potential for abuse with churches is even greater. “Churches” don’t have to obtain recognition of exemption from the IRS. Anyone can create a church and claim exempt status without the IRS even knowing that it exists. In addition, churches don’t have to file tax returns of any type. At least with (c)(4)s, we have some idea of the total amount spent on political activities to the extent that they accurately report on their Form 990 tax returns. We are unlikely to ever know anything about the extent of political activity of a church. They have no reporting requirements at all.

The bills permitting statements in the ordinary course of regular activities are not a whole lot more protective. They would be almost impossible to administer. Every activity would become an opportunity for supporting or opposing candidates, undermining all of the reasons charities like to be non-partisan. “Regular” activities could be amped up during election season. The increased activity could be funded with tax-deductible charitable contributions and would presumably be okay so long as making a political statement didn’t cost significantly more than making a non-political statement. The IRS certainly doesn’t have the personnel to police this effectively. With churches, it would be almost impossible to tell whether a political statement cost any more because they don’t have to disclose their costs.

The proposals to eliminate the prohibition on charitable participation in election campaigns may sound benign. But they would seriously undermine the long-term trust, and therefore effectiveness, of charities, and would significantly and adversely affect our political system.

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Editor and Publisher  
Lisa T. Chatburn  
Managing Editor

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## Board has inherent power to suspend club members

The board of directors of a nonprofit sportsmen's club has inherent power to suspend an uncooperative member, even where the member has survived a membership vote to dismiss him, the Pennsylvania Commonwealth Court has held.

It has affirmed a trial court decision affirming the member's suspension and later expulsion when he failed to properly renew his membership.

John Mark Muller was membership secretary and procurement officer of the Northern Chester County Sportsmen's Club when he began to buy items and cancel contracts without board approval and in some cases in direct opposition to instructions in 2014. He claimed he had authority to do what he saw fit because he was "running the club."

The board then met with Muller, suspended him as a member and voted to recommend his expulsion by the membership. It directed Muller to return all of his membership records and other materials to the organization. The members voted 87-84 to expel Muller, but it was not effective because it was not a two-thirds vote.

The club filed a suit to obtain return of the materials and an injunction to stop Muller from holding himself out as a member or officer of the club. Muller paid his dues for 2014-2015, but failed to pay for 2015-2016. After a bylaw change while he was suspended and the litigation was pending, he failed to comply the new procedures. After a hearing, the trial court found in favor of the club, including a ruling that Muller was no longer a member.

On appeal, Muller argued that the board had no authority to suspend him from his membership rights. The Court said that the bylaws did provide for expulsion, but did not contain any provisions about suspension. And while the state Nonprofit Corporation Law limits expulsion in the absence of a bylaw, it does not prohibit or restrict suspension in the absence of a bylaw. The Court also said that a nonprofit corporation is not restricted to taking only those actions specifically set forth in its articles of incorporation or bylaws.

The Court said that the statute gives directors the power to conduct the corporation's business and to exercise all of the powers and means appropriate to effect the purpose of the corporation. It therefore had the power to suspend the member, "notwithstanding the

absence of specific authorization in the club's bylaws.”

Muller argued that the suspension amounted a de facto expulsion in violation of the limitation on termination. The Court disagreed. It was not a permanent termination, the Court said, and lasted only while he refused to return all of the club's records and property.

The Court also rejected Muller's claim that he did not receive notice of the bylaw amendment that made his removal easier to accomplish. Since notice was required only for members “entitled to vote” and since he was not in good standing and not entitled to vote, he was not entitled to notice, the Court ruled. And since he had not complied with the new bylaws on renewal of membership, he was no longer a member. (*Northern Chester County Sportsmen's Club v Muller*, Commonwealth Ct., PA, No. 1933 C.D. 2016, 11/21/17.)



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## Boorish behavior not grounds for court to remove director

"Boorish and insulting behavior" toward other members of the board of directors of a nonprofit corporation does not constitute sufficient grounds for judicial removal of the director under the Pennsylvania Nonprofit Corporation Law, the state Commonwealth Court has held. While calling the conduct "deplorable," it said it does not constitute grounds for court intervention in the nonprofit's governance.

Zbigniew "Joe" Kowalski was one of nine directors of A Pocono Country Place Property Owners Association, who had difficult relations with the other directors during 2016. He directed multiple insulting remarks at the other directors, seven of whom were women. He criticized them as "dangerous," "cunning and conniving," "vindictive and spiteful," and "incoherent." He complained that there were too many women on the board and characterized their actions as based on the fact that they were women. He characterized homeowners who volunteered for committee work as alcoholics motivated by free alcohol at the volunteers' dinner.

In October, the board censured Kowalski for violation of the Association's Code of Conduct, and ordered him to attend sensitivity training. After the training, he continued a string of insulting emails, comparing the directors to Nazis, calling one "arrogant and abusive," accusing two of pathological lying, calling two others "control freaks" and "poster children for dysfunctional behavior." In January, 2017, the board suspended Kowalski and petitioned the court to remove him and bar him from serving in the future.

The corporate bylaws provided that the property owner members of the corporation could remove a director with a 2/3 vote. The bylaws also gave the directors the right to declare the position vacant if a director is declared of unsound mind by a court, is convicted of a felony, or fails to attend three consecutive meetings or six in a 12 month period.

The state's nonprofit corporation law gives the members the right to remove a director, the directors the right to remove "for any other proper cause" even if not specifically provided in the bylaws, and a court the right to remove in case of fraudulent or dishonest acts, or gross abuse of authority or discretion, illegal action, or "for any other proper cause."

The trial court found, however, that judicial removal "is a drastic remedy that cannot be granted for merely undesirable or offensive behavior." The Commonwealth Court agreed. It said that there is no

proper cause for judicial removal without showing that the director committed fraud, dishonesty, gross mismanagement, violation of the statute or other illegal or ultra vires conduct.

“Limiting court removal to such extreme cases does not render the phrase ‘for any other proper cause’ mere surplusage, as it encompasses misconduct beyond the grounds for removal” spelled out specifically in the statute, the Court said.

The Court rejected the Association’s argument that the behavior would be grounds for an employer to discharge an employee because discharging an employee does not involve issues of interference with corporate governance.

The Court went on to say that even though the phrase “for any other proper cause” is identical in both sections of the statute, “proper cause for board action against a director and proper cause for court removal of a director are not the same.” “The board of directors is charged with the management of the corporation’s affairs,” the Court said. “In contrast, court removal of a director is a judicial intrusion in the management of the corporation’s affairs. In addition, a board’s removal of a director does not interfere with rights of the members to the same degree as court action. If the members disapprove the board’s action, they may obtain its reversal by voting out the board members and re-electing the director; members, however, have no such redress against a court action with which they disagree.”

It concluded that Kowalski’s “boorish and unprofessional behavior does not constitute fraud, dishonesty, gross mismanagement, or illegal or ultra vires conduct” and affirmed the trial court’s refusal to remove him. (*A Pocono Country Place Property Owners Association v. Kowalski*, PA Commonwealth Ct., No. 904 C.D. 2017, 5/7/18.)

***You Need to Know....*** *The director removal provision of nonprofit bylaws is one of the most important provisions in the bylaws. (See Ready Reference Page: “Bylaws Function as ‘Constitution’ of Nonprofit Corporations”) We normally give the board the right to remove “with or without cause” if an absolute majority of the board thinks the director should go. It is almost never used, but it provides good leverage — if the board has the votes — to encourage the non-performing director to change his or her ways or to resign to avoid being voted off.*



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## Charity Bike Ride Uninsured When Participant Is Injured

*Court says exclusions prevent coverage for rider's claims  
of charity's negligence in auto accident*

A 501(c)(3) nonprofit running long-distance bicycle rides to raise money for affordable housing has found itself uninsured when sued for negligence by one of its participants who was seriously injured while on a cross-country ride. A federal District Court in Philadelphia has granted summary judgment to the organization's commercial liability and excess coverage insurers who sought a declaration that they had no obligation to protect the charity from the rider's claims.

Bike & Build organizes its cycling trips and recruits riders who commit to raise a certain amount of money, typically \$4500, from others who sponsor their trips. It uses the funds to make grants to affordable housing groups selected by the riders and for its own overhead.

Bridget Anderson was injured and another rider was killed in an automobile accident in Oklahoma on July 30, 2015 while they were on a ride from Maine to Santa Barbara. The driver of the car who hit them was not affiliated in any way with Bike & Build and Bike & Build had no ownership interest in the car she was driving. Anderson sued Bike & Build for negligence and gross negligence in the planning, operation and execution of the bike ride, including the selection of the route, which she said exposed riders to an unreasonable risk of harm from passing vehicles.

Bike & Build tendered the complaint to its carriers. The carriers issued a reservation of rights and ultimately declined coverage and sought a declaratory judgment that they had no obligation to protect the charity. They argued that coverage was precluded by three specific exclusions in the policies—the auto exclusion in the commercial liability policy, a volunteer worker/employee exclusion in the commercial policy, and a participants exclusion in the excess policy.

The basic policy provided defense for bodily injury occurring in accidents in the United States, but was subject to certain exclusions. In the printed form, the exclusion applied to an accident arising out of the ownership, maintenance, use or entrustment to others of any auto "owned or operated by or rented or loaned to any insured." An endorsement added to the policy in a section of the same name changed the coverage to exclude bodily injury arising out of the use of any auto. It dropped the qualification that the auto had to be owned or

operated by an insured person. The company claimed that the injury arose from the operation of an automobile and was therefore not covered.

Bike & Build argued that the policy was ambiguous but the Court said that the new language was not reasonably susceptible of different constructions or capable of being understood in more than one sense. It said the change in language could not be reasonably interpreted to apply only to Bike & Build's own use or entrustment of an auto. It also said that the injuries arose out of the accident and cited several other cases reaching similar results.

Bike & Build also argued that the Court's conclusion would defeat its reasonable expectation of coverage, given that its greatest source of liability exposure was from injury to its riders. The Court recognized that Pennsylvania law provides that coverage issues must be determined with reference to the reasonable expectations of the insured, but said that the language of the policy provides the best indication of the parties' reasonable intentions. It said the "mere assertion" of the insured will not ordinarily defeat the unambiguous language of the policy excluding coverage.

The Court said that Pennsylvania has applied the reasonable expectation doctrine only in "very limited circumstances," and that absent an affirmative misrepresentation by the insurer or its agent, the plain and unambiguous terms of a policy demonstrate the parties' intent and control the obligations of the insurer. The deposition testimony showed that the insured and the agent had not talked specifically about these terms of the policy and there was no basis for a misrepresentation claim.

Because the claim was excluded by the language of the policy, the Court said, the commercial policy issuer had no duty to defend or pay damages, and the excess insurer, providing coverage only beyond the coverage in the basic policy, had no liability either.

Having reached this decision, the Court said it had no duty to review the other exclusions argued by the carriers, but would do so "for the sake of completeness."

It rejected the commercial insurer's argument that the claim was excluded under a provision stating that the policy did not apply to injury to employees, contractors, volunteers and other workers. It held that the rider was not a "worker" as defined in the policy.

The Court upheld, however, the argument of the excess carrier that its policy did not apply to "participants" in certain types of athletic, sports, or entertainment "events" managed by the insured. (*Nautilus Insurance Company v. Bike & Build*, E.D. PA. No. 16-4839, 10/18/18.)

## **YOU NEED TO KNOW**

*This is another example of the need to read insurance policies before the fact to try to be sure that they cover your actual exposures.*

*The insured in this case was not liable for large financial losses, however, because it settled the rider's claims prior to the decision in this case for \$10 million, but only to the extent that it was covered by the insurance. It assigned its right to collect from the carriers to the plaintiff, who then prosecuted this case without success.*

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## Association for Honest Attorneys loses exemption

The Tax Court has confirmed the action of the Internal Revenue Service in retroactively revoking the 501(c)(3) charitable status of the Association for Honest Attorneys. The IRS had determined that the Association had been operating primarily for the private benefit of its founder as far back as January 1, 2010 and not in the public interest.

The Tax Court had recently affirmed the imposition of more than \$88,000 in excess benefit taxes on the founder for personal expenditures over three years. (See *Nonprofit Issues*®, Vol. XXVIII, No. 1)

The organization was first granted a charitable exemption in 2003 for the purpose of improving the legal system, saving people money, keeping attorneys honest, and seeking justice for all. During 2010, 2011, and 2012, its founder Joan Farr provided assistance to individuals with respect to legal matters, produced a quarterly newsletter, maintained a website in the Association's name, and paid certain of her personal expenses with corporate money, including paying for the exhumation and DNA testing of the remains of her father.

In 2010, the founder was enjoined from the unauthorized practice of law for assisting clients with legal matters and from violating the Kansas Consumer Protection Act. She nevertheless continued to advise individuals on legal matters.

The Court said it was the Association's obligation to establish that the determination of the IRS was erroneous, but that it failed to do so. On the administrative record that formed the basis of the action, the Court found that during 2010, 2011, and 2012 the net earnings of the Association inured to Ms. Farr's personal benefit and that more than an insubstantial part of the Association's activities furthered nonexempt, private purposes. (*Association for Honest Attorneys v. Commissioner*, T.C. Memo. 2018-41, 4/3/18.)

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## Charity CEO must pay excess benefit taxes

The Tax Court has imposed first and second tier excess benefit taxes on the CEO of The Association for Honest Attorneys, who used the organization's money for personal purchases over a three-year period. The total amount for the three-year period is more than \$88,000.

Joan Farr, (formerly known as Joan Heffington) was the CEO of the Association operating from her home. During the three years, she spent more than \$39,000 with vendors such as Dillard's, Walmart, Kwik Shop, Kohl's, Walgreens, Dillons, A&A Auto Salvage, T&S Tree Service and other real estate related firms. She filed the annual Form 990-N stating the organization was operational, but filed no tax returns showing income and expenditures.

She did not report any personal income from the organization on her personal income tax return, but claimed the expenditures were in lieu of compensation when the IRS inquired. The organization filed no employee tax information for those years and had no record of receiving loans from her.

The Court had no trouble agreeing with the IRS that Farr was a disqualified person because she was both CEO and a member of the board of directors. But it disregarded her testimony that the purchases were for a business purpose, or were compensation, or were repayments of loans she had made to the organization. It found her documentation "questionable, not reliable, not credible, and/or otherwise not persuasive." It said that she had failed to carry her burden of establishing error in the IRS's determinations of deficiencies.

Since it was not disputed that she had failed to "correct" the improper payments, it imposed the 200% penalty tax in addition to the first tier tax of 25% of the excess. (*Farr v. Commissioner*, T.C. Memo 2018-2, 1/9/18.)

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## Do Corporations Use Charitable Gifts As Means to Obtain Political Influence?

*New study estimates 7.1% of corporate charitable giving,  
totaling about \$1.3 billion annually, is politically motivated*

A new academic study has concluded that 7.1% of all U.S. corporate charitable giving, about \$1.3 billion annually, is politically motivated and correlated with the relevance of the Congressional representative of the charity's district to the business interests of the corporation. The authors conclude that this charitable giving may be a form of political influence that goes mostly undetected by voters and shareholders, and is directly subsidized by taxpayers.

The study, "[Tax-Exempt Lobbying: Corporate Philanthropy as a Tool for Political Influence](#)," was written by Marianne Bertrand of the University of Chicago Booth School of Business, Matilde Bombardini and Francesco Trebbi of the University of British Columbia, and Raymond Fisman of Boston University. It has been published on the Social Science Resource Network.

Based on reviews of 320 corporate private foundations associated with Fortune 500 and S&P 500 corporations, they show that grants given to charitable organizations located in a congressional district increase when its representative obtains seats on committees that are of policy relevance to the company foundation. They say that the pattern parallels that of publicly disclosed political action committee (PAC) spending. As additional evidence, they show that a member of Congress's departure leads to a short-term decline in charitable giving to the district, another pattern similar to PAC spending.

The authors have studied gifts in districts of politicians "who are particularly important to the firm's profitability." In part, they studied contributions to charities with which the legislator had a direct connection, such as serving on the board. They said that a charity "is more than four times more likely to receive grants from a corporate foundation if a politician sits on its board."

"To understand how charitable contributions directed to a congressional district may serve as a useful channel of political influence," they said, "one can build on the notion of credit-claiming by self-motivated politicians." They noted previous research that said "much of congressional life is a relentless search for opportunities to engage in [such credit-claiming]."

Their estimate of politically related giving for 2014 was about \$1.3 billion, which was 280% greater than PAC spending and about 40% of total annual lobbying expenditures for the year.

The authors argue that the diversion of charitable funds can result in a “welfare loss” in several ways. One is the “loss of information that may be useful to voters in forming their decision strategies” because it is so difficult to trace the political contributions. Another is the tax subsidization of “what amounts to the political voice of certain special interests.” Third is the lack of information and transparency for shareholders, and fourth is due to a “misallocation of charitable funds.” The authors conclude that “corporate foundations are at a minimum not in compliance with the spirit of the law” but do not prescribe any type of change in rules that govern corporate charitable giving.

## YOU NEED TO KNOW

The authors acknowledge that others have raised points like these in regard to corporate responsibility efforts in general, but claim to provide “the first systematic empirical support for such concerns.” Their conclusions sound reasonable. What, if anything, should be done about it is a different question.





## The Charges Against the Trump Foundation

*NY AG says Foundation has operated in persistent violation of state and federal laws governing charities*

The Attorney General of New York has petitioned a state court to dissolve the Donald J. Trump Foundation and prevent its directors, particularly President Trump, from having anything to do with a nonprofit organization in New York in the future. She has also referred the issues to the Internal Revenue Service for further investigation.

“For more than a decade,” she says, the Foundation “has operated in persistent violation of state and federal law governing New York State charities.” The “pattern of illegal conduct” includes “improper and extensive political activity, repeated and willful self-dealing transactions, and failure to follow basic fiduciary obligations to implement even elementary corporate formalities required by law.”

The Attorney General began an investigation in 2016 during the presidential election campaign when significant issues were raised in the Washington Post and other media about the operation of the Foundation and its relationship to the election. The investigation concluded that the Foundation, classified as a private foundation for federal tax purposes, “operated without any oversight by a functioning board of directors,” and “used charitable assets to pay off the legal obligations of entities [then-candidate Trump] controlled, to promote Trump hotels, to purchase personal items, and to support his presidential election campaign.”

She has filed a “special proceeding” to ask the court to dissolve the Foundation, to force President Trump, Donald J. Trump, Jr., Ivanka Trump and Eric Trump, the Foundation’s directors, to “make restitution and pay all penalties resulting from the breach of fiduciary duties,” to enjoin President Trump from serving as an officer, director or in any position involving fiduciary duties to a nonprofit in New York for ten years, to enjoin the others from such service for one year, directing the President to pay “an amount up to double the amount of benefits improperly obtained through related party transactions entered into after July 1, 2014,” to restrain the Foundation from any activities without court permission, and to grant “such other and further relief as the court may deem just and proper.”

Here is a litany of the charges from the Complaint:

### Insufficient Board Oversight and Lack of Internal Controls

The Board existed “in name only,” the Complaint charges. It has not met since 1999 and “does not oversee activities in any way.” It has no criteria for the consideration, approval, or monitoring of grants and received no reports, allowing Trump to run the Foundation “according to his whim, rather than the law.” Trump was sole signatory on the bank accounts and had accounting staff of the Trump Organization issue checks for his signature.

The Foundation failed to adopt a conflict of interest policy, as required by amendments to the state’s Non-for-Profit Corporation Law in 2014. The Foundation did not have an investment policy, although required since 2010. Although it had an average monthly value of more than \$1 million, the Foundation kept its money in a money market account earning “negligible interest.”

## **2016 Political Activity/Related Party Transactions**

“In 2016,” the Complaint charges, “the Board knowingly permitted the Foundation to be coopted by Mr. Trump’s presidential campaign, and thereby violated its certificate of incorporation and state and federal law by engaging in political activity and prohibited related party transactions.” In particular, the campaign “extensively directed and coordinated the Foundation’s activities in connection with a nationally televised charity fundraiser for the Foundation in Des Moines, Iowa on January 28, 2016.” This was the event Trump staged to raise funds for veterans’ organizations instead of attending a televised presidential debate for Republican candidates.

The fundraiser was “planned, organized, financed, and directed by the Campaign, with administrative assistance from the Foundation,” the Complaint says. Its website listed a campaign staffer as its “organizer.” The podium was decorated with a sign that “borrowed the Trump Campaign themes and slogans,” including its trademarked slogan Make American Great Again.

The fundraiser raised \$2.8 million in contributions to the Foundation, but senior campaign staff “dictated the manner in which the Foundation would disburse those proceeds,” directing the first distributions right before the Iowa Caucuses. The Complaint recites numerous specific directions from the campaign to the Foundation for grants that were promptly made. In several of the events in which Trump made public grants with large “presentation checks” from the Foundation, the checks carried the Make America Great Again slogan of the campaign. The campaign later claimed credit for making the gifts to the veterans’ groups.

The Complaint says the grants were “related party transactions” where the Foundation “ceded control over the grants to the Campaign” and that the grants “made Mr. Trump and the Campaign look charitable and increased the candidate’s profile to Republican primary voters.” It also said that “Mr. Trump had a financial interest in the Campaign and benefitted from the Foundation’s in-kind contributions to the Campaign.”

The Complaint said “Mr. Trump’s wrongful use of the Foundation to benefit his Campaign was willful and knowing.” It cited Trump’s public opposition to the “Johnson Amendment” that prohibits charities from participating in political campaigns as evidence of his knowledge that the Foundation could not participate in the election.

## **The “And Justice for All” Transactions**

In September 2013, the Foundation issued a check for \$25,000 to “And Justice for All,” a political organization supporting the re-election of Pam Bondi as Attorney General of Florida. The Foundation’s Form 990-PF did not list the donation to the political group, but reported a gift to a charity in Kansas known as Justice for All. “The Foundation has no credible explanation for the false reporting,” the Attorney General said. After the situation was reported in the Washington Post, Trump personally repaid the \$25,000 and paid a 10% federal excise tax on the taxable expenditure by the Foundation.

## **Additional Self-Dealing/Related Party Transactions**

In September, 2007, the Foundation made a \$100,000 payment to the Fisher House Foundation, a charitable organization, to settle legal claims against Mar-A-Lago, a private club of which Trump is a 99.99% owner. Trump reimbursed the Foundation, with interest, after the OAG commenced the investigation.

In February 2012, the Foundation made a \$158,000 payment to the Martin B. Greenberg Foundation to settle legal claims against the Trump National Golf Club when it tried to deny a \$1 million hole-in-one



claim by Greenberg at a celebrity golf tournament. The Foundation paid a portion of the total settlement. Trump repaid the Foundation with interest on this amount also.

In November, 2013, the Foundation made a \$5,000 payment to the DC Preservation League for promotional space featuring Trump International Hotels in a charity event program. The Trump International Hotel repaid the amount, with interest, and paid the excise taxes to the IRS for the improper expenditure.

In March, 2014, the Foundation paid \$10,000 to the Unicorn Children's Foundation to purchase a portrait of Trump at a charity auction. The painting was used as décor at the Trump National Doral Miami, owned indirectly by Trump. After the commencement of the investigation, the painting was returned to the Foundation, along with \$182.82, to compensate for the fair rental value of the painting, plus interest, "as determined by an outside appraisal report." Trump's organization paid excise taxes when the transaction was reported to the IRS as a self-dealing transaction.

In December 2015, the Foundation made a payment of \$32,000 to the North American Land Trust "in connection with a pledge by Seven Springs, LLC to fund the management of a conservation easement." Seven Springs, also owned indirectly by Trump, donated 156 acres for a conservation easement and pledged \$32,000 for the Land Trust's fund for managing the easements it obtains. The Foundation admitted that the contribution should have been made by Seven Springs, which reimbursed the Foundation, with interest, and paid the IRS excise tax. (*People v. Trump*, Supreme Ct., New York County, NY, No. 451130, 6/14/18.)

The Trump Foundation blasted the petition as "playing politics and nothing more." It said it had previously proposed its own voluntary dissolution more than a year and a half ago, and criticized the timing of the report "on the very day of the issuance of the Inspector General's Report on the Hillary Clinton e-mail investigation."

#### YOU NEED TO KNOW

These are only charges, of course, but they present a serious cautionary tale for people who agree to serve as director of a nonprofit corporation and then fail to pay attention to their duties.

According to the Complaint, the Foundation has admitted and has caused someone to pay the excise taxes on most of the self-dealing transactions

It is interesting to see how New York has prosecuted federal tax law prohibitions as state law violations by recognizing that the private foundation limitations are required provisions in the articles of incorporation of every private foundation. In some states, they are imputed into the articles or certificate as a matter of state law. In other states, they have to be directly written into the document. But in either case, violation of the federal standards is, by operation of law, violation of the state law governing corporate activity as well.

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## Court approves cy pres of trust to conversion foundation

An appellate court in Pennsylvania has approved a trial court decision awarding income from a charitable trust to a conversion foundation created upon the sale of a local nonprofit hospital. It denied the claim by another beneficiary that the income should be divided among three churches also benefiting from the trust.

When William J. Cohen died in 1947, he left the residuary of his estate to provide income equally for two churches in the City of Chester, a church in Philadelphia, and Chester Hospital, a private nonprofit local hospital. In 1964, after Crozer-Chester Medical Center succeeded to the interest of Chester Hospital, the court awarded the income interest to Crozer-Chester. In 2016, Crozer-Chester was sold to a for-profit hospital corporation and the Crozer-Chester Community Foundation was created to hold the assets and make grants for the improvement of the health and welfare of residents of Chester and Delaware County.

The Foundation filed a petition requesting the Orphans' Court to award the income to the Foundation. One of the churches objected and asked that it be divided equally among the churches. The state Attorney General filed a letter of no objection to the Foundation's request.

In the Orphans' Court, the church argued that since the money had been given for the benefit of a hospital, and the Foundation was not a hospital, the gift had failed and should be divided among the continuing churches. The Orphans' Court rejected the argument and awarded the income to the Foundation.

On appeal, the Superior Court affirmed. It cited Pennsylvania's adoption of the Restatement (Second) of Trusts Section 399, stating that if a gift becomes impossible, impracticable or illegal, a court will direct the application of property to some charitable purpose within the general charitable intention of the settlor. The concept, it said, had been embodied in the state's Decedents, Estates and Fiduciaries Code.

Applying a "deferential standard of review" to the findings of the Orphans' Court, the Superior Court said "we discern no abuse of the orphans' court's discretion" in crediting the testimony of the Foundation's president stating that the Foundation's mission is "to improve the health of the residents of Delaware County." It said the Orphans' Court's determination "rests upon solid ground."

"Reiterating that the testator's intent is paramount and charitable donations are favored," it said, "we conclude that the relevant factors

support the orphans' court's interpretation of Mr. Cohen's bequest to Chester Hospital as based on a desire to support the health and welfare of the Chester community. The orphans' court considered the significant number of health-related programs and services supported by [the Foundation] for Chester mothers, infants, toddlers, drug and alcohol addicts, low-income residents, and cancer patients, along with other relevant factors to determine with care what institution Mr. Cohen would have chosen had he been aware of the present situation." (*In Re: Trust Created Under the Will of William J. Cohen*, Superior Ct., PA, No. 2887 EDA 2017, 5/25/18.)

# Investing for Social Impact

## *Greater Philadelphia*

**Sidney Hargro**  
Executive Director





# Impact Assets for Social Change

# Impact Assets



# Impact Assets



**\$1.5 T**



# Impact Assets



**\$1.5 T**



**?**



# Impact Assets



**\$1.5 T**



**\$890 B**

# Impact Assets



**\$1.5 T**



**?**



**\$890 B**

# Impact Assets



**\$15.4 B**

# Impact Assets

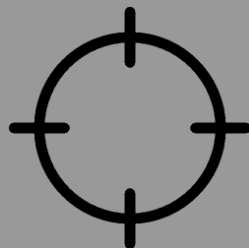


At 5%, this would equate to  
**\$770 M in Grantmaking.**

# Impact Assets



**What about the other 95%?**



**Working Definition**

# Impact Investing

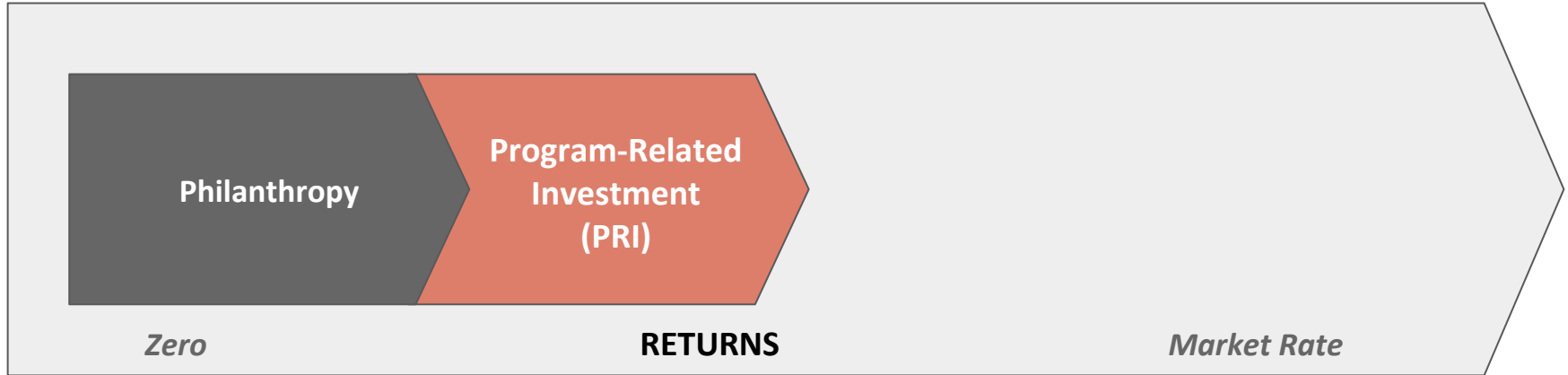
Investments made with the **intention** to generate positive, measurable social and environmental impact alongside a financial return.

# Assets for Social Impact/Returns

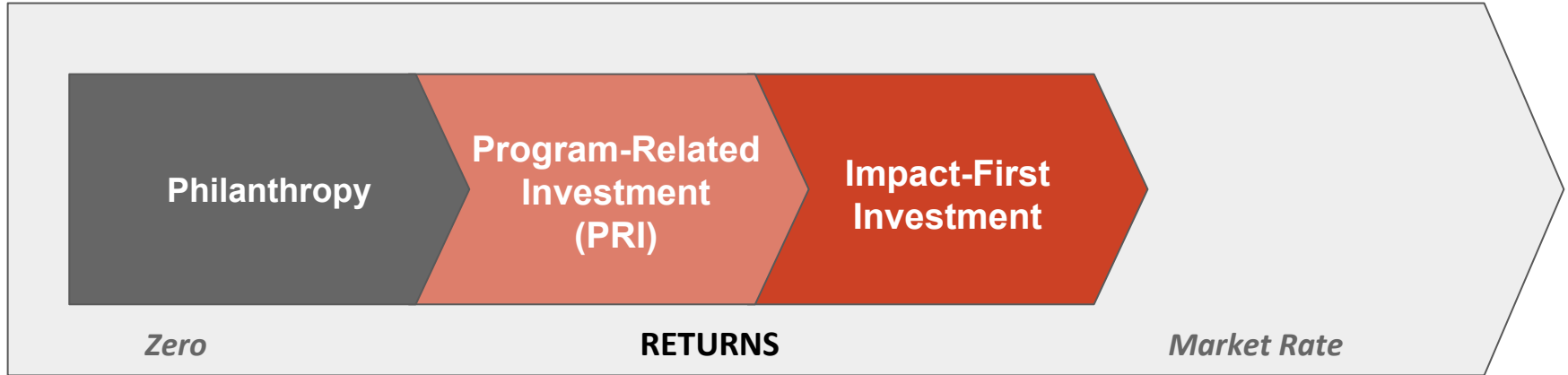




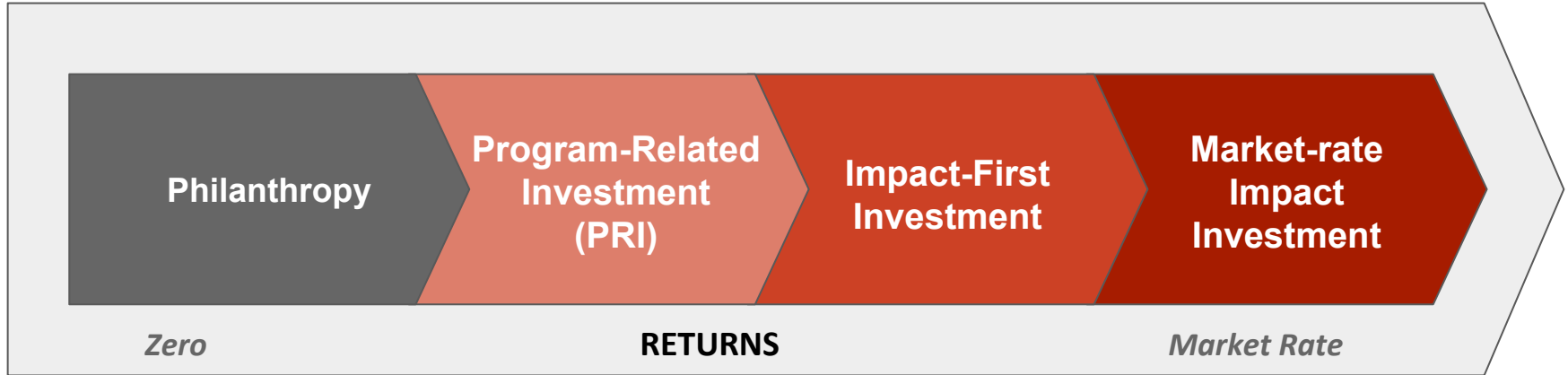
# Assets for Social Impact/Returns



# Assets for Social Impact/Returns




# Assets for Social Impact/Returns



# Mission Investing

Mission Investing is philosophy and practice that asserts that **all assets** exist to achieve social impact goals including but not exclusive to mission-related and programmatic goals.





**Why should foundations, which are set up to do good, use only 5 percent of their assets to actually do good and the rest of it, a full 95% to function like an investment bank?**

**Laura Kind McKenna**

The Patricia Kind Foundation

# Three Myths

1. Impact Investments only involve taking lower returns or greater risk.

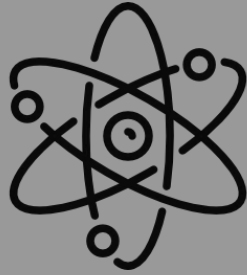
# Three Myths

1. Impact Investments only involve taking lower returns or greater risk.
2. Impact investments will take dollars away from nonprofits.

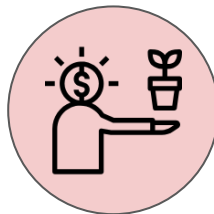
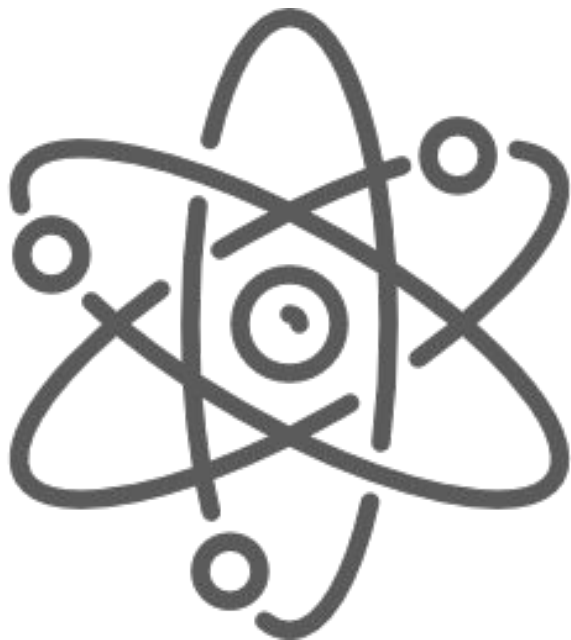
# Three Myths

1. Impact Investments only involve taking lower returns or greater risk.
2. Impact investments will take dollars away from nonprofits.
3. Only large foundations with significant staff and resources can make impact investments.

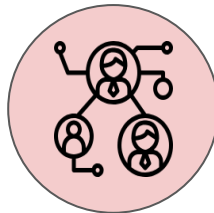




# Impact Investment Ecosystem



**Investors** - Individuals, Foundations



**Intermediaries** - CDFI, Loan Funds,  
PhilImpact Fund, TRF, PIDC Community  
Capital






**Field Builders** - Philanthropy Network,  
GIIN, MIE, ImpactPHL








**Investees** - Nonprofits, Social  
Entrepreneurs, Social Impact-minded  
Business, B-Corps, L3C, Corporations






## Example Deb/Equity Investments

 <b>Patricia Kind Family Foundation</b>	 <b>THE BARRA FOUNDATION</b>	
<p><b>Investment:</b> DePaul USA/Immaculate Cleaning Services</p> <p><b>Amount/Term:</b> \$37,000/60 Months</p> <p><b>Type:</b> PRI</p> <p><b>Purpose:</b> Interest-free, multi-year loan allowed to purchase a commercial cleaning franchise, Immaculate Cleaning Services, to generate unrestricted income and jobs.</p>	<p><b>Investment:</b> New Day Chester</p> <p><b>Amount:</b> \$260,000/60 Months</p> <p><b>Type:</b> PRI</p> <p><b>Purpose:</b> Rehabilitation of three of buildings which will be at the core of the arts district.</p>	<p><b>Investment:</b> Columbus Speech &amp; Hearing/Citra App</p> <p><b>Amount:</b> Ongoing equity return</p> <p><b>Type:</b> Hybrid (PRI/Equity)</p> <p><b>Purpose:</b> PRI to CSH to develop Citra app and joint equity in Citra (now an L3C), now used by 220,000 that allows parents, teachers, and therapists to share lesson plans and post confidential notes.</p>

 <b>Patricia Kind Family Foundation</b>	 THE BARRA FOUNDATION	 <b>The Wells FOUNDATION</b>
<p><b>Investment:</b> DePaul USA/Immaculate Cleaning Services</p> <p><b>Amount/Term:</b> \$37,000/60 Months</p> <p><b>Type:</b> PRI</p> <p><b>Purpose:</b> Interest-free, multi-year loan allowed to purchase a commercial cleaning franchise, Immaculate Cleaning Services, to generate unrestricted income and jobs.</p>	<p><b>Investment:</b> New Day Chester</p> <p><b>Amount:</b> \$260,000/60 Months</p> <p><b>Type:</b> PRI</p> <p><b>Purpose:</b> Rehabilitation of three of buildings which will be at the core of the arts district.</p>	<p><b>Investment:</b> Columbus Speech &amp; Hearing/Citra App</p> <p><b>Amount:</b> Ongoing equity return</p> <p><b>Type:</b> Hybrid (PRI/Equity)</p> <p><b>Purpose:</b> PRI to CSH to develop Citra app and joint equity in Citra (now an L3C), now used by 220,000 that allows parents, teachers, and therapists to share lesson plans and post confidential notes.</p>

 <b>Patricia Kind Family Foundation</b>	 <b>THE BARRA FOUNDATION</b>	 <b>The Wells FOUNDATION</b>
<p><b>Investment:</b> DePaul USA/Immaculate Cleaning Services</p> <p><b>Amount/Term:</b> \$37,000/60 Months</p> <p><b>Type:</b> PRI</p> <p><b>Purpose:</b> Interest-free, multi-year loan allowed to purchase a commercial cleaning franchise, Immaculate Cleaning Services, to generate unrestricted income and jobs.</p>	<p><b>Investment:</b> New Day Chester</p> <p><b>Amount:</b> \$260,000/60 Months</p> <p><b>Type:</b> PRI</p> <p><b>Purpose:</b> Rehabilitation of three of buildings which will be at the core of the arts district.</p>	<p><b>Investment:</b> Columbus Speech &amp; Hearing/Citra App</p> <p><b>Amount:</b> Ongoing equity return</p> <p><b>Type:</b> Hybrid (PRI/Equity)</p> <p><b>Purpose:</b> PRI to CSH to develop Citra app and joint equity in Citra (now an L3C), now used by 220,000 that allows parents, teachers, and therapists to share lesson plans and post confidential notes.</p>

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## Example Pooled Fund Investments



# PhilaImpact Fund



REINVESTMENT  
FUND

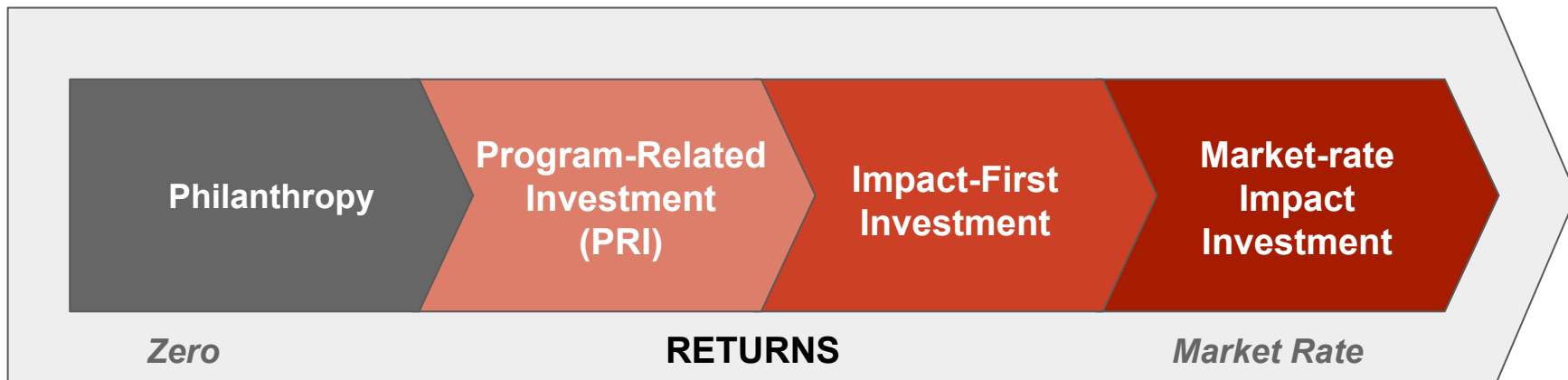
THE  
PHILADELPHIA  
FOUNDATION



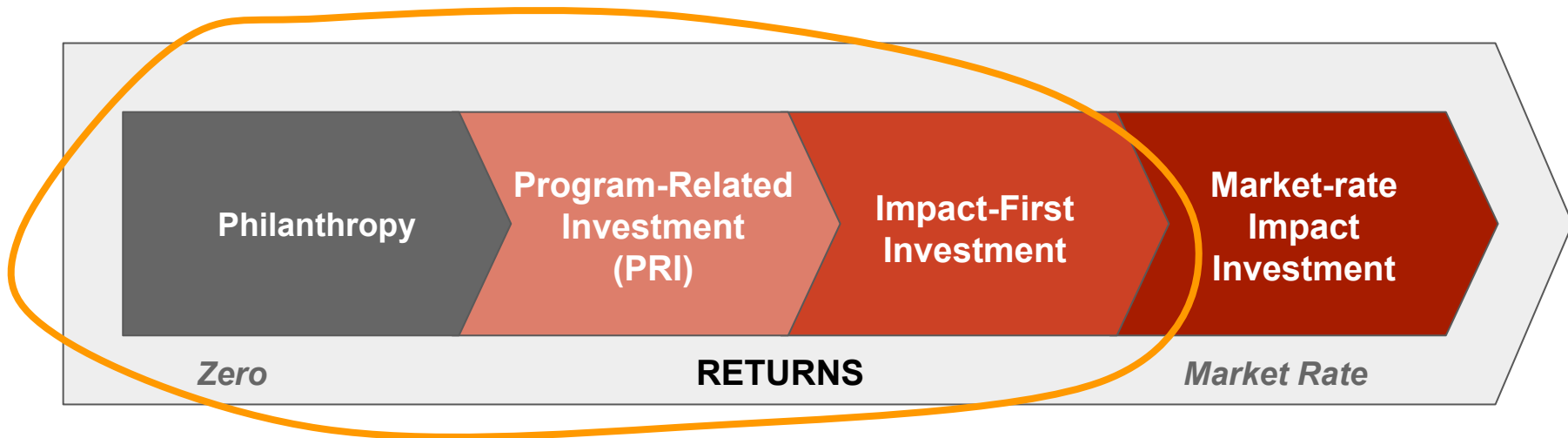


# Our Work Going Forward

# Philanthropy Network



# Philanthropy Network



# Philanthropy Network

**Focus:** Advancing place-based mission investing that impacts the greater Philadelphia Region informed by social equity and opportunity.

**Research:** Ecosystem Study/REBUILD Loan Fund Feasibility Study

**Field-building:** Launching targeted opportunities to help foundations advance their mission investing practice.

**Partnerships:** ImpactPHL

# Impact Assets



**What about the other 95%?**

An additional 1% (from endowments) would generate over \$150 million for regional investment.

# Thank You

**Website:**

[www.philanthropynetwork.org](http://www.philanthropynetwork.org)

**Twitter:**

[@sidneyrhargro](https://twitter.com/sidneyrhargro)

[@philanthropyPHL](https://twitter.com/philanthropyPHL)

## Appendix A: Sample Conflict of Interest Policy

**Note:** Items marked *Hospital Insert – for hospitals that complete Schedule C* are intended to be adopted by hospitals.

### Article I Purpose

The purpose of the conflict of interest policy is to protect this tax-exempt organization's (Organization) interest when it is contemplating entering into a transaction or arrangement that might benefit the private interest of an officer or director of the Organization or might result in a possible excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflict of interest applicable to nonprofit and charitable organizations.

### Article II Definitions

#### 1. Interested Person

Any director, principal officer, or member of a committee with governing board delegated powers, who has a direct or indirect financial interest, as defined below, is an interested person.

*[Hospital Insert – for hospitals that complete Schedule C*

*if a person is an interested person with respect to any entity in the health care system of which the organization is a part, he or she is an interested person with respect to all entities in the health care system.]*

#### 2. Financial Interest

A person has a financial interest if the person has, directly or indirectly, through business, investment, or family:

- An ownership or investment interest in any entity with which the Organization has a transaction or arrangement,
- A compensation arrangement with the Organization or with any entity or individual with which the Organization has a transaction or arrangement, or
- A potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which the Organization is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial.

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2, a person who has a financial interest may have a conflict of interest only if the appropriate governing board or committee decides that a conflict of interest exists.

### Article III Procedures

#### 1. Duty to Disclose

In connection with any actual or possible conflict of interest, an interested person must disclose the existence of the financial interest and be given the opportunity to disclose all material facts to the directors and members of committees with governing board delegated powers considering the proposed transaction or arrangement.

#### 2. Determining Whether a Conflict of Interest Exists

After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the governing board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.

#### 3. Procedures for Addressing the Conflict of Interest

- An interested person may make a presentation at the governing board or committee meeting, but after the presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.
- The chairperson of the governing board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.
- After exercising due diligence, the governing board or committee shall determine whether the Organization can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.
- If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the governing board or committee shall determine by a majority vote of the disinterested directors whether the transaction or arrangement is in the Organization's best interest, for its own benefit, and whether it is fair and reasonable. In conformity with the above determination it shall make its decision as to whether to enter into the transaction or arrangement.



#### **4. Violations of the Conflicts of Interest Policy**

- a. If the governing board or committee has reasonable cause to believe a member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.
- b. If, after hearing the member's response and after making further investigation as warranted by the circumstances, the governing board or committee determines the member has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

#### **Article IV** **Records of Proceedings**

The minutes of the governing board and all committees with board delegated powers shall contain:

- a. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the governing board's or committee's decision as to whether a conflict of interest in fact existed.
- b. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings.

#### **Article V** **Compensation**

- a. A voting member of the governing board who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.
- b. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization for services is precluded from voting on matters pertaining to that member's compensation.
- c. No voting member of the governing board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Organization, either individually or collectively, is prohibited from providing information to any committee regarding compensation.

#### ***[Hospital Insert – for hospitals that complete Schedule C***

- d. Physicians who receive compensation from the Organization, whether directly or indirectly or as employees or independent contractors, are precluded from membership on any committee whose jurisdiction includes compensation matters. No physician, either individually or collectively, is prohibited from providing information to any committee regarding physician compensation.]

#### **Article VI** **Annual Statements**

Each director, principal officer and member of a committee with governing board delegated powers shall annually sign a statement which affirms such person:

- a. Has received a copy of the conflicts of interest policy,
- b. Has read and understands the policy,
- c. Has agreed to comply with the policy, and
- d. Understands the Organization is charitable and in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

#### **Article VII** **Periodic Reviews**

To ensure the Organization operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

- a. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.
- b. Whether partnerships, joint ventures, and arrangements with management organizations conform to the Organization's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes and do not result in inurement, impermissible private benefit or in an excess benefit transaction.

#### **Article VIII** **Use of Outside Experts**

When conducting the periodic reviews as provided for in Article VII, the Organization may, but need not, use outside advisors. If outside experts are used, their use shall not relieve the governing board of its responsibility for ensuring periodic reviews are conducted.



# READY REFERENCE PAGE

NO. 39  
FOR YOUR FILE

## Conflict of Interest Policies Help Avoid Problems

*In addition to protecting against embarrassment and loss of contributions, policies can provide protection against possible excess benefits tax violations*

For charities dependent upon public contributions for their success, a conflict of interest scandal can be devastating. It can erode public confidence in their organization and jeopardize the entire program.

It can also be expensive for the individuals involved under the excess benefits tax rules. The IRS can impose a tax on any "disqualified person," including any officer, director or other person in a position to exercise substantial influence over the affairs of the organization in the last five years who receives more from the organization than is provided in return. (See Ready Reference Page: "Charities Must Avoid Excess Benefit Transactions")

State law may be fairly relaxed on conflicts, in some cases providing that a transaction is not voidable if the conflict relationship is disclosed to the board (or members if the corporation has voting members) and the transaction is approved by an independent majority of the board or membership (even if not fair), or if the transaction is fair to the corporation when entered into. If the relationship is not disclosed, however, the fairness test will generally be looked at after the fact, when the deal has gone sour.

Charities and other nonprofits can clearly benefit from a stated Conflict of Interest Policy, tailored to their own situation and followed by all. Although most policies cover financial conflicts of interest, boards should realize that it is also possible for directors to have positional conflicts on matters of policy that may not be fully covered by a policy limited to financial interests.

Although some organizations include conflicts provisions in their bylaws, more deal with the issue in a Resolution. The Internal Revenue Service has published a suggested conflicts policy, primarily for health care organizations, which was slightly revised and published in its Continuing Professional Education Manual for 2000.

A somewhat different policy, with a few comments in italics, is set out below. Additional language for grantmaking organizations is included in [brackets].

\* \* \* \* \*

### CONFLICT OF INTEREST POLICY

WHEREAS, the Board of Directors of \_\_\_\_\_ (the "Organization") has consistently followed a policy of avoiding a conflict of interest or the appearance of such conflict on the part of the members of the Board and staff; and

WHEREAS, the policy of the Board has been to include representatives of clients of the Organization as well as others on the Board; (This provision obviously may not be applicable in all situations.) and

WHEREAS, it is desirable that the policy to avoid conflicts of interest be clarified and spelled out in a Resolution of the Board; NOW, THEREFORE, BE IT RESOLVED, that this Board hereby adopts the following policy with respect to possible conflicts of interest among the members of the Board and the staff of the Organization:

Service on the Board of the Organization is purely voluntary and shall not be used as a means for private benefit or inurement. *(This provides the basis for removal of anyone who uses his or her position for private gain, including a diversion of corporate opportunity. It also provides a basis to object to a member exercising authority in a situation involving a positional conflict.)*

No member of the Board who is a vendor of goods or services to the Organization or is affiliated (as defined below) with any vendor of goods or services to the Organization shall vote on, or participate on behalf of the Organization in the administration of, any contract with such vendor. *(This assures that no one will act personally in a conflict situation.)*

No member of the Board who is a recipient of [grants,] goods or services from the Organization or is affiliated (as defined below) with a recipient of [grants,] goods or services from the Organization shall vote on, or participate on behalf of the Organization in the administration of, any contract or other arrangement with such recipient.

Such member shall, upon request of any member of the Board, leave any meeting for the period of time the Board (of any committee thereof) is discussing any arrangement with which he or she has an affiliation. *(State law may permit a board member to remain in the meeting while his or her transaction is being discussed, a "chilling" situation for discussion by the other board members. This requires them to leave if anyone so requests. It does not prevent the member from discussing the issue while in the room, which can often help to clarify the situation for those in doubt.)*

No individual or entity with which a member of the Board or staff is affiliated shall receive any special consideration by the Board or staff. There shall be no variation in the procedures for processing [grants to or] contracts with such affiliated entities or individuals, except that additional scrutiny may be applied to such consideration, and the Organization shall follow such procedures as are necessary or appropriate to assure that the transaction does not constitute an "excess benefit transaction" under the Internal Revenue Code. *(It is worth a specific reminder of the excess benefits rules and the necessity for independent review and approval after comparison with comparable situations.)*

No member of the staff of the Organization shall, without previous approval of the President, be, or be affiliated with, either a vendor to, or recipient of [grants,] goods or services from, the Organization.

A person shall be deemed to be affiliated with an entity if the person

- (a) serves as a member of a governing body of the entity,
- (b) serves as an officer or employee of the entity,
- (c) has a material economic relationship with the entity, *(Materiality is obviously a question of degree. Ownership of 100 shares of AT&T stock should not prevent the member from being involved in selecting the telephone provider, but having a spouse own the janitorial company*

*seeking the organization's business would be material.) or*  
(d) if the person's spouse, parent, sibling, child, or member of the immediate household, holds such a position or has such a relationship. *(The inclusion of members of the immediate household is intended to cover a "significant other" living with the board member. Although such person has no legal relationship, the newspaper will point out the conflict.)*

A person shall be deemed to be affiliated with an individual if such individual is a spouse, parent, sibling, child, or member of the immediate household of such individual or has a material economic relationship with such individual.

Where a member of the Board or staff is unsure whether a conflict or an affiliation exists, he or she shall disclose the relevant facts to the President, or to the Board, and shall abide by the decision of the President or the Board as to the existence of a conflict or an affiliation.

A member of the Board shall advise the President of affiliation with any existing or proposed vendor or recipient of [grants,] goods or services in response to an annual questionnaire and at any other time when such member of the Board becomes aware of an affiliation which has not previously been disclosed. *(This requires both the annual certification and disclosure when a new conflict arises so that the Board will be able to act appropriately in every instance.)*

Nothing in this policy shall prevent a member of the Board who is or is affiliated with a recipient of [grants,] goods or services from the Organization from participating in discussions or decisions relating to the scope or quality of [grants,] goods or services provided generally to such recipient and other clients similarly situated. *(The policy is not intended to disenfranchise a board member, particularly a client representative, from debating general issues applicable to all persons similarly situated.)*

Attached to Conflict of Interest Policy:

Compliance with Pennsylvania Charitable Solicitation Registration Law

In addition, to satisfy the requirements of the Pennsylvania Solicitation of Charitable Funds Act, a member of the Board or staff shall advise the President in response to an annual questionnaire and at any other time when such person becomes aware of such relationship which has not previously been disclosed, if such person is related by blood, marriage or adoption to any other member of the Board of Directors, or to any officer, or employee of the Corporation or to any officer, agent or employee of any professional fund raising counsel or professional solicitor under contract with the Corporation, or to any supplier or vendor providing goods or services to the Corporation, and the names and business and residence addresses of any such related party.

Page Break

CONFLICT OF INTEREST DISCLOSURE STATEMENT

I have read and familiarized myself with the Corporation's Conflict of Interest Policy. I certify that I am not, and have no affiliation with, an existing or anticipated vendor to, or recipient of grants, goods or services from, the Corporation and have no information to report with respect to the Pennsylvania Solicitation of Charitable Funds Act, except:

\_\_\_\_\_  
(Please write "None" if you have no information to disclose)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Position

\_\_\_\_\_  
Date

## **Policy on Conflicts of Interest and Disclosure of Certain Interests**

### **Article I – Purpose**

The purpose of this Policy on Conflicts of Interest and Disclosure of Certain Interests (“Policy”) is to assure that \_\_\_\_\_ (Name Grantee Organization) (“Grantee”), a grantee of \_\_\_\_\_ has procedures in place for the disclosure of certain interests and the protection against conflicts of interest in connection with transactions and arrangements that might benefit the private interest of a director, officer, employee or volunteer of the Grantee, or might result in a possible excess benefit transaction. This Policy is intended to supplement and not replace any applicable state and federal laws governing conflicts of interest applicable to nonprofit and charitable organizations.

### **Article II – Definitions**

1. **Interested Person** means any director, officer, employee or volunteer, who has a direct or indirect financial interest, as defined below.

2. **Volunteer** means any person providing services to the Grantee without compensation, and includes any member serving on the board of directors of the Grantee or on any committee of the Grantee with board delegated powers.

3. **Financial Interest**

A person has a financial interest if the person has, directly or indirectly, through business, investment, or family:

a. An ownership or investment interest in any entity with which the Grantee has a transaction or arrangement,

b. A compensation arrangement with the Grantee or with any person or entity with which the Grantee has a transaction or arrangement, or

c. A potential ownership or investment interest in, or compensation arrangement with, any person or entity with which the Grantee is negotiating a transaction or arrangement. Compensation includes direct and indirect remuneration, as well as gifts or favors.

The existence of a financial interest is not automatically a conflict of interest hereunder. Under Article III, Section 2, a person who has a financial interest has a conflict of interest only if the board of directors of the Grantee or the appropriate committee of the Grantee with board delegated powers determines that a conflict of interest exists.

7

## **Article III – Procedures**

### **1. Duty to Disclose**

Every interested person must disclose the existence of a financial interest and be given the opportunity to disclose all material facts relating to such financial interest in connection with any proposed transaction or arrangement involving the Grantee and the interested person. Such disclosure must be made to the board of directors of the Grantee or to the members of the appropriate committee of the Grantee with board delegated powers considering the proposed transaction or arrangement.

### **2. Determining Whether a Conflict of Interest Exists**

After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the meeting of the board or the appropriate committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.

### **3. Procedures for Addressing the Conflict of Interest**

a. An interested person may make a presentation at the meeting of the board or committee, but after the presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.

b. The chairperson of the board or committee shall, if appropriate, appoint a disinterested person or committee to investigate alternatives to the proposed transaction or arrangement.

c. After exercising due diligence, the board or committee shall determine whether the Grantee can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.

d. If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the board or committee shall determine by a majority vote of the disinterested directors or committee members whether the transaction or arrangement is in the Grantee's best interest, for its own benefit, and whether it is fair and reasonable. In conformity with the above determination, the board or committee shall make its decision as to whether to enter into the transaction or arrangement.

### **4. Violations of the Conflicts of Interest Policy**

a. If the board or committee has reasonable cause to believe an interested person has failed to disclose actual or possible conflicts of interest, it shall inform the interested person of the basis for such belief and afford the person an opportunity to explain the alleged failure to disclose.

b. If, after hearing the interested person's response and after making further investigation as warranted by the circumstances, the board or committee determines the



interested person has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

#### **Article IV – Records of Proceedings**

The minutes of the board of directors of the Grantee and all committees with board delegated powers shall contain:

- a. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the decision of the board or committee as to whether a conflict of interest in fact existed.
- b. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings.

#### **Article V – Compensation**

- a. A voting member of the board who receives compensation, directly or indirectly, from the Grantee for services is precluded from voting on matters pertaining to that member's compensation.
- b. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Grantee for services is precluded from voting on matters pertaining to that member's compensation.
- c. No voting member of the board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from the Grantee, either individually or collectively, is prohibited from providing information to any committee regarding compensation.

#### **Article VI – Annual Statements**

Each director, officer, employee and volunteer shall annually sign a statement, which affirms that such person:

- a. Has received a copy of this Policy,
- b. Has read and understands this Policy,
- c. Has agreed to comply with this Policy, and
- d. Understands that the Grantee is charitable and, in order to maintain its federal tax exemption, must engage primarily in activities which accomplish one or more of the Grantee's tax-exempt purposes.



### **Article VII – Periodic Reviews**

To ensure the Grantee operates in a manner consistent with its charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

- a. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.
- b. Whether partnerships, joint ventures, and arrangements with management organizations conform to the Grantee's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes, and do not result in inurement, impermissible private benefit or in an excess benefit transaction.

### **Article VIII – Use of Outside Experts**

When conducting the periodic reviews as provided for in Article VII, the Grantee may, but need not, use outside advisors. If outside advisors are used, their use shall not relieve the board of its responsibility for ensuring periodic reviews are conducted.

## Principle of Ethical Conduct and Whistleblower Policy

### A. General

The \_\_\_\_\_ (“Corporation”) is committed to facilitating open and honest communications relevant to its governance, finances, and compliance with all applicable laws and regulations. The Corporation’s goal is for each director, officer, employee and volunteer (individually, “Representative” and collectively, “Representatives”), whether full-time or part-time, to conduct him or herself in an honest and principled fashion, and to act in good faith with others, both within and outside of the Corporation (the “Principle of Ethical Conduct”). The Corporation expects that Representatives will comply with the letter and spirit of the Principle of Ethical Conduct.

### B. Responsibility

All Representatives must adhere to the Principle of Ethical Conduct and submit a good faith report of a suspected Impropriety, in accordance with Section C.

“Impropriety” means an act or failure to act with the intention of obtaining an unauthorized benefit for any private person or entity, or any action or inaction, whether or not intentional, which is or may be a violation of any statute, regulation or Corporation policy, including the Principal of Ethical Conduct.

“Good faith” means that the Representative making the report has reasonable grounds for believing the report is true and accurate and the conduct may be an Impropriety.

Any report not made in good faith will subject the Representative to serious disciplinary action, including possible termination of employment or termination of status as an officer or member of the board.

### C. Reporting Procedures

Generally, if a Representative possesses a good faith belief that another Representative has taken an action or failed to take an action that has or will result in an Impropriety, he or she must promptly report the matter to the President, subject to the following qualifications:

1. If the suspected violation involves the President or if the Representative is uncomfortable reporting the matter to the President, the Representative shall report the matter to the Treasurer.

2. If the Representative is not comfortable reporting the matter to the Treasurer, the Representative shall report the matter to any other member of the Board of Directors.

The report may be made anonymously.

**D. Handling of Reported Violations**

A Representative who is the recipient of, or investigating, a suspected commission of an Impropriety shall preserve the confidentiality of the Representative making the report to the greatest extent possible without impeding a full and fair investigation.

**E. No Retaliation**

If a Representative reports a violation of an Impropriety in good faith, he or she shall not suffer harassment, retaliation or adverse employment action, as a result. Any Representative who harasses, retaliates or takes any adverse action against the individual who reported the Impropriety in good faith shall be subject to discipline, including possible termination of employment or termination of status as an officer or member of the board. This provision shall not prohibit non-retaliatory adverse actions which are independently justified or required by circumstances unrelated to the report of an Impropriety.

Adopted: \_\_\_\_\_

## **RECORD RETENTION POLICY**

### **INTRODUCTION**

\_\_\_\_\_ (the “Foundation”) adopts the attached Record Retention Policy which policy is consistent with the Foundation’s commitment to its mission. Implementing a Record Retention Policy assists the Foundation to: meet legal standards for retention, storage and retrieval; optimize the use of limited space; minimize the costs of record retention; provide for consistency in the retention and destruction of records.

All Foundation employees shall comply with the standards set forth in this policy. The failure to do so may result in disciplinary action, including termination.

This policy provides a general guide for employees in performing their record retention responsibilities. It cannot address every issue that may arise.

Retention periods may increase by government regulations, judicial or administrative consent order, change in best practice standards, private or government contract, audit requirements, or pending litigation, investigation or other actions. The Foundation’s policy regarding “legal holds” is discussed below. If there are inconsistencies in the required retention periods, follow the longer retention period.

#### **I. Definitions.**

A. **Record.** For the purpose of this policy, a “record” is defined as information, regardless of medium or format, which has operational, institutional or legal value to the Foundation. Collectively the term is used to describe both documents and electronically stored information.

B. **Retention Period.** “Retention Period” is the amount of time a record shall be maintained. A Retention Period is measured from the last date that an item occurred or was in effect. For instance, a contract will be kept for seven years after the date the contract terminated or expired, as opposed to the date the contract began. Records which relate to minors must be kept until the minor attains majority and then for the applicable Retention Period.

C. **Essential and Non-essential E-mails.** Essential e-mails are e-mails which contain, in whole or in part, content which is otherwise subject to the Record Retention Policy and/or which is essential to the Foundation. Such e-mails should be saved to a computer hard-drive or printed in hard copy, but remain subject to the retention guidelines set forth in the attached Policy. Non-essential emails are e-mails which have no content subject to the Record Retention Policy and/or which have no content essential to the Foundation. Questions or concerns about the appropriate treatment of any e-mail document may be directed to the \_\_\_\_\_ [Title].

**II. Record Retention Practices.** In general, employees should maintain records only as long as necessary to comply with regulatory and legal requirements and the Foundation's business needs. Once the Retention Period for the record set forth in this policy has passed, the employee should destroy the records in accordance with the procedures identified below.

Due to the volume of records that are created during the ordinary course of doing business, there are substantial costs and administrative burdens associated with excessive record retention. The costs of retaining unneeded records include waste of file and storage space, additional expense incurred from outside records storage services, and unnecessary burdens on the Foundation's electronic information systems.

The length of time that a record must be maintained will depend upon the type of information contained in the record, statutory or regulatory requirements for its maintenance and applicable statutes of limitations. Not all documents will have a "legally" required period of retention. Where there is no legally required period of retention, the Foundation has assigned a reasonable time period. The form in which the record exists (documentary or an electronic form) will not determine the Retention Period.

**III. Retention Schedule.** Exhibit A, attached to this policy, is a schedule that provides the standards that all employees must follow in managing the Foundation's records. Only the most common types of documents are listed in this schedule.

**IV. Record Storage Service.** The Foundation uses the services of \_\_\_\_\_ for external document storage. Records that are not currently being utilized or are not required by law to remain "on-site" should be appropriately labeled and boxed for storage off site. The labels should sufficiently identify the content of the records, the department, the dates of the records, and the date they should be destroyed in accordance with the schedule set forth in Exhibit A.

**V. Electronic Communications.** This policy extends to electronic communications, which shall include all communications and information transmitted, received or contained in the Foundation's business equipment or information systems, including email, facsimile transmissions and voice mail.

**VI. Email Communications.** Email communications are a form of record and covered by this policy. Junk emails should be deleted immediately and removed from the network server. Non-essential emails should be deleted within thirty (30) days of receipt. Emails containing information subject to the Retention Schedule should be saved to a computer hard-drive or printed in hard copy.

**VII. Legal Holds.** There are occasions in which records, including electronic communications, that are otherwise scheduled for destruction must be retained due to a "legal hold." A valid "legal hold" is issued only by the \_\_\_\_\_ [Title] and suspends the destruction of records due to pending, threatened or otherwise reasonably foreseeable litigation, audits, government investigations or similar proceedings. No records specified in any Legal Hold may be destroyed, even if the scheduled destruction date has passed, until the hold is

withdrawn in writing by the \_\_\_\_\_ [Title] or \_\_\_\_\_ [Title]. A sample Legal Hold is attached as Exhibit B to this policy.

Once any employee learns of the institution of a legal proceeding or threatened legal proceeding (including any audit, subpoena, or government investigation) against the Foundation or its personnel, prompt notification should be given to the \_\_\_\_\_ [Title].

Notice of a Legal Hold, which will identify the relevant documents covered by the notice, will be provided by the Foundation to all appropriate personnel. All employees must follow the instructions set forth in the Legal Hold notice.

The Foundation takes very seriously its obligations to preserve information relating to litigation, audits, and investigations. It is a federal offense to destroy, alter or mutilate any record under federal investigation. The consequences of failing to retain items subject to a Legal Hold can be serious, including possible criminal and civil sanctions against the Foundation and its employees, and possible disciplinary action against responsible individuals (up to and including termination of employment).

**VIII. Violations of Policy.** Any actual or suspected violations of the Foundation's Record Retention Policy should be reported to the \_\_\_\_\_ [Title].

If you have any questions about compliance with or implementation of this Record Retention Policy, please contact the \_\_\_\_\_ [Title].

Date approved by the Board of the Foundation: \_\_\_\_\_, 20\_\_\_\_.

## EXHIBIT A

### Retention Schedule

16

Category	Documents	Retention Period
<b>Contracts</b>	<ul style="list-style-type: none"> <li>Construction Contracts</li> <li>Loan documents</li> <li>General Vendor contracts</li> </ul>	<ul style="list-style-type: none"> <li>Permanent</li> <li>Permanent if there are terms which survive payment of the loan</li> <li>Seven (7) years after termination/expiration of the agreement and all terms contained in the Agreement</li> </ul>
<b>Corporate Records</b>	<ul style="list-style-type: none"> <li>Evaluation of other organizations, businesses and general business matters</li> <li>Due Diligence Files</li> <li>Articles of Incorporation</li> <li>Bylaws</li> <li>Board-related documents (corporate charters, by-laws, minutes, corporate documents, agenda)</li> <li>Intellectual property (Trademarks, patents, copyrights)</li> <li>Closed litigation files</li> <li>Executed contracts with other parties</li> <li>Drafts of contracts</li> <li>Compliance documents</li> <li>Documents related to subpoena requests or court orders</li> <li>Conflict of Interest Policy, Amendments</li> <li>Annual Conflict of Interest Disclosure Statement (signed by all Board members and employees)</li> <li>Nondisclosure Statements</li> <li>Board self-appraisals/evaluation</li> <li>Policies and Procedures</li> </ul>	<ul style="list-style-type: none"> <li>Ten (10) years</li> <li>Permanent</li> <li>Permanent</li> <li>Permanent</li> <li>Permanent</li> <li>Ten (10) years</li> <li>Life of contract plus seven (7) years</li> <li>Seven (7) years</li> <li>Seven (7) years</li> <li>Five (5) years after disposition</li> <li>Permanent</li> <li>Seven (7) years</li> <li>Permanent</li> <li>Seven (7) years after implementation of new policy and procedure</li> </ul>
<b>Electronic Media</b>	<ul style="list-style-type: none"> <li>E-mail</li> </ul>	<ul style="list-style-type: none"> <li>Junk – Delete immediately (Department Head approval not required)</li> <li>Non-essential – Delete after thirty (30) days (Department Head approval not required)</li> <li>Essential e-mails – Save out of inbox using the file system (save to source other than the email server, such as network drive, hard media or other recoverable format) and then subject to retention schedule</li> </ul>



Category	Documents	Retention Period
<b>Employment-related:</b> -- <u>Legal Requirements:</u> <ul style="list-style-type: none"> <li>Title VII, Civil Rights Act of 1964 and the Americans with Disabilities Act</li> </ul>	<ul style="list-style-type: none"> <li>Any personnel or employment records, including: <ul style="list-style-type: none"> <li>application forms and records concerning hiring, promotion, demotion, transfer, layoff and rates of pay;</li> <li>requests for reasonable accommodations.</li> </ul> </li> <li>Records concerning charges of bias or discrimination</li> <li>EEO-1 Forms</li> <li>Records on the effect of hiring procedures on women and minorities</li> </ul>	<ul style="list-style-type: none"> <li>Three (3) years from date of record creation or personnel action (whichever is later)</li> <li>Until final resolution of matter</li> <li>Copy of most recently filed report must be maintained</li> <li>Three (3) years</li> </ul>
<ul style="list-style-type: none"> <li>Age Discrimination in Employment Act</li> <li>Fair Labor Standards Act</li> </ul>	<ul style="list-style-type: none"> <li>Employee payroll records (including weekly compensation) and rate of pay</li> <li>Employment or personnel records relating to applications, resumes, promotions/demotions, layoffs</li> <li>Employee benefit plans</li> <li>Basic records relating to employee compensation, including: <ul style="list-style-type: none"> <li>payroll records;</li> <li>individual employment contracts;</li> <li>certificates and notices of Wage and Hour administrator;</li> <li>sales and purchase records</li> </ul> </li> <li>Supplementary basic records including: <ul style="list-style-type: none"> <li>work schedules;</li> <li>basic employment and earnings records;</li> <li>wage rate tables;</li> <li>records of additions or deductions from wages paid;</li> <li>order, shipping and billing records;</li> <li>records of changes in compensation rates;</li> <li>documentation for basis of any wage differences to employees of opposite sex.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Three (3) years</li> <li>Three (3) years from date of personnel action to which record relates</li> <li>One (1) year after termination of plan</li> <li>Three (3) years</li> <li>Three (3) years</li> </ul>

18

Category	Documents	Retention Period
	<ul style="list-style-type: none"> <li>▪ Certificates of Age</li> </ul>	<ul style="list-style-type: none"> <li>▪ Termination of employment</li> </ul>
<b>Employment-related (cont.):</b> <ul style="list-style-type: none"> <li>▪ Executive Order No. 11246 (for federal contractors/subcontractors)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Affirmative action programs and supporting documentation, including job files</li> </ul>	<ul style="list-style-type: none"> <li>▪ Two (2) years from the date record was made or personnel action occurred, whichever is later</li> <li>▪ Current and prior year's AAP must be maintained on site</li> </ul>
<ul style="list-style-type: none"> <li>▪ Immigration Reform and Control Act</li> </ul>	<ul style="list-style-type: none"> <li>▪ INS Form I-9</li> </ul>	<ul style="list-style-type: none"> <li>▪ Three (3) years after date of hiring or one year after employee's termination, whichever is later</li> </ul>
<ul style="list-style-type: none"> <li>▪ Employment Policies</li> </ul>	<ul style="list-style-type: none"> <li>▪ Records concerning the adoption of policies and procedures</li> <li>▪ Personnel files</li> <li>▪ Records concerning employment claims</li> </ul>	<ul style="list-style-type: none"> <li>▪ Seven (7) years</li> <li>▪ Five (5) years following termination of employment</li> <li>▪ Until resolution of claim</li> </ul>
<ul style="list-style-type: none"> <li>▪ Benefits</li> </ul>	<ul style="list-style-type: none"> <li>▪ Plan documents, summary plan descriptions and related documents</li> <li>▪ Provider contracts, records concerning plan administrators and related and similar records</li> <li>▪ Records concerning pension or 401(k) eligibility</li> <li>▪ Records concerning health and welfare plan eligibility</li> </ul>	<ul style="list-style-type: none"> <li>▪ Permanent</li> <li>▪ Seven (7) years</li> <li>▪ Seven (7) years</li> <li>▪ Seven (7) years</li> </ul>
<ul style="list-style-type: none"> <li>▪ Payroll</li> </ul>	<ul style="list-style-type: none"> <li>▪ All payroll-related documents</li> </ul>	<ul style="list-style-type: none"> <li>▪ Seven (7) years</li> </ul>

19



Category	Documents	Retention Period
<b>Grantmaking</b>	<ul style="list-style-type: none"> <li>▪ Grantee files</li> <li>▪ Due Diligence Files</li> <li>▪ Approved grants – all documentation supporting grant payment, including applications, recommendation, due diligence, grant agreement letters, and grant transmittal letters</li> <li>▪ Approved grants – post-grant reporting information, outcome analysis</li> <li>▪ Records from committees, including minutes, if any and lists of grants recommended for approval</li> <li>▪ Scholarship grant records, including application, if the Foundation participates in selection decisions</li> <li>▪ Declined and/or withdrawn grant applications</li> </ul>	<ul style="list-style-type: none"> <li>▪ Seven (7) years</li> <li>▪ Seven (7) years</li> <li>▪ Seven (7) years after completion of funded program, or date of grant if general operating support</li> <li>▪ Permanent</li> <li>▪ Seven (7) years</li> <li>▪ Seven (7) years</li> </ul>
<b>Investment-related</b>	<ul style="list-style-type: none"> <li>▪ Performance reports</li> <li>▪ Fund-specific documents</li> <li>▪ Manager performance</li> <li>▪ Manager contracts</li> <li>▪ Consultant reports</li> <li>▪ Consultant contracts</li> </ul>	<ul style="list-style-type: none"> <li>▪ Three (3) years</li> <li>▪ Ten (10) years</li> <li>▪ Seven (7) years after the termination of the fund</li> <li>▪ Seven (7) years</li> <li>▪ Seven (7) years after the completion of all obligations under contracts</li> <li>▪ Seven (7) years</li> <li>▪ Seven (7) years</li> </ul>
<b>Philanthropic Services</b>	<ul style="list-style-type: none"> <li>▪ Fund agreement/related files, correspondence</li> <li>▪ Gift acknowledgement</li> <li>▪ Gift solicitations</li> <li>▪ Trust Agreements &amp; file</li> <li>▪ Supporting organizations fund files</li> <li>▪ Donor-advised fund files</li> </ul>	<ul style="list-style-type: none"> <li>▪ Permanent</li> <li>▪ Seven (7) years</li> <li>▪ Seven (7) years after final distribution of funds received in response to solicitations</li> <li>▪ Seven (7) years after termination of trust</li> <li>▪ Seven (7) years after termination of trust</li> <li>▪ Seven (7) years after termination of the fund</li> </ul>
<b>President's Office</b>	<ul style="list-style-type: none"> <li>▪ Various documents identified by President not otherwise subject to retention schedule</li> </ul>	<ul style="list-style-type: none"> <li>▪ Two (2) years</li> </ul>

21

22

Category	Documents	Retention Period
<b>Real Estate</b>	<ul style="list-style-type: none"> <li>▪ Leases</li> <li>▪ Deeds, mortgages, notes, security agreements for real estate held for sale, satisfactions, releases of mortgage</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ten (10) years</li> <li>▪ Permanent (in donor file if applicable)</li> </ul>
<b>Regulatory</b>	<ul style="list-style-type: none"> <li>▪ Charitable registrations (as applicable in each state)</li> <li>▪ IRS exemption determination, 1023 application, related correspondence</li> <li>▪ Tax returns</li> <li>▪ OSHA</li> </ul>	<ul style="list-style-type: none"> <li>▪ Seven (7) years</li> <li>▪ Permanent</li> <li>▪ Permanent</li> <li>▪ Depends on the type of record</li> </ul>
<b>Risk Management</b>	<ul style="list-style-type: none"> <li>▪ All insurance - related information (including policies, underwriting information, outside broker information)</li> <li>▪ Claim Files</li> <li>▪ Accident Reports</li> <li>▪ OSHA – employee medical records               <ul style="list-style-type: none"> <li>– logs, summaries of occupational injuries/illnesses</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Permanent</li> <li>▪ The later of seven (7) years or life of the claim</li> <li>▪ Seven (7) years</li> <li>▪ Thirty (30) years</li> <li>▪ Five (5) years</li> </ul>
<b>Technology</b>	<ul style="list-style-type: none"> <li>▪ Software including licenses, support contracts</li> </ul>	<ul style="list-style-type: none"> <li>▪ Seven (7) years after the completion of all obligations under contracts</li> </ul>

EXHIBIT B

**NOTICE OF LEGAL HOLD**

**To:** All Employees having access to relevant records or information

**From:** Foundation President

**Date:** \_\_\_\_\_

Effective immediately, all destruction of the records described in the attached Document Preservation Notice (including all originals, copies and electronic forms) in accordance with the Foundation Record Retention Policy **must be suspended** until further notice from the office of the President.

By signing this form, the undersigned acknowledges receiving this Notice and agrees to maintain all relevant records, and further acknowledges that the failure to abide by this Notice may result in disciplinary action, including termination.

All questions regarding this Notice should be directed to the office of the President.

Description of Records:

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Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Date: \_\_\_\_\_

Department: \_\_\_\_\_

## **Is This a Good Confidentiality Policy?**

### **ABC Nonprofit Organization Confidentiality Policy Statement for Board**

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Nonprofit Board members have a fiduciary duty of loyalty. One aspect of the duty of loyalty is the duty of confidentiality. As a member of the Board of the ABC Organization, I appreciate the sensitive nature of information received and generated by the ABC Organization. Accordingly, I acknowledge the following as a matter of policy adopted by the Board of ABC Organization:

- Discussions, related materials and information are presumed confidential and for ABC Organization internal use only.
- Board members' conduct will assure that the respect and confidence of all staff, volunteers, clients and members of the public is honored. This confidence may not be betrayed by divulging information obtained to anyone other than other members of the ABC Organization Board unless such disclosure is otherwise approved by the Board Chair or President of the Corporation.
- The public is encouraged to utilize ABC Organization information readily available through our web site, printed information disseminated to the public and publicly available regulatory filings. Board members shall not act as the spokesperson for ABC Organization unless asked to do so by the current designated spokesperson for ABC Organization.
- When decisions resulting from board discussions are reached, those decisions are confidential unless otherwise directed that the decisions can be made public. Confidentiality is critical in matters dealing with highly sensitive areas, e.g., personnel issues.
- As ambassadors for ABC Organization, all those associated with ABC Organization should be well informed and able to discuss ABC Organization's mission, activities and decisions with the general public.

I have read, understand and acknowledge that I shall comply with my responsibilities as set forth in this policy statement.

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Board Signature

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Date

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Board Name (Printed)

24

## **Code of Ethics and Confidential Information Policy**

Members of the Board of Directors, Directors Emeritus, committee members, Management and \_\_\_\_\_, Inc. ([ORGANIZATION]) staff shall at all times abide by and conform to the following code of ethics:

1. All above will abide in all respects by the [ORGANIZATION] Code of Ethics and Confidentiality Agreement and all other rules and regulations of [ORGANIZATION] (including but not limited to [ORGANIZATION]'s Articles of Incorporation and Bylaws) and will ensure that their position in [ORGANIZATION] for which they serve as officer, director, management or employee, as the case may be, remains in good standing at all times. Furthermore, each member of the Board of Directors will at all times obey all applicable federal, state and local laws and regulations and will provide or cause to provide the full cooperation of [ORGANIZATION] when requested to do so by those institutions and their persons set in authority as are required to uphold the law.
2. Members of the Board of Directors, Management and employees will conduct the business affairs of the Corporation in good faith and with honesty, integrity, due diligence, and reasonable competence.
3. Members of the Board, any other person serving on a committee of the Board, and [ORGANIZATION] staff may use Confidential Information obtained through their service to [ORGANIZATION] solely for the purpose of performing services for [ORGANIZATION] and may not disclose, divulge, or make accessible Confidential Information to any person other than to persons to whom the [ORGANIZATION] Board has authorized disclosure. Members of the Board, directors emeritus, a committee of the board, or staff may disclose Confidential Information among themselves to the extent necessary to perform their services for [ORGANIZATION].

Confidential Information includes, but is not limited to:

- Personal information, including financial and health information or financial obligations to [ORGANIZATION], relating to any member or resident of [ORGANIZATION].
- Financial information about [ORGANIZATION] that is not otherwise part of public records or has not been disclosed by the Board at a meeting open to the members.
- Employee records, salary information, performance data, etc.
- Board committee and Board executive session discussions, except to the extent that the conclusion of those discussions need be disclosed at an open Board meeting or otherwise disclosed to the public.
- Information about any pending or potential litigation or investigation involving [ORGANIZATION] or any member of [ORGANIZATION].
- The identity of a whistleblower who has filed a complaint with the Board, except to the extent necessary to resolve the matter complained of.

Confidential Information does not include:



- Information that is required to be disclosed by law.
- Information that is already of public record or has become generally known to the public.

At the end of a person's term in office or on a committee or as staff (for any reason), such person shall, upon request of [ORGANIZATION], destroy or return all documents, papers, and other materials that may contain such Confidential Information.

4. Members of the Board of Directors will exercise proper authority and good judgment in their dealings with [ORGANIZATION] employees, Management, vendors, resident members and the general public, and will respond to the needs of [ORGANIZATION]'s members in a responsible, respectful, and professional manner.
5. No member of the Board of Directors will use any information provided by [ORGANIZATION] or acquired as a consequence of the Board member's service to [ORGANIZATION] in any manner other than in furtherance of his or her Board duties without the approval of the Executive Committee of [ORGANIZATION]. Further, no member of the Board of Directors will misuse [ORGANIZATION] property or resources and will at all times keep [ORGANIZATION] property secure and not allow any person not authorized by the Board of Directors to have or use such property.
6. No member of the Board of Directors shall persuade or attempt to persuade any [ORGANIZATION] employee to leave the employ of [ORGANIZATION] or to become employed by any person or entity other than [ORGANIZATION] except to the extent authorized by the Executive Committee of [ORGANIZATION]. Furthermore, no member of the Board shall persuade or attempt to persuade any advertiser, subscriber, supplier, contractor, or any other person or entity with an actual or potential relationship to or with [ORGANIZATION] to terminate, curtail, or not enter into its relationship to or with [ORGANIZATION], or to in any way reduce the monetary or other benefits to [ORGANIZATION] of such relationship.
7. The Board of Directors must act at all times in the best interests of [ORGANIZATION] and not for personal or third-party gain or financial enrichment. When encountering potential conflicts of interest, Board members will identify the conflict and, if requested by any member of the Board or committee considering such matter, remove themselves from all discussion on the matter. No member of the Board shall vote on any matter in which such Director has a conflict.

**Statement of Understanding and Agreement**

**I am aware that, during the course of my service to [ORGANIZATION] as a Director, Director Emeritus, member of a Board committee, or staff, Confidential Information may be made available to me and agree not to disclose, divulge, or make accessible Confidential Information to any other person except as permitted by the [ORGANIZATION] Code of Ethics and Confidential Information Policy. I have read and understand the Code of Ethics and Confidential Information Policy of [ORGANIZATION] and agree to abide by the terms thereof.**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

Excerpt from  
Draft Conflict of Interest and Confidentiality Policy  
Of \_\_\_\_\_ University

Confidentiality. It shall be the policy of \_\_\_\_\_ that trustees of \_\_\_\_\_ may not disclose, divulge, or make accessible confidential information belonging to, or obtained through their affiliation with \_\_\_\_\_ to any person, including relatives, friends, and business and professional associates, other than to persons who have a legitimate need for such information and to whom the University has authorized disclosure. Trustees shall use confidential information solely for the purpose of performing services as a trustee for \_\_\_\_\_. This policy is not intended to prevent disclosure where disclosure is required by law.

*Nonprofit Issues*<sup>®</sup> / PANO Webinar, May 17, 2016.

[Logo and other graphics]

# Gift Acceptance Policy

## Mission

The charitable mission of the [Organization] is to extend benevolence to men, women and children of all ages, means and circumstances, across the Commonwealth of Pennsylvania, throughout the United States and beyond.

## Purpose of this Policy

Experience has shown that the procedures outlined in this Gift Acceptance Policy help donors efficiently accomplish their desired tax and charitable goals by reducing the misunderstandings and mistakes which frequently arise in complex transactions. The Office of Planned Giving of the [Organization] at \_\_\_\_\_ (the “PG Office”) serves as a common resource for donors to [Organization].

Only the PG Office can accept transfers of illiquid assets or gifts which potentially may be controversial. The PG Office cannot accept a gift which it believes may not advance the charitable mission of the [Organization].

This policy can be found on the website of the [Organization].

## Types of Gift Assets

### Liquid Assets

Common liquid assets are currency, cash, cash equivalents, marketable securities, and other assets which result in the delivery of cash to the [Organization], such as a distribution from an individual retirement account (IRA) or a pecuniary bequest under a will.

Donors intending to make gifts of currency in an amount exceeding Ten Thousand in any twelve month period must arrange an appointment with the PG Office.

To catch and correct delivery errors before these can cause difficulties, we strongly encourage donors or their representatives to give the PG Office advance notice of any transfer other than a check. Please provide the name of the donor, the scheduled date of the transfer and the amount and specific securities to be transferred.

### Real Estate

Please contact the PG Office to discuss a contemplated gift of real estate. In order for the PG Office to investigate the desirability of such a gift, please provide information about title, estimated value and other relevant information.

### **Title and Environment**

If the PG Office is interested in accepting a gift of real estate, it will secure a title search and any environmental survey it believes necessary at its own cost. Donors must reasonably cooperate with these tasks. For example, a donor must grant access to the real estate. In some cases, the PG Office will accept a gift of real estate only via a special purpose vehicle.

### **Encumbrances**

The PG Office may refuse to accept real estate which is subject to encumbrances such as a mortgage, liens or unpaid property taxes.

### **Carrying Costs**

If the donated real estate is to be sold to fund a distribution to the donor or a beneficiary, the PG Office will, and in other cases the PG Office may, require the donor to provide funds for the carrying and/or sales costs of the real estate.

### **Life Insurance**

Life insurance is a special asset with unique features. While exceptions can be made, the following observations may be useful:

- The PG Office will not accept a policy with unpaid policy loans
- The PG Office must be the sole owner and beneficiary of the policy
- Donors will be expected to make ongoing premium payments directly to the insurance company
- If the donor does not continue making premium payments, the PG Office may convert the policy to a paid up policy or surrender it for cash

### **Tangible Personal Property**

Except for items with [Organizational] significance, the PG Office will only accept gifts of tangible personal property which can be used directly in the [Organization's] programs or readily sold for a significant amount.

### **Illiquid Business Interests**

Please contact the PG Office to discuss a contemplated gift of an illiquid business interest. In order for the PG Office to investigate the desirability of such a gift, please provide information about the nature of the business, copies of the business' governing instrument, financial statements, estimate of value, and other owners. The PG Office will screen proposed gifts to determine whether further investigation is warranted.

If the PG Office is interested in the proposed gift of an illiquid business interest, the PG Office will typically require that donor engage competent legal counsel to review the planning for such a gift with its legal counsel because of the number and sophisticated nature of potential issues.

Please note that for the donor's own protection, the PG Office will not accept gifts subject to pre-arranged sales except in extraordinary circumstances.

### **Payments from Family Foundations, Donor Advised Funds**

Donors may not use payments from a family private foundation or from a donor advised fund to satisfy a pledge or other obligation of the donor to the [Organization] or to make a quid pro quo gift that provides goods or services in return. Any payment received from such an entity in such situation shall be held and discussed with the donor in order to avoid potential adverse consequences for the donor.

## **Appraisals**

The PG Office generally does not provide donors with valuations of liquid assets.

When a gift of an illiquid asset is connected to a charitable gift structure, the PG Office will hire a qualified appraiser to determine the value. If the PG Office believes that the value of the illiquid asset is less than \$100,000, it may, prior to hiring an appraiser, require the donor to agree to pay the cost of the appraisal if the appraised value is less than \$100,000. The PG Office will pay for the cost of the appraisal if the appraised value of the asset exceeds \$100,000. If a donor disagrees with the appraisal, the donor may secure a second appraisal at donor's cost. If the two appraisals are within a ten percent range, the value assigned to the gift shall be the higher of the two appraised values. If the lower appraisal is less than ninety percent of the value of the higher appraisal, a third appraisal will be required, with the expense equally divided between the donor and the PG Office. The third appraisal will be accepted as the gift value.

The PG Office is willing to assist the donor in obtaining an appraiser for an outright illiquid gift and will pay for the cost of the appraiser (subject to a limit of 5% of the appraised value of the gift) when the appraised value of the gift exceeds \$100,000.

## **Charitable Gift Structures**

### **Charitable Gift Annuities**

#### **Rates**

The PG Office ordinarily uses the most recently approved rates published by the American Council on Gift Annuities. While annuities in excess of the recommended rates may be issued in unusual circumstances, the PG Office does not compete for charitable gift annuities on the basis of issue rates.

### **Age**

For annuitants over the age of eighty-five, the PG Office may use a rate lower than the one recommended by the American Council on Gift Annuities. The PG Office will issue immediate annuities to annuitants under the age of fifty-five only if it determines that the immediate annuity is suitable given the donor's financial goals for the annuity.

### **Minimum Amount**

The minimum purchase price for a gift annuity is \$5,000.

### **Deferred Gift Annuities**

The PG Office issues deferred gift annuities. The PG Office will issue deferred gift annuities with a deferral period greater than twenty years only if it determines that the deferred annuity is suitable given the donor's financial goals.

### **State**

The PG Office does not offer gift annuities in every state. It will offer gift annuities only for residents of \_\_\_\_\_.

## **Charitable Remainder Trusts**

### **Trustee Services**

Under certain conditions, the PG Office will appoint an individual to serve as trustee if desired. The section on Fiduciaries below provides additional details applicable to this offer.

- The net present actuarial value of the interest dedicated to the [Organization] must have a value of at least Sixty Thousand Dollars.
- The trust must be funded with at least Three Hundred Thousand Dollars. If the trust has beneficiaries other than, or in addition to, the donor and/or the donor's spouse, the minimum size may be increased.
- The terms of the trust must comply with both the approved forms of charitable remainder trusts published by the Internal Revenue Service and the requirements of the attorney representing the PG Office.

## **Charitable Lead Trusts**

The PG Office is pleased to accept distributions from charitable lead trusts of cash and other liquid assets. Please call the PG Office to discuss trustee services and distributions of illiquid assets.

# Endowment Gifts

## Variance Power

A charitable gift can produce benefits for a very long time: some English charitable gifts have continued to produce benefits nearly 1,000 years after being established. Sometimes the purposes for a specific gift can become impractical or impossible to carry out. Courts have the “cy pres” power to modify the purpose of such a charitable gift to accomplish the donor’s most likely intention given the impracticality or impossibility of the original expression. Unfortunately, it can be expensive and time consuming to obtain court approval. A condition to every gift accepted by the PG Office which is intended for a specific purpose is that the PG Office may modify the charitable purpose in light of current conditions, subject to a duty to accomplish the donor’s most likely intention.

## Initial Expression of Intent

Donors are encouraged to think broadly about their desired goals in light of the possibility of changes in technology, governmental assistance programs and general social conditions. The PG Office can assist you and your advisors in drafting flexible and farsighted statements of charitable purpose. Many donors including “sunset clauses” in their charitable gifts, which require the entire fund to be spent on the intended purpose within a period such as 50 years.

## Distribution Rates

Generally, the PG Office will not accept endowment gifts which require the accumulation of income for a lengthy period or defines income in a manner which results in an abnormally low distribution for charitable purposes.

## Tax Reporting

The PG Office provides receipts for all gifts which satisfy the income tax reporting requirements of donors.

The PG Office will file Form 8282 with the Internal Revenue Service when a contributed illiquid asset is disposed of (other than being used in the charitable program) within three years of the gift. The PG Office cannot agree with a donor to delay the sale of an asset to avoid filing Form 8282.

As a courtesy, the PG Office will send a copy of a Form 8283 to donors making a gift of illiquid assets as a reminder that the donor will need to obtain an appraisal to substantiate the gift for income tax purposes.

## Legal Counsel

The PG Office strongly encourages donors to consult their own attorney and/or financial advisor in all matters related to planned gift instruments. The PG Office can supply sample forms for the convenience of the donor’s advisors. Only an attorney should draft a



planned gift instrument such as wills and trusts, and the PG Office will not assist a donor in drafting an instrument which the donor plans to execute without legal review.

Where a competent and fully informed donor decides not to engage an independent attorney despite the PG Office's written recommendation, the PG Office may direct its attorney to prepare documents for review by the donor. For purposes of applicable professional rules, the client of the attorney in such cases will be the PG Office. However, the PG Office will always instruct its attorney to place the donor's stated objectives first in any consideration.

In some cases where the donor is represented by legal counsel, the PG Office will engage separate legal counsel at its own cost to review the details of a specific gift.

## **Confidential Information**

All donor information including names and addresses, beneficiaries, nature and worth of estates, amount of bequests and any other matter deemed personal by the donor shall be kept strictly confidential by the PG Office. In select cases, donors may be asked on a purely voluntary basis whether the PG Office may use selected information for purposes of referral, testimonial, or example. If the information is intended for broad dissemination, such as in published literature, specific authorization for the first such use must be granted in writing.

## **Fiduciaries**

The PG Office strongly encourages donors to appoint independent persons to serve as executors and trustees ("fiduciaries") of planned gift instruments. Where a competent and fully informed donor strongly desires to have the PG Office supply a fiduciary for a planned gift instrument, and no suitable family member is available, the PG Office will do so in accordance with this section.

### **Fiduciary Compensation**

Where appropriate, the PG Office will agree that its nominee will serve as a fiduciary at no cost to the donor. Such agreements must be memorialized in writing. To avoid misunderstanding, donors should consult with the PG Office in advance of signing a planned gift instrument which contemplates that the PG Office will supply a fiduciary.

Due to requirements of state law and for other reasons, the PG Office will in some cases arrange to have a trust company appointed to serve as a personal representative of a probate estate.

### **Legal Representation**

A fiduciary supplied by the PG Office will engage an attorney to provide legal advice about the duties of the fiduciary. The cost of this representation will be borne by the estate or transfer.

## Potentially Controversial Gifts

Some gifts, if accepted, may result in controversy which will not advance the charitable mission of the [Organization]. The PG Office will not decline a gift solely based on the source of the gift. The PG Office shall have exclusive authority to determine whether a gift should be declined, and will consider the following factors in evaluating a potentially controversial gift.

- Core Values: Will accepting the gift compromise any core values of the [Organization]?
- Compatibility of Cause: Is there convergence of cause and intent between the donor and recipient? Will accepting the gift further the mission, goals and/or objectives of both?
- Public Relations: Will the client's importance to the [Organization] create a significant public relations problem for the [Organization] if the gift is turned down?
- Motivation: Is there clear charitable intent and a commitment to benefit the work of the [Organization]? It is understood that it is usually appropriate for there to be tax incentives, community acceptance and publicity values for donors.
- Consistency: Will acceptance of the gift be consistent with past gift acceptance decisions?
- Credibility: What effect will the reputation of the donor have upon the reputation of the [Organization]?
- Form of Gift: Will the nature of the contribution create problems such as in advertising or sponsorship?
- Bottom Line: Will the gift encourage others to give? What will be the net effect on the bottom line? Will acceptance of the gift necessitate that the [Organization] undertake a course of action it otherwise would not choose.

**Pennsylvania Association of Nonprofit Organizations**  
**Policy on Public Policy**

**Included:**

Purpose, Committee Structure, Decision-Making Criteria, Nonpartisan Stance, Identifying Relevant Issues

<b>Last Board Approval:</b>	February 13, 2014
<b>Reviewed by the Board:</b>	January 12, 2018
<b>Approved by the Board:</b>	January 18, 2018

**I. PURPOSE**

To define the process by which PANO determines positions on specific legislative or other public policy issues so that PANO can efficiently and effectively work toward making the systemic changes necessary for creating thriving communities throughout Pennsylvania.

**II. COMMITTEE STRUCTURE**

The Committee shall be chaired by and include directors of PANO and may include representatives of PANO members and others concerned with the community benefit sector. The Executive Director shall be an *ex officio* member of the Committee.

The committee may establish and have the power to disband time-limited, issue-focused task forces that come together to address specific bills, legislation or other public policy issues that arise. Each task force will include members involved and/or interested in the identified issue. Each task force will make recommendations to the Public Policy Committee for approval purposes. The Public Policy Committee will ensure that issues fall within PANO guidelines. Each task force will meet as long as needed and then disband upon completion of the agreed-upon work plan. Task forces shall be chaired by and include at least one director of PANO and may include representatives of PANO members and others concerned with the issue being explored by the task force.

**III. DECISION-MAKING CRITERIA**

PANO's primary focus will be on common issues broadly affecting the community benefit sector. PANO may also implement appropriate organizational positions on legislative or other public policy issues which have a national application and/or effect, a statewide application and/or effect, or have local or limited application but are determined to have statewide policy significance. These issues must have general relevance to the creation, management, operation, administration and well-being of Pennsylvania community benefit organizations. They also are of broad community-wide importance and are likely to have such a significant impact on the people and communities the community benefit organizations serve that it is appropriate for the voice of the nonprofit sector to be represented in the policy debate.

Except as referenced above, PANO will not take or implement positions on legislation or other public policy issues which are limited in application to a specific interest group of the nonprofit sector.

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#### IV. DECISION-MAKING PROCESS

The Committee will meet at the call of the Chair or Executive Director to consider suggested, proposed or pending legislation, regulatory action or other proposals at any level of government that could have a broad impact on the community benefit sector. These discussions may also include affirmative new proposals generated by the Committee itself. The Committee will advise the Executive Director or his/her designee on the position that PANO should take with respect to any such legislation or regulation.

If the position recommended by the Committee is consistent with previously stated positions of the Board of PANO, the Executive Director and other representatives of PANO may enunciate PANO's position without further approval. If the recommended position is inconsistent with previous PANO policy, or is outside the scope of PANO's prior positions, the Public Policy Committee will make a recommendation to the PANO Board for approval. If time is not sufficiently available, the Public Policy Committee shall communicate its recommendation to the full Board; unless one-third of the members of the Board object promptly, PANO representatives may enunciate the position publicly.

The Executive Director may enunciate PANO's position on any issue within the scope of PANO's prior positions without prior approval of the Board, Executive Committee, or Public Policy Committee. If the Executive Director is unsure whether a position is within the scope of prior positions, the Executive Director may consult with PANO's President, the Chair of the Public Policy Committee, or any other director on the Committee for guidance.

PANO will conduct research, educate elected officials, testify, inform constituents, form and participate in advocacy coalitions, build cooperative partnerships with other groups, utilize the media and other informational mediums. PANO may convene organizations that hold differing viewpoints on a particular issue to determine if common ground can be found. In these situations, PANO may decide not to take a stance on a particular issue, but provide facilitation and space for these conversations to occur. The Executive Director and the Committee will share PANO's positions with legislators and legislative staff and will volunteer to serve on various task forces.

PANO plans must address emerging issues that are known to be facing the community benefit sector. We must be in the forefront of new issues. PANO must continue to strengthen its role as the voice of the community benefit sector. We must reach out aggressively to inform and involve nonprofits and the broader community in our advocacy work. This constituency building is likely to encourage organizations to join PANO thereby increasing funds and effectiveness.

#### V. NON-PARTISAN STANCE

Under the Internal Revenue Code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. PANO's *Standards for Excellence* notes that well-managed nonprofits "shall be diligent in assuring that the activities of the organization are strictly nonpartisan." PANO does not support one candidate over another candidate and does not support any political party. PANO works with all political parties in legislative efforts.

#### VI. IDENTIFYING RELEVANT ISSUES

PANO will monitor all state legislation, legislative proposals, regulations, relevant judicial decisions, departmental guidelines and procedures relevant to the nonprofit sector. PANO will work closely with the Independent Sector, National Council of Nonprofits, ASAE and other state and national nonprofit groups to develop coordinated strategies at the state and federal level.

### Committee Procedures: Questions for Decision-Making

We will ask ourselves the following questions as we seek to identify the appropriate issues to address:

- Is the issue related to the nonprofit sector's ability to enhance or protect the quality of life in communities around Pennsylvania?
- Does this issue have the potential of impacting the majority of nonprofits working in Pennsylvania?
- Will this issue affect the creation, management, operation, administration or general wellbeing of nonprofits in Pennsylvania?
- If this issue is too broad or too limited in scope for PANO to address, are there educational and capacity-building opportunities for the affected organizations?
- Would PANO be perceived as a legitimate and appropriate advocate for this position?
- Are the processes in place and is there PANO capacity and expertise to act on the issue in a timely and effective matter?
- Are there organizations/people we can partner with on this issue?
- Are there organizations/partners that may differ with us on this issue? What is the impact?
- What is the impact on PANO's revenue goals?

# Sexual Harassment in the Non-Profit Workplace: Prevention, Investigation, and Remediation

This Year In Nonprofit Law

November 13, 2018



## The (incomplete) list of powerful men accused of sexual harassment after Harvey Weinstein

by Doug Criss, CNN

Updated 2:05 PM ET, Wed November 1, 2017

**(CNN)** — It's only been a few weeks since the sexual assault allegations against media mogul — Harvey Weinstein — exploded into public view, but there have been more allegations "brought against" men in various industries, including actors, writers, and producers.

From the popular belief that a sexual assault victim's story is the only one that matters, to the fact that the #MeToo movement has sparked a global conversation on sexual harassment, the #MeToo movement has become a global phenomenon. The #MeToo movement has also sparked a global conversation on sexual harassment, the #MeToo movement has become a global phenomenon.

This list of men who've been accused of sexual harassment follows the lead of the #MeToo movement, which has sparked a global conversation on sexual harassment. The #MeToo movement has also sparked a global conversation on sexual harassment, the #MeToo movement has become a global phenomenon.



# Workplace Harassment

- Workplace harassment is:
  - Unwelcome, unwanted or offensive conduct based on or because of an employee's protected class status



## Types of Workplace Harassment

- Sexual Harassment
- Quid Pro Quo Harassment
- Hostile Work Environment
- Bullying in the Workplace
- Third-Party Harassment
- Retaliation



## What is Sexual Harassment?

- A form of sex discrimination that violates Title VII and equivalent state and local laws
- **Quid pro quo:**
  - Submission to the advance or conduct is made explicitly or implicitly a condition of employment
  - Submission to or rejection of the advance or conduct is used as a basis for employment decisions
- **Hostile Work Environment:** The advance or conduct unreasonably interferes with an employee's work performance by creating an intimidating, hostile, or offensive work environment



## Quid Pro Quo Harassment

- *Quid pro quo* is Latin and means “this for that”
- Applies where a supervisor seeks sexual favors either:
  - In return for a job benefit (for example, a promotion or raise)
  - To avoid a job detriment (for example, a demotion or pay cut)
- *Quid pro quo* harassment also occurs when an employee's reaction to an advance negatively affects his employment
- Examples:
  - A manager tells her employee that she will give him a raise if he goes on a date with her.
  - An employee is passed over for a promotion after rejecting her supervisor's advances.
  - An employee in a romantic relationship with a manager receives preferential treatment.





## Hostile Work Environment Harassment

- Involves harassment in the workplace that is:
  - Unwelcome
  - Based on a protected class status (sex or gender)
  - Attributable to the employer
  - Severe or pervasive enough to change the conditions of employment and create an abusive environment
- Need not be targeted at the offended individual to give rise to a hostile work environment claim



## Examples of Sexual Harassment

- Sexual harassment comes in many forms and is not limited to physical actions. Harassment also includes verbal or non-verbal conduct that rises to the level of being “severe or pervasive.”
- Examples of sexual harassment include:
  - Physical actions:
    - Touching or brushing an individual’s clothes, body or hair
    - Initiating unwanted sexual activity (kissing, touching or hugging)
    - Rubbing or touching anyone sexually in the presence of another
    - Exposing oneself



## Examples of Sexual Harassment (cont'd)

- Examples of sexual harassment include:
  - Verbal actions:
    - Repeating requests for a date with someone who has not returned an interest
    - Telling unwelcome jokes or stories, often with sexual innuendo
    - Initiating unwelcome flirtations
    - Making or using derogatory comments, epithets, slurs, and jokes
    - Making graphic verbal commentaries about an individual's body or using sexually degrading words to describe an individual
    - Using expressions that can be belittling, such as "honey," "dear," "sweetheart," or "lady supervisor"



## Examples of Sexual Harassment (cont'd)

- Examples of sexual harassment include:
  - Non-Verbal actions:
    - Staring or looking someone up and down
    - Blocking or impeding an individual's movement
    - Following someone inappropriately
    - Giving unwelcome gifts
    - Making sexual gestures
    - Displaying sexually suggestive objects, pictures, cartoons, books, or magazines
    - Winking, blowing kisses, or licking lips
    - Standing or sitting too close to someone





## Who Can Be a Harasser?

- Supervisors
- Co-Workers
- Customers
- Clients
- Vendors
- Individuals or groups doing business with the company or on the premises

## Harasser's Intent is Irrelevant

- Sexual harassment may be unlawful, even if not motivated by sexual desire
- Gender is also irrelevant:
  - Men can harass women
  - Women can harass men
  - Men can harass men
  - Women can harass women



## Harassment is Not Limited to the Workplace

- Sexual and other harassment can occur outside of the workplace, for example during:
  - Annual meetings
  - Business trips
  - Holiday parties
  - Sporting events



## Third-Party Harassment

- Behavior not found offensive by some employees can facilitate an offensive environment for other employees.
  - Example: A group of employees talking about each other's sex lives in the presence of another person who feels very uncomfortable about such discussions.



## What is Retaliation?

- When an employee suffers an adverse employment action for engaging in protected activity, such as reporting harassment or cooperating in a related investigation.
- Retaliation is prohibited by law. Thus, supervisors should refrain from retaliating against any employee who reports harassment.
- “Adverse employment actions” include:
  - Termination; Demotion; Reassignment to a less desirable position or duties; Reduction of work hours; Failure to promote; Failure to award pay increases or raises



## How does a company prevent sexual harassment?

- Culture
- Policies
- Training
- Management sets the tone
- React appropriately



## Reporting Sexual Harassment

- Why is it important for employees to report sexual harassment?
  - Sexual harassment can cause:
    - Employees to be hurt emotionally
    - Productivity to go down
    - Absenteeism to go up
    - The work of the Company to be jeopardized
    - Employees to be fearful of others
    - Workplace morale to be reduced
    - Employee turnover



## Reporting Sexual Harassment

- Why do employees hesitate to report discrimination, workplace harassment, and sexual harassment?
  - Fear of losing their job
  - Fear of retaliation
  - Fear of getting someone in trouble
  - Fear of disrupting the workplace
  - Fear of being accused of having no sense of humor
  - Fear of being embarrassed
  - Fear of feeling like “less of a man/woman”
  - Fear of not being believed. Discrimination and harassment are generally subtle and inconspicuous



## Cost of Sexual Harassment

- Back pay
- Front pay
- Emotional distress damages
- Punitive damages
- Attorneys' fees and costs
- Reinstatement
- Lost time



## Supervisor Liability for Sexual Harassment

- Supervisors should understand their potential liability for misconduct.
- State law permits a supervisor to be held individually liable for discriminatory acts against employees.
- Supervisors may be found liable for other legal claims including: assault and battery, intentional infliction of emotional distress, and defamation.





## Company Liability for Sexual Harassment

- A company may be strictly liable for harassment by supervisors, particularly if it results in a tangible employment action (such as termination or demotion).
- A company may be held liable even without any tangible employment action if the employee can prove hostile work environment harassment.



## Supervisor's responsibilities

An employee reports harassment to his/her supervisor and says, "I don't want you to do anything about this. I just want you to listen and be aware of what is going on."

- How should the supervisor respond?



## Supervisor's responsibilities

### Answer:

- A supervisor cannot promise to “just listen and be aware.”
- Once a supervisor receives a report of harassment or discrimination, a supervisor has an obligation to take action.
- In fact, a supervisor has the responsibility to ensure the integrity of the workplace. A supervisor must exercise reasonable care to prevent and promptly correct any discrimination, workplace harassment or sexual harassment they know about or should know about.



## Your Duties as a Supervisor

- Set a good example.
- Be knowledgeable about the organization's harassment policy and reporting procedures
- If you witness harassing conduct, stop the conduct immediately.
- Do not let personal relationships or personal beliefs get in the way of your duties as a supervisor to watch out for harassment and discrimination.
- Employees should be directed to report complaints immediately to their immediate supervisor or Human Resources, or if the employee is not comfortable with those options, to another management official.



## Your Duties as a Supervisor (cont'd)

- Supervisors should report all complaints to Human Resources
- Human Resources should be consulted when uncertain about appropriate activities or behavior.
- If you are the subject of a harassment/discrimination claim, continue your duties as a supervisor and do **not** retaliate against the complaining employee(s).
- Implement appropriate disciplinary action in accordance with instructions from HR/Management and work to ensure that the workplace is free of harassment.



## Hypothetical

Jeff is a supervisor and Claudia, one of his employees, tells him that a co-worker keeps asking her out and making other remarks that make her uncomfortable at work. To Jeff, the situation doesn't sound like sexual harassment. Claudia wears tight clothes and short skirts and is known around the office to be quite a flirt. Jeff thinks Claudia is being overly sensitive and exaggerating the situation.

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What are Jeff's responsibilities, if any?



## Hypothetical

Jeff must report Claudia's complaint to Human Resources.

- Supervisors must report all employee complaints to Human Resources.
- Jeff's subjective opinion of the situation is not relevant.
- Supervisors have a duty to maintain a respectful workplace and not permit inappropriate behavior to go unchecked. If uncertain about appropriate activities or behavior, supervisors should consult Human Resources.
- Supervisors should also support the company in its responsibility to investigate complaints of discrimination. At the end of the investigation, supervisors should work with Human Resources to implement any disciplinary action.



## Hypothetical 2

Rebecca often tells her administrative assistant, James, who has been working for her for about six months, how attractive she finds him. James never says anything in response. Rebecca assumes he is flattered and continues saying things like, "You should wear tighter shirts so I can see your muscles" and "I bet you're really good in bed."

When James learns that another administrative assistant hired after him earns more money, James asks Rebecca for a raise. Rebecca says that she will consider it if James goes out to dinner with her. James makes it clear that he wants to keep their relationship purely professional and would prefer not to go out with her. Rebecca says she understands and that they can talk about it over dinner.

While having lunch with a friend in Human Resources, James mentions that his boss will only consider a raise if he goes out with her, which he is dreading because she constantly makes comments that make him feel uncomfortable.



## Hypothetical 2 (cont'd)

Human Resources investigates the comments and interviews Rebecca. Angry and embarrassed, Rebecca transfers James to a position on a later shift where she won't have to see him at work.

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Is Rebecca sexually harassing James?

What, if anything, should James do or say in response to his boss' constant comments?

Does Rebecca's transfer of James constitute retaliation?



MONTGOMERY McCracken

## Hypothetical

Yes, Rebecca's conduct probably does amount to legally actionable harassment of James.

- Remember, the standard is that the conduct must be unwelcome, and must be so severe **or** pervasive as to create a hostile work environment.
- For six months, Rebecca has been regularly making inappropriate comments, which is a pervasive amount of time. Whether the comments have created a hostile work environment is based on both an objective and subjective standard. Here, an objective person would find that the sexually suggestive comments were offensive. James also subjectively found the comments unwelcome and offensive.



MONTGOMERY McCracken

## Hypothetical 2: Analysis

Yes, Rebecca's conduct probably does amount to legally actionable harassment of James.

- Remember, the standard is that the conduct must be unwelcome, and must be so severe **or** pervasive as to create a hostile work environment.
- For six months, Rebecca has been regularly making inappropriate comments, which is a pervasive amount of time. Whether the comments have created a hostile work environment is based on both an objective and subjective standard. Here, an objective person would find that the sexually suggestive comments were offensive. James also subjectively found the comments unwelcome and offensive.
- James should not have to silently endure his boss' sexually suggestive comments, which are inappropriate and offensive. James could have considered telling his boss that her comments made him uncomfortable and asked her to stop. If he did not feel comfortable confronting his boss directly, he should have informed Human Resources so they could take appropriate action.



## Hypothetical 2: Analysis

Yes, Rebecca's reassignment of James appears retaliatory.

- James reported harassing behavior to Human Resources, which is a protected activity.
- Assuming that the nighttime word processing role is a less desirable position, James' reassignment as a result of reporting harassment constitutes an "adverse employment action" and is prohibited.



## Hypothetical 3

Laura is very attracted to her boss, Will. Since they are both single, she asks him out for after-work drinks. After proceeding to dinner and having a few too many drinks, they both go back to Laura's apartment and Will ends up spending the night.

-----

Are there any potential problems here? What are the factors to consider?

Could this be considered sexual harassment?



## Hypothetical 3: Analysis

- Based on the few facts in the hypothetical, this situation appears to be mutually desired by two consenting adults. Whether or not a romantic relationship is allowed depends on if the company has a workplace romance policy that forbids relationships between supervisors and employees.
- Even if the company's policy does not forbid supervisors from dating their subordinates, the situation does raise some legal exposure for the company, and for Will. Because Will is Laura's boss, Laura could later allege that she felt pressured to sleep with Will in order to keep her job, or for a number of other job-related reasons.
- Employers and supervisors should be aware of how their sexual relations with a subordinate could have detrimental effects on the company.



Questions?





***28th Annual***

**“THIS YEAR IN NONPROFIT LAW”**

**November 13, 2018**

**ETHICAL ISSUES FOR NONPROFIT EXECUTIVES,  
ACCOUNTANTS AND LAWYERS**

**Donald W. Kramer  
Stephanie K. Benecchi  
Catherine H. Gillespie  
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John M. Myers  
Montgomery, McCracken, Walker & Rhoads, LLP  
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1. An attorney responded to another attorney with the following communication:

“I am a former United States Attorney for the Southern District of Iowa. Your emails and message from today seem to be an apparent attempt at possible blackmail or extortion.

You also mentioned filing a complaint with the Better Business Bureau... I am assuming you understand that there could be serious civil and criminal consequences for you.”

Is this an appropriate response?

2. Environmental Litigation Fund is a 501(c)(3) public charity, which is controlled by Clean Environment Now, which is a 501(c)(4) social welfare organization. The Litigation Fund owns an office building that serves as its primary place of business. Clean Environment has its primary place of business in another building, but recently lost its lease. TV anchor Audrey Smashem of the Litigation Fund’s board of directors thinks the Litigation Fund could reorganize its operations to free up enough space to let Clean Environment move in. Randy Realtor, also a member of the Litigation Fund’s board, suggests a fair market rental rate and says he is willing to broker the deal at his standard commission rate. Sam “Soft Touch” Tockett says Litigation Fund ought to let Clean Environment use the space for free. You are an attorney, the only attorney on the board of the Litigation Fund. What do you recommend?

Does your recommendation differ if the Litigation Fund is a 501(c)(4) that controls Clean Environment, which is a 501(c)(3)?

3. Dorothy Daughter, along with her sister Sally, is the income beneficiary of a charitable remainder unitrust (CRUT) created by her mother. Dorothy wants to invest in a hot new hedge fund but there is a minimum commitment requirement that she can't make on her own. If the CRUT also invests in the fund, together they could make the minimum the commitment for investment. The CRUT does not need the anticipated tax benefit, but her tax advisor says it sounds like a good idea. Dorothy is also on the board of her college alma mater and could probably have the college invest a portion of its endowment with her. What should she do?

4. Ellen has a private family foundation that owns and maintains some statues in a public park near her brother Frank's company's office building. Frank gave the statues to Ellen's foundation, along with some stocks and bonds so that the foundation could pay for the cost of maintaining the statues. Frank has his company's janitor periodically remediate ornithological encrustations on the statues, and the company bills the foundation only for the wages paid to the janitor, absorbing all overhead costs including employer payroll taxes and cost of supplies. Should Frank's company charge Ellen's foundation at the fair market value of the service and make a profit?

5. Meyer University needs a large multi-use facility with an auditorium, gallery space, class rooms, and other specific requirements. There is no space available on campus for new construction, and one property that might meet the need is owned by Meyer Products, a small publicly traded company of which Scott Meyer is the president. Many years ago Scott's grandfather Hiram founded both Meyer University and Meyer Products in small community of Meyerstown. Scott is the third generation to serve on the board of the University and through his position as president of the Chamber of Commerce has close connections with most of the business and civic leaders of Meyerstown. A large public company that currently has a small stake in Meyer Products is considering purchasing the rest of the stock of the company, which would create a "liquidity event" that would be an opportunity for Scott to make a major gift to the University. Selling the building to the University would be a huge plus for the proposed acquisition since the prospective purchaser doesn't want to deal with the deteriorated structure. The University board has engaged an experienced local valuation expert to appraise the value of the building. You are advising the University. Are there any questions that should be asked or concerns to think about?

6. You work as the planned giving officer for the We Want Money charity. I. M. Loaded is a very wealthy woman who has been giving to We Want Money for a number of years. She traditionally gives \$100,000 from her IRA in lieu of her required minimum distribution, makes gifts from her donor advised funds, and writes checks personally. She also indicates that she plans to give your charity a very significant gift in her will.

Ms. Loaded met Pretty Please, your predecessor as the planned giving officer at We Want Money, when he gave an informational seminar on tax aspects of planned giving at one of the local hotels. He often boasted that taking Ms. Loaded to dinner later that evening was one of the best decisions he ever made. He assiduously cultivated the relationship over the years, primarily

through expensive entertaining, and she increased her annual pledge to We Want Money by about \$25,000 a year, in part to cover the increasingly growing cost of her entertainment. But Please complained to the V.P. for Development that Ms. Loaded continually asked him to come back to her room with her after his annual presentation at the hotel's annual giving seminar and after other dinner events. It finally got so bad that when We Want Money didn't do anything about it, he quit.

You inherited this relationship, and frankly your job depends on keeping it. You know it will require a lot of time and a lot of We Want Money's money, but you think it will be an extremely fun part of your job to indulge her expensive tastes, particularly the trip to the Islands every winter. The first thing you did was to get Ms. Loaded and the sponsoring organization of her DAF to make her sister the advisor for one of her DAFs, and have her sister make the recommendation to send money from the DAF to We Want Money. But you know that DAFs cannot be used for personal benefit and have begun to wonder if the payments are a problem. What do you do?

7. You are in a meeting with a colleague who works with you in your nonprofit organization. Your colleague tells you that they believe a third person is wearing a wire and recording them as part of an investigation, and that every time he/she says something suspicious or interesting, he/she hears a loud beep, like an answering machine recording. You are certain your colleague is experiencing auditory hallucinations and appears to be delusional as well.

Assume you are an accountant in a meeting with a client, but that the situation is otherwise as described above.

Assume you are an attorney, not an accountant, in a meeting with a client but that the situation is otherwise as described above.

Assume the same relationships as above, but instead of indicating that your colleague/client is delusional, your colleague/client shares with you that he/she has experienced suicidal ideation – that is, your colleague/client has expressed that he/she wished they were not alive, or thought about taking their life.

Assume that your colleague/client has shared that he/she has experienced suicidal ideation, but in addition, your colleague/client had shared with you that he/she has a plan for how they would take their life and have acquired the means for that plan.

\*\*\*\*\*

For information on the Columbia Lighthouse Project for identifying risk and preventing suicide visit: [www.cssrs.columbia.edu](http://www.cssrs.columbia.edu).



## Copyright and Cybersecurity for Nonprofits

### Presenters:

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## Copyright Basics

*The Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

U.S. Constitution, Article 1, Section 8, Clause 8

Copyright is a form of intellectual property protection grounded in the United States Constitution.



Title 17 of the United States Code codifies the Copyright Act of 1976 (effective Jan. 1, 1978), which provides the basic framework for the current federal copyright law.

Under the Copyright Act, copyright protection extends to “**original works of authorship** [published or unpublished] **fixed in any tangible medium of expression**, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”

Copyright Act, Sec. 102

“Original” means the independent creation of the author.

Works of authorship protected by copyright include the following categories:

- literary works (includes computer programs);
- musical works, including any accompanying words;
- dramatic works, including any accompanying music;
- pantomimes and choreographic works;
- pictorial, graphic, and sculptural works;
- motion pictures and other audiovisual works;
- sound recordings; and
- architectural works.

Copyright protection does **not** extend to:

- ideas;
- procedures;
- processes;
- systems;
- methods of operation;
- concepts;
- principles; or
- discoveries.

Although, it may extend to the expression of the foregoing.

However, when there is only one or a few ways of expressing an idea, idea and expression “merge” and even the expression is not protectable (e.g., rules for a sweepstakes contest).

### Other forms of IP Protection:

- **Patent:** a limited duration right granted by the government to exclude others from making, using, offering for sale or selling, or importing an invention (i.e., a new, useful and nonobvious process, machine, article of manufacture, or composition of matter as well as improvements to these).
- **Trademark:** a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods and/or services of one party from those of others.

Unlike patents and copyrights, trademarks do not expire after a set term of years.

### The copyright owner has the exclusive rights to do and to authorize any of the following:

- to **reproduce** the copyrighted work in copies or phonorecords;
- to **prepare derivative works** based upon the copyrighted work;
- to **distribute** copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- for literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **perform** the copyrighted work publicly;
- for literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to **display** the copyrighted work publicly; or
- for sound recordings, to **perform** the copyrighted work publicly **by means of a digital audio transmission**.

An original work of authorship is automatically protected under copyright the moment it is fixed in a tangible form.

Registration of a work with the Copyright Office (a separate federal department within the Library of Congress) is **not** a prerequisite for copyright protection.

Federal registration, however, is required before a copyright infringement action can proceed.

Registered works may be eligible for statutory damages and attorney fees and costs in successful litigation. Also, registration is *prima facie* evidence of the validity of the copyright when made within 5 years of publication. And, registration permits a copyright owner to establish a record with U.S. Customs and Border Protection for protection against the importation of infringing copies.



A copyright notice is an identifier placed on copies of the work to inform the public of copyright ownership. The copyright notice generally consists of the © symbol, or the word “copyright” (or abbreviation “copr.”), the year of first publication of the copyrighted work, and an identification of the owner of the copyright, e.g., ©2018 Joe Shmo.

Once required as a condition of copyright protection, use of a copyright notice is now **optional**. Also, use of the notice does **not** require permission from, or registration with, the Copyright Office.

For works of authorship created by an individual, copyright protection lasts for the **life of the author + 70 years**.

Authors or their heirs can terminate an agreement that transferred or licensed the author’s copyright to a third party after 35 years.

For works of authorship created anonymously, pseudonymously, and for **works made for hire**, protection lasts **95 years from** the date of **publication or 120 years from** the date of **creation, whichever is shorter**.

**For works made for hire, termination provisions do not apply.**

When deciding to use a work protected by copyright, the general rule is to seek permission from the copyright owner.

However, under the Copyright Act, certain uses of copyrighted works are permissible without first obtaining permission of the copyright owner.

The Copyright Act codifies the **fair use doctrine**, which promotes freedom of expression by permitting the unlicensed use of copyright protected works for purposes such as, for example, criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.

Whether a particular use is a fair use depends on:

- the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

## Work Made for Hire

The general rule is that the person who creates the work is its author and the copyright owner. The exception is a **work made for hire**.

When a work qualifies as a work made for hire, the author is not the person who actually created the work. Rather, **the creator's employer or the commissioning party is considered the author and the copyright owner**.

Whether a work is made for hire is determined by the circumstances existing at the time the work is created. A work may be made for hire:

- when it is **created by an employee** (under general principles of agency law, which look to the status and conduct of the employer and the control exercised by the employer over the employee and the work) **within the scope of employment, or**
- when a creator (**independent contractor**) and the hiring party enter into an **express written agreement** that it is to be considered a “work made for hire” **and** the work is **specially ordered or commissioned for use as**:
  - a compilation;
  - a contribution to a collective work;
  - part of a motion picture or other audiovisual work;
  - a translation;
  - a supplementary work (e.g., a forward; editorial notes);
  - an instructional text;
  - a test;
  - answer material for a test; or
  - an atlas.

Mere ownership or possession of the created thing itself does not convey any copyright ownership in the underlying creative work.

It is the copyright owner who may direct how and to what extent copies of the work may be made and used.

To determine who owns a work of authorship, the principal inquiry is whether the creator of the work is an **employee** or an **independent contractor**.

If the creator is an employee, the presumption is the employer owns the copyright.

If the creator is an independent contractor, the presumption is the independent contractor owns the copyright -- unless there is a work made for hire agreement and the work falls into one of the foregoing nine categories of specially-ordered or commissioned works.

**The work made for hire exception does not apply to volunteers!**

When a volunteer creates a copyrightable work, the Copyright Act confers exclusive ownership to the volunteer.

Also, in the area of the visual arts, the Visual Artists Rights Act of 1990 confers to the volunteer creator (regardless of physical ownership of the work itself, and regardless of who holds the copyright) the additional moral rights of attribution, integrity (i.e., the right to prevent distortion, mutilation, or modification that would prejudice the author's honor or reputation), and, for authors of works of "recognized stature," to prevent destruction.

A nonprofit hiring an employee author (e.g., a writer, artist, programmer, designer) should take affirmative steps to secure the copyright in the work product if that is its intention.

This can be accomplished by including in the employment agreement:

- an assignment clause drafted as a **present grant**;
- a back-up work made for hire provision (to minimize the risk that the employee may later attempt to claim ownership);
- a waiver of moral rights clause; and
- a further assurances clause.

To secure work made for hire for an eligible work created by an independent contractor, **a written agreement signed by the parties expressly stating that the work is a “work made for hire” is required.**

The work for hire clause should be accompanied by a back-up present assignment in the event copyright ownership through work made for hire is challenged (note: where copyright ownership is transferred via assignment to the commissioning party, the author or heirs may have the right to terminate the assignment after 35 years).

When dealing with a volunteer creator, the nonprofit can pursue a written agreement to acquire ownership of the work or to license rights in and to the work.

The agreement should include a detailed, expansive, and substantive recitation of the benefits derived by the volunteer to demonstrate that the parties have validly exchanged valuable consideration in good faith.

Ideally, the agreement should require the volunteer to waive any moral rights and to represent and warrant that the work is original and (to the volunteer’s knowledge) does not violate third party IP rights.

## Cybersecurity for Nonprofits



## Cybersecurity is a **NONPROFIT** Issue

Cyber Criminals are targeting smaller organizations

- Lack of sophisticated network security

Nonprofits have what Cyber Criminals want:

- Payment information
- Personally Identifiable Information (PII)
- Information of donors, patrons, newsletter subscribers, etc.

## Cybersecurity is a NONPROFIT Issue

Nonprofit  
Nightmare: Data  
Breach Exposes  
10,000 Donors'  
Financial Records

Wednesday, November 4, 2015 / Categories:  
Nonprofit Insurance

Hacked! Crooks are Grabbing  
Nonprofit Websites and Demanding  
Ransom

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TECHNOLOGY

Small Indiana Nonprofit Falls Victim To  
Ransom Cyberattack

May 20, 2017 8:02 AM ET  
Heard on Weekend Edition Saturday

ANNIE ROPEK

FROM IPBS

Malware attacks San Ysidro School District,  
demands \$19K ransom

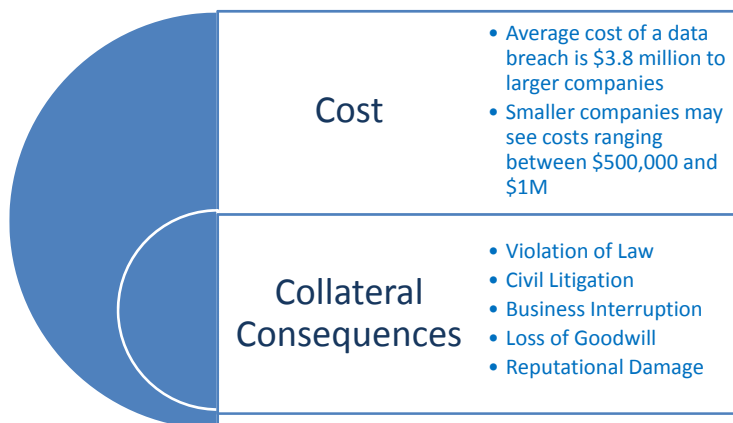
Posted: Oct 05, 2017 3:25 PM EDT  
Updated: Oct 05, 2017 3:43 PM EDT



MONTGOMERY McCracken

25

## Impact of Data Breach



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26

26



## Uncertain Legal Framework

- **NO** single state or federal standard
- Federal Laws
  - FTC Act
  - Gramm-Leach-Bliley Act – 15 U.S.C. § 6801 *et seq.*
  - Red Flag Rules (FCRA)
  - HIPAA, FERPA, COPPA, and more...
- State Laws – A patchwork
  - Wide variations in applicability of laws outside of state borders
  - Wide variations in definitions of PII
  - Wide variations in definition of breach
  - Wide variations in duties imposed by law



## Federal Laws

- Laws regulate specific industries and associated companies (e.g., financial, healthcare, etc.)
- Congress delegates enforcement to numerous agencies:
  - FTC, CFPB, SEC
  - Agency policies and regulation





## Red Flags Rule

- **Fair and Accurate Credit Transactions Act of 2003**
- **Apply to Financial Institutions and Creditors**
  - Can apply to nonprofits across all industries
    - By accepting multiple payments pledges where donors provide bank account or credit card information
  - Lawyers, doctors, ... and other service providers [are] no longer classified as 'creditors' for the purpose of the red flags rule
- **Requires an Identity Theft Protection Plan**
  - Must identify 'red flags' of identity theft
  - Implement procedures necessary to detect 'red flags'
  - Policies to respond to 'red flags'
  - Ongoing assessment and refinement of policies



## Data Security Laws

- More than half the states
- Apply to businesses that own, license, or maintain personal information about a resident of that state
- Requires implement and maintain reasonable security procedures and practices appropriate to the nature of the information
- Protect the personal information from unauthorized access, destruction, use, modification, or disclosure

<http://www.ncsl.org/research/telecommunications-and-information-technology/data-security-laws.aspx#DataSecLaws>

## Data Breach Notification Laws

- All 50 states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands
- Who must comply (e.g., businesses, data/ information brokers, government entities, etc.)
- Definitions of “personal information” (e.g., name combined with SSN, drivers license or state ID, account numbers, etc.)
- What constitutes a breach (e.g., unauthorized acquisition of data)
- Requirements for notice (e.g., timing or method of notice, who must be notified)
- Exemptions (e.g., for encrypted information)

<http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx#1>

## Data Disposal Laws

- FTC Disposal Rule
- 34 states and Puerto Rico
- Require either private or governmental entities or both to destroy, dispose, or otherwise make personal information unreadable or undecipherable

<http://www.ncsl.org/research/telecommunications-and-information-technology/data-disposal-laws.aspx>

## Pennsylvania (73 Pa. C.S. §§ 2301 *et seq.*)

- Law applicable to PA residents regardless of state where data resides
- PII defined narrowly
  - first name (or initial) and last name along with
    - social security number,
    - driver's license number (or state ID), or
    - bank information along with the access code or similar codes
- Notification where 'reasonable belief' of breach
  - by letter, phone, or e-mail "without unreasonable delay"
- Requires active assessment of breach
- No private right of action

## California Consumer Privacy Act of 2018

- Apply to a for profit business collect "personal information" and profit from consumers in California
- Broad definition of "Personal information"
  - identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.
- Consumer Rights
  - Know What Information Is Collected
  - Request Deletion
  - Request disclosures about Personal Information that Is sold
  - Opt Out of the sale of Personal Information

## International Laws and Regulations

### EU General Data Protection Regulation (GDPR)

- Extraterritorial applicability
  - applies to the processing of personal data by controllers and processors in the EU, regardless of whether the processing takes place in the EU or not.
- Penalties
  - Organizations in breach of GDPR can be fined up to 4% of annual global turnover or €20 Million (whichever is greater).
- Consent
  - Consent must be clear and distinguishable from other matters. It must be as easy to withdraw consent as it is to give it.
- Data Subject Rights

## International Laws and Regulations

### China Data Protection Regulations (CDPR)

- Critical information infrastructure operators (CIIOs) to store personal information and important data collected and generated within the territory of the PRC.
- Regulates cross-border transmitting of personal information and important data
  - Require Consent
  - Require Data Security Assessment

## Don't Wait. Develop A Cybersecurity Program

- Assess & Address Risks – Know Your Data
- Prepare & Implement Policies and Procedures
- Prepare an Incident Response Plan
- Re-Assess & Re-Address Regularly



## Assess Your Organization's Cybersecurity Landscape: Classify Data

- What Types and Use of Data (PII?)
- Who is the Data being collected from
  - Collected from or about individuals
    - Donors/Sponsors/Grantors
    - Employees
    - Clients
    - Volunteers
- How is Data Collected
  - Website?
    - Online Credit Card Donations?
  - Paper Applications?
    - Employee job applications, intake forms, background checks

## Assess Your Organization's Cybersecurity Landscape

- **Where** is PII stored [Electronically? Encrypted? Paper?]
- **Who** Has Access to PII [Employees, Volunteers, Board Members, Third Parties]
- **How** is access limited or tracked
- Different types of data are subject to differing levels of protection: Look to the statutory and regulatory framework to determine how your policies should treat different kinds of information

## Common Attack Vectors

- **Malware:** Programs that introduce malicious codes (viruses, worms, Trojans)
- **Keyloggers:** Employs programs to collect everything that the user types via keyboard. They can even take screenshots.
- **Social engineering:** Obtaining confidential information from a person or organization to use it for malicious purposes.
  - **Phishing:** Deceiving the users to obtain their confidential information by spoofing the identity of a body or Internet website.
  - **Spam:** Email; instant messaging; and unsolicited calls

## Common Attack Vectors (Cont'd)

### Active Attacks:

- **Spoofing:** Addresses to the use of techniques for identity theft.
- **Modification:** Consists in modifying the routing table so that the sender sends message through longer paths causing major delays.
- **DDoS:** Attack of Distributed Denial of Service (DDoS) is to keep busy consuming network bandwidth with constant messages that disrupt normal service delivery.
- **Fabrication:** False routing message generated to prevent information of reaching its destination.

## Defining Data Breach

- An Incident in which **Secure, Sensitive, Protected, or Confidential Data** has been released to or accessed by individuals not authorized to view the data
- Includes not just digital media, but also physical data and devices





## Causes of Data Breaches

- External Threats: hackers, cyber-espionage, webapp attacks, malware, ransomware, spoofing

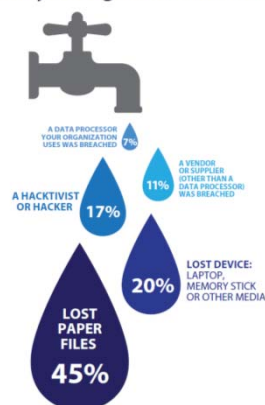


- Internal Threats: employee mistakes, physical loss/theft, purposeful misuse, social engineering, business email compromise



## Public Perception vs. Hard Facts

What was the source of the last data breach your organization suffered?



Society of Corporate Compliance & Ethics / corporatecompliance.org

- Third parties (vendor or data processor) – 18%
- Hackers – 17%
- Lost Device – 20%
- Lost Paper – 45%

Employee errors and purposeful misuse account for overwhelming majority of actual breaches

## Cybersecurity Best Policy & Procedure Practices

- **Designate** cybersecurity employee or committee to monitor and oversee your policies and procedures
- **Develop** a written plan detailing how you will prevent, mitigate, and report a data breach
- **Monitor** cybersecurity threats, vulnerabilities, and legal updates regularly
- **Update** your software regularly; apply patches
- **Ensure** access rights to sensitive data stored in your system is granted only where necessary
- **Train** employees on the importance of cybersecurity and policies and procedures
- **Conduct** periodic risk assessments at regular intervals
- **Isolate and encrypt** sensitive data and PII



## Policies to Consider, Draft, Implement

- Employee Internet Usage Policy
- Social Media Policy
- Strong Password Policy
- Dual-Factor Authentication
- E-Mail Usage Policy
- Email Retention Policy
- Mobile Device Policy
- Backing up and Storing Data



## Retention and Disposal Policies

- Disposal of PI
  - Shred
  - Destroy electronically
- Retention Policies
  - Only as long as needed for business purpose
  - Comply with applicable statutes retention policies
  - Keep no longer than required
  - Destroy if required to destroy



## Best Cybersecurity Investment?





## TRAIN, TRAIN, TRAIN



- Believe it or not, technological solutions cannot keep up with the changing and evolving threat.
- Internal actors are estimated to be responsible for **43 percent** of data loss.
- Training topics can be tailored to needs:
  - Data security and consequences of data loss
  - How to spot a phishing email, social engineering awareness
  - How to Handle Phone Inquires for Information
  - Disposing of Data
  - Avoiding Shoulder Surfing
  - ETC

## Culture Matters



SENSE SOMETHING,  
DO SOMETHING

Work to build a culture where everyone understands the risks of cybersecurity, cyber crimes, and data loss, and feels comfortable raising questions or problems.

## Third Party Cybersecurity is Critical

- FTC, and many others, **require** oversight of third-party vendors and service providers as part of a compliant security program
  - Adequate compliance requires “select[ing] and retain[ing] service providers that are capable of maintaining appropriate safeguards for the customer information at issue.” 16 CFR 314.4(d)(1).
  - Documenting in writing all “steps to select and retain service providers capable of maintaining appropriate safeguards and contractually requiring service providers to implement and maintain appropriate safeguards.” CFTC Advisory Letter No 14-21.



## Third Party Cybersecurity is Critical

- Third Party control
  - Restrictions on Third Parties
  - Transfer to Third Parties
- What kind of data security does Third Party have
  - Liability for actions of Third parties
  - Via contract – ensure compliance of Third parties with your own industry standards and maintain appropriate safeguards



## Breach: When It Happens ....



**You'll Need a Plan ....**

## Breach Response Plan



- Establish written incident response plan
- Train all employees to identify and report risks and actual breaches
- Designate and train employees to respond to a breach
- Know where to get help, and who to call

## Breach Response Plan



- Identify key employees to respond to a breach: PR, IT, Legal, HR, Third Party, etc.
- Require assessment of cause of and scope of the breach along with types of data compromised.
- How can you know how best to respond, if you don't know what you're responding to? Questions to ask:
  - Was data actually exposed during the breach?
  - When was the data exposed?
  - What data was exposed?
  - How many individuals are potentially affected by the breach?
  - Who was the data collected from?
  - Was the data encrypted?

## Key Steps for Incident Response

- ✓ **Diagnose** and **fix** the issue that caused the incident
- ✓ **Prevent** further unauthorized access, intrusion, or disruption of systems and information.
- ✓ **Identify**, if possible, the specific source and cause of the incident
- ✓ **Preserve** potentially relevant evidence for follow-on investigation and analysis
  - ✓ Secure compromised systems and devices
  - ✓ Determine the individuals and types of information affected
  - ✓ Identify all security systems and countermeasures in place at the time of the incident

## Key Steps for Incident Response

- ✓ **Determine** your legal obligations: Type of data exposed will determine potential legal responsibilities of the response.
  - Determining your data breach notification requirements is only one aspect of this step.
  - Other aspects include:
    - Federal and state agency reporting requirements
    - Law enforcement notification and cooperation
    - Insurance requirements
- ✓ **Prepare** your internal and external communications regarding the incident

## Post-Breach Analysis

- How and why did breach occur despite previous security assessments? What needs to change?
- How well did pre-breach policies, procedures, and training function in a crisis situation?
- Were pre-breach policies and procedures followed?
- How can policies, procedures, and trainings be improved in the future?







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