

Montgomery County Community Foundation

GIFT ACCEPTANCE POLICY

The Asset Acquisition program of the Montgomery County Community Foundation (hereinafter the “Foundation”) encompasses the solicitation and acceptance of **outright gifts** with income dedicated immediately to the charitable needs of the community, **planned gifts** with split interest of income and principal reserved to charitable or noncharitable beneficiaries, and **testamentary gifts** created by bequest for all purposes consonant with the objectives of the Foundation.

AUTHORIZATION:

It is the policy of the Foundation Board of Directors (hereinafter “Board”) to encourage donors to make outright, planned and testamentary gifts. Planned and testamentary gift types include bequests, charitable remainder trusts, charitable lead trusts, retained life estates, life insurance, interest in business entities such as partnerships, retirement assets, and such other gift arrangements as the Board may from time to time approve.

It is the Board’s directive that Staff shall aggressively seek such gifts, and that adequate Staff and resources for a fully effective program be maintained. All programs, solicitation plans, and activities shall be subject to the oversight of the Board.

Also, the Foundation Board and Staff must be able to assure that gifts accepted by the Foundation do not place other assets of the Foundation at risk and that they can be easily converted into assets that fall within the Foundation’s investment policy. The Foundation must also assure that it can administer the terms of the gift in accordance with the donor’s wishes.

CONFLICT OF INTEREST:

Foundation will urge all prospective donors to seek the assistance of personal legal and financial advisors in matters relating to their gifts and the resulting tax and estate planning consequences. The Foundation will comply with the Model Standards of Practice for the Charitable Gift Planner promulgated by the National Committee on Planned Giving, shown as an appendix to this document.

WHAT THE FOUNDATION WILL NOT DO:

The Foundation will not pay for legal assistance on behalf of the donor.

The Foundation will not pay for appraisals or other services on behalf of the donor except in extraordinary circumstances and only upon approval of the Executive Committee or Board of Directors.

The Foundation will not establish or corroborate the value of any property for the purpose of substantiating the donor's income tax charitable deduction.

The Foundation will not serve as a "trustee" of a charitable trust without the prior specific approval of its Executive Committee or Board of Directors.

DONORS SHALL BE ADVISED OF THE FOLLOWING:

1. The irrevocability of a gift.
2. Prohibitions on donor restrictions.
3. Items subject to variability (market value, investment return, and income yield).
4. The Foundation's responsibility to provide periodic financial statements.
5. The Foundation's responsibility to provide a Donor Bill of Rights to donors:
http://www.afpnet.org/files/ContentDocuments/Donor_Bill_of_Rights.pdf.
6. The Gift Acceptance Policy is available to donors upon request.

PURPOSE OF GIFTS:

The Foundation will accept unrestricted gifts and gifts for specific programs and purposes, provided that such gifts are not inconsistent with its stated mission, purposes, and priorities. The Foundation will not accept gifts that are too restrictive in purpose. Gifts that are too restrictive are those that are too difficult to administer, or gifts that are for purposes outside the mission of the Foundation. All final decision on the restrictive nature of a gift, and its acceptance or refusal, shall be made by the Executive Committee of the Foundation. The purpose of the gift and the procedures for its administration shall be defined in a letter or fund agreement signed by the donor. All funds must have a minimum balance of \$5,000 except for scholarship funds which must have a minimum balance of \$25,000.

FUNDS:

The Foundation offers several different types of funds. These include:

Unrestricted Funds. Gifts to these funds help the Foundation help our community. The Foundation makes distributions to support effective work of charitable organizations throughout the area we serve.

Field of Interest Funds. These funds support a charitable purpose designated by the fund's donor or donors. Distributions are determined by the Foundation consistent with the fund's purposes. Where appropriate, the Foundation may create an advisory committee to make recommendations for distributions.

Designated Funds. These funds support a charitable organization designated by the fund's donor or donors. Distributions generally are determined by applying the Foundation's spending policy to the assets held in the fund.

Agency Endowments. These funds are created by charitable organizations that designate themselves as the fund's beneficiary. Distributions generally are determined by applying the Foundation's spending policy to the assets held in the fund.

Scholarship Funds. These funds provide financial assistance to students at schools, colleges, and universities. Scholarship funds can also support vocational training and assistance in paying for special courses. Donors recommend eligibility criteria and may serve on selection committees.

Donor Advised Funds. Donors recommend grants to charitable organizations.

Pathway Plan. A new fund may be established with a lower minimum if the donor arranges regular payments to bring the fund to the minimum level within a reasonable time frame. No grants may be made from any fund until the minimum is reached.

VARIANCE POWER

Sometimes a fund just doesn't work anymore. Scientists discover a cure for polio. A charitable organization goes out of existence. The Foundation has the ability to address these situations through its variance power. This power gives the Foundation's board the ability to make changes to a fund when its purpose is no longer necessary, can no longer be fulfilled, or has become inconsistent with the charitable needs of the community. This power to update funds helps protect donors by avoiding the need for complex and costly legal proceedings.

POLICIES:

1. The policy of the Foundation is to inform, serve, guide or otherwise assist donors who wish to support the Foundation's activities, but never under any circumstances to pressure or unduly persuade.
2. For purpose of annual reports and news items announcing new gifts, names of donors will be disclosed unless otherwise requested by the donor; provided, however all information concerning donors and prospective donors shall be held in

confidence by the Foundation if requested by donors, subject to legally authorized and enforceable requests for information by government agencies and courts.

3. Persons acting on behalf of the Foundation shall encourage the donor to discuss the proposed gift with the legal and/or tax advisors of the donor's choice, at his/her expense, to ensure that the donor receives a full, accurate and independent explanation of all aspects of the proposed charitable gift.
4. Persons acting on behalf of the Foundation shall advise the donor that it is the donor's responsibility to obtain any necessary appraisals, file appropriate personal tax returns, and defend against any challenges to claims for tax benefit.
5. The Foundation's Executive Director, legal counsel and consultants or Staff retained by the Foundation for this purpose are authorized to negotiate planned gift agreements with prospective donors, following program guidelines approved by the Board.
6. All planned giving agreements requiring execution by the Foundation shall first be reviewed and approved as to form by the Foundation's legal counsel. However, each particular agreement need not be reviewed by legal counsel, provided it is based on a prototype agreement that has been reviewed and approved.

PROCEDURES FOR REVIEW OF GIFTS:

In reviewing gifts to the Foundation, Board and Staff will consider the following criteria:

1. The charitable intent and ultimate community benefit.
2. The nature of any restrictions.
3. The permanency of the gift; or in the case of a non-permanent fund, the amount of time the fund will remain with the Foundation and/or the community need it addresses.
4. The administrative cost of gift management in relation to its size and permanence.
5. Fee revenues to the Foundation for administering the gift.
6. The likelihood and liability of income generated by the gift being or becoming 'unrelated business income' as that term is defined by the Internal Revenue Code.

Acceptance by Staff of gifts consistent with the purposes, bylaws and procedures of the Foundation shall not require review by the Board, **if the gifts are any of the following forms:**

1. Outright gift of Marketable securities listed on a recognized, national stock exchange.
2. Outright gift of Cash
3. Outright gift of Checks

4. Outright gift by credit cards or wire transfer to the Foundation's account
5. Outright gifts of useable furniture and equipment for the Foundation offices or for programs of the Foundation
6. Outright gifts of precious metals, where the value is easily established

Gifts requiring review and prior approval of the Board include the following:

1. Announced intentions or attempts to make gifts of real estate. The donor will be required to provide an independent appraisal and in most cases and environmental review (at least a Phase I) as well as a description of the property. The Board will review these documents as well as consider its marketability and any liabilities, restrictions or other conditions related to the gift.
2. Announced intentions or attempts to make gifts of interests in business entities (i.e. marketable securities, partnership interests) where, in the opinion of Staff, there may be concerns about the assets owned by the entity, valuation, long-term disposition, income production, business partnership, charitable intent, requirements or limitations, tax deductibility or other questions that indicate that a Board review is necessary.
3. Announced intentions or attempts to make gifts of all split-interest arrangements including, without limitation charitable remainder trusts, charitable lead trusts, or charitable gift annuities, if funded with assets other than cash or marketable securities.
4. Announced intentions or attempts to make gifts of retained life estate in real estate.
5. Announced intentions or attempts to make gifts of bargain sales or other arrangements where the donor receives payments from the Foundation.
6. Announced intentions or attempts to make gifts of other property that may be unusual or fall outside the type of gifts usually handled by the Foundation, including tangible personal property unrelated to the Foundation's charitable purpose.
7. Announced intentions or attempts to make gifts of interests in business entities and/or unmarketable securities.
8. Announced intentions or attempts to make gifts of life insurance policy ownership.
9. Announced intentions or attempts to make gifts of having a purpose that may fall outside the purposes, bylaws and procedures of the Foundation.

In cases where such review is required, the Staff will provide the Board all pertinent details of the gift and its charitable purpose. The Executive Committee may act on behalf of the Board for gift acceptance purposes.

The Foundation's President and/or Executive Director acting on his/her behalf is authorized by the Board to accept all gifts not requiring Board review. Gifts requiring Board review will be handled promptly. The Foundation Staff will deliver to the chair of the Executive Committee all information necessary to make a decision. If a gift is not accepted, the donor will be notified in writing by Staff immediately. All gift reviews will be handled with confidentiality.

Notation: Gifts requiring immediate action (e.g. gifts on December 31) may be exempted from full Board review if, in the judgment of the Executive Director or legal counsel, that gift may be conditionally accepted without significant reservations or in any way jeopardizing the Foundation's tax exempt status. The Executive Director will present this gift acceptance for ratification at the next full meeting of the Board.

GIFTS:

Asset Types

The Foundation will accept gifts in the form of the following assets, subject to the conditions described below. In order to provide written substantiation for gifts over \$250, the donor's name and address must be provided.

1. **Cash and/or Checks** -Gifts of cash should be paid or made payable to the Foundation if accepted. Gifts of cash or checks will be accepted as an unrestricted gift to endowment unless accompanied by a written document (fund agreement, letter or other written instruction) signed by the donor.
2. **Pledges**-Written pledges to make gifts may be made applicable to any fund at the Foundation. A schedule of pledges payable should be included in the fund agreement, letter or other written instruction from the donor.
3. **Marketable Securities**-Publicly traded stocks and bonds may be accepted by the Foundation if accepted. As a general rule, all marketable securities shall be sold upon receipt unless otherwise directed by the Investment Committee. Stock controlled under Securities and Exchange Commission Rule 144 if accepted will be held until the restriction on sale expires and then will be immediately sold. Gifts of bonds that require a holding period will be accepted and cashed when the holding period has expired. Securities may be conveyed to the Foundation by certificate or by electronic transfer to the Foundation's accounts. Stock may be reregistered in the name of the Foundation or may be conveyed through use of a stock power form.

Detailed instructions for transfer of securities are available from the Foundation office.

4. **Closely Held Securities:** Closely held securities, which include not only debt and equity positions in non-publicly traded companies but also interests in LLP's and LLC's or other ownership forms, can be accepted subject to the approval of the Executive Committee. However, gifts must be reviewed prior to acceptance to determine that:
 - a. There are no restrictions on the security that would prevent Foundation from ultimately converting those assets to cash;
 - b. The security is marketable; and
 - c. The security will not generate and undesirable tax consequences for the Foundation.
 - d. The security will not cause the Foundation to assume any liability.

Gifts of closely-held business interests are evaluated on a case-by-case basis and are subject to Executive Committee approval and the Excess Business Holdings Regulations set forth by the IRS. (See Appendix A)

- a. There can be no restrictions that would prevent MCCF from ultimately converting the closely-held assets into cash.
- b. The closely-held asset will not generate any undesirable tax consequences for MCCF.
- c. Gifts of closely-held assets may require six to eight weeks to prepare for acceptance by MCCF.

If potential problems arise on initial review of the security, further review and recommendation by an outside professional may be sought before making a final decision on acceptance of the gift. The final determination on the acceptance of closely-held securities shall be made by the Executive Committee and/or Board of Directors and legal counsel when necessary. Every effort will be made to sell non-marketable securities as quickly as possible and indemnity agreements shall be required in addition to appraisals, evidence of ownership, and certification on non-liability of underlying assets.

5. **Real Property**

Gifts of real estate may include developed property, undeveloped property, farms, dwellings or gifts subject to a prior life interest. Prior to acceptance of real estate, the Foundation shall require an initial environmental review of the property to ensure that the property has no environmental damage. In the event that the initial inspection reveals a potential problem, the Foundation shall retain a qualified inspection firm to conduct an environmental audit. The cost of the environmental audit shall generally be an expense of the donor. If proposed gift represents a remainder interest following a life interest in donor or donor's family, expenses for

maintenance, real estate taxes, and any property indebtedness are to be paid by the donor or primary beneficiary.

When appropriate, a title binder or abstract shall be obtained by the Foundation prior to the acceptance of the real property gift. The costs of such title evidence shall generally be an expense of the donor.

Prior to acceptance of the real property, the gift shall be approved by the Executive Committee and by the Foundation's legal counsel. See Appendix B for Real Estate Gifts Procedure Checklist. Criteria for acceptance of the real property shall include:

- a. Is the property useful for the purposes of the Foundation?
- b. Is the property marketable?
- c. Are there any restrictions, reservations, easements, or other limitations associated with the property?
- d. Are there carrying costs, which may include insurance, property taxes, mortgages, or notes, etc. associated with the property?
- e. Does the environmental audit reflect that the property is not damaged?
- f. Will ownership impose 'unrelated business income' as that term is defined by the Internal Revenue Code?

6. Tangible Personal Property

Gifts of such assets as boats, airplanes, automobiles, artwork, furniture, equipment, jewelry, gems and metals must be accompanied by a qualified appraisal as required by IRS guidelines. Unless property is to be used in connection with the Foundation's tax-exempt purpose, it will be sold at the highest possible price as soon as possible after the conveyance. No commitment will be made to keep gifts of tangible personal property. The Foundation discourages gifts of tangible personal property which cannot readily be sold or which require unusual expenses prior to sale. If a lengthy selling period is anticipated, the Foundation may ask the donor to cover such expenses with a cash gift. Proposed gift of tangible personal property shall be examined in light of the following criteria:

- a. Does the property fulfill the mission of the Foundation?
- b. Is the property readily marketable?
- c. Are there any undue restrictions on the use, display, or sale of the property?
- d. Are there any carrying costs for the property?

7. Royalties, Distribution Rights

The Foundation may accept gifts of royalties or distribution rights on published works (such as books or films) where there is clear evidence of marketability or assurance of an income stream. A qualified appraisal is required. Proposed gifts of royalties or distribution rights shall be examined in light of the criteria for tangible personal property. Because of environmental concerns, oil, gas and mineral

interests shall not be accepted without appropriate indemnity assurances by donor and evaluation pursuant to criteria for acceptance of real property gifts.

8. Insurance Policies and Proceeds

Paid-Up Insurance Policy:

Foundation must be named as both the beneficiary and irrevocable owner of an insurance policy before a life insurance policy can be recorded as a gift. The gift is valued as its interpolated terminal reserve value, or cash surrender value, upon receipt. If the donor contributes future premium payments, the Foundation will include the entire amount of the additional premium payment as a gift in the year that it is made.

If the donor does not elect to continue to make gifts to cover premium payments on the life insurance policy, the Foundation may:

- a. continue to pay the premiums;
- b. convert the policy to paid up insurance, or
- c. surrender the policy for its current cash value.

Beneficiary Designations: Donors and supporters of Foundation will be encouraged to name the Foundation as beneficiary or contingent beneficiary of their life insurance policies. Such designations shall not be recorded as gifts to the Foundation until such time as the gift is irrevocable. Where the gift is irrevocable, but is not due until a future date, the present value of that gift may be recorded at the time the gift becomes irrevocable.

9. Retirement Assets

“Account” type retirement plans, in which an account balance accumulates as principle, may be gifted to the Foundation. These include Individual Retirement Accounts (IRA), 401(k), 403(b), and defined contribution plans. (“Annuity” plans, such as defined benefit plans, in which retirement benefits are paid out as income and principal does not accumulate, generally cannot be used for charitable gifts). Donors and supporters of Foundation will be encouraged to name the Foundation as beneficiary of their retirement plans. Such designations will not be recorded as gifts to the Foundation until such time as the gift is irrevocable. When the gift is irrevocable, but is not due until a future date, the present value of that gift may be recorded at the time the gift becomes irrevocable.

10. Planned and Testamentary Gifts:

The Foundation’s planned and testamentary giving program encompasses all forms of gifts whose benefits do not fully accrue to the Foundation until some future time

(such as death of the donor or other income beneficiaries or the expiration of a predetermined period of time), or whose benefits to the Foundation are then followed by the interests of non-charitable beneficiaries.

Donors using planned and testamentary gift techniques may establish any of the fund types listed previously in this document. Will, trust, or other documents should specify the Foundation as the charitable recipient and name the fund to which the donor's gift will contribute. The type of fund and purpose of the fund may be described in detail in a separate fund agreement.

Bequests:

- a. Bequests (devises) may be from a will or trust and be specific, residuary, or contingent in nature. All bequests shall be promptly reviewed upon death of donor and bequests which are not consistent with the purposes and objectives of the Foundation and/or its compliance with Sec 501(c)(3) of the Internal Revenue Code shall be disclaimed in a timely fashion (9 months from date of death).
- b. Representatives of the Foundation are authorized to solicit wills providing for bequests, as well as wills to establish gift annuities and charitable trusts. Any advice offered by representatives of the Foundation must be accompanied by a written recommendation that the prospect consult his/her attorney and/or tax counsel.
- c. Bequests for outright gifts may be solicited if the purpose is in accordance with the charitable purposes of the Foundation.
- d. The Foundation is responsible for maintaining a confidential record of information about known provisions in wills or trusts for bequests.

11. Charitable Annuity Trust

The Foundation may accept designation as remainder beneficiary of a charitable gift annuity only with the prior approval of the Executive Committee or Board of Directors of Foundation and advice from Foundation's legal counsel.

Foundation may offer charitable gift annuities. The minimum gift for funding is \$20,000. The minimum age for life income beneficiaries of a gift annuity shall be 60. Where a deferred gift annuity is offered, the minimum age for life income beneficiaries shall be 50. No more than two life income beneficiaries will be permitted for any gift annuity.

Annuity payments may be made on a quarterly, semi-annual or annual schedule. Foundation will not accept real estate, tangible personal property, or any other illiquid asset in exchange for current charitable gift annuities. Foundation may accept real estate, tangible personal property or other illiquid assets in exchange for deferred gift annuities so long as there is at least a 5-year period before the commencement of the annuity payment date, the value of the property is reasonably certain, and the Board of Directors has approved such arrangements. Funds contributed in exchange for a gift annuity shall be set aside and invested during the term of the annuity payments. Once those payments have terminated, the funds representing the remaining principal contributed in exchange for the gift annuity shall be transferred to the Foundation's general endowment funds, or to such specific fund within the Foundation as designated by the donor. An annuity shall be an amount annually in dollars fixed irrevocably at the time of the gift and stated in the trust agreement. This must equal at least 5% of the fair market value of the assets placed in the trust when it is created. Income in excess of the annual payment is added to principal. If the income in any one-year is less than the annual payment the difference is derived from realized capital gain or principal.

Representatives of the Foundation are authorized to solicit gifts in the form of Annuity Trusts with annual pay out rates of not more than 5% of fair market value of trust assets. Representatives of the Foundation are authorized to solicit gifts in the form of Annuity Trusts with annual pay out rates not to exceed the rate established for annuities funded using the current rates as recommended by the American Council on Gift Annuities.

12. Charitable Remainder or Lead Trust

The Foundation may accept designation as remainder beneficiary of a charitable remainder trust or a charitable lead trust only with the prior approval of the Executive Committee or Board of Directors of Foundation with advice from Foundation's legal counsel. The Foundation will not accept appointment as Trustee of a charitable remainder trust or a charitable lead trust.

13. Miscellaneous Provisions

- a. Appraisals and legal fees: It will be the responsibility of the donor to secure an appraisal (where required) and independent legal counsel for all gifts made to the Foundation.
- b. Valuation for development purposes: The Foundation will record a gift received at its valuation for gift purposes on the date of the gift or if made but not due until a future date, the present value of that gift when the gift becomes irrevocable, whichever is later.

- c. IRS Filings: The Foundation staff is responsible for filing IRS Form 8282 upon the sale or disposition of any asset sold within two (2) years of receipt by the Foundation when the charitable deduction value of the item is more than \$5000. The Foundation must file this form within 125 days of the date of sale or disposition of the asset. Form 8282 with Filing Instructions is attached as an appendix to these policies.

14. Amendments to Gift Acceptance Policies

These policies and guidelines have been reviewed and accepted and ratified by the Board of Directors of the Foundation. These policies may be amended after recommended by the Executive Committee and ratified by the Board of Directors. When provided by these policies, the Executive Committee may approve deviations from these policies.

Appendix A

Council on Foundations: Excess Business Holdings

Under the Pension Protection Act of 2006 (PPA), the private foundation excess business holdings rule applies to donor-advised funds as if they were private foundations.¹ That is, the holdings of a donor-advised fund in a business enterprise, together with the holdings of persons who are disqualified persons with respect to that fund, may not exceed any of the following:

- Twenty percent² of the voting stock³ of an incorporated business
- Twenty percent of the profits interest of a partnership or joint venture or the beneficial interest of a trust or similar entity

Ownership of unincorporated businesses that are not substantially related to the fund's purposes is also prohibited.

Donor-advised funds receiving gifts of interests in a business enterprise after the date of the PPA's enactment (August 17, 2006) will have five years to divest holdings that are above the permitted amount, with the possibility of an additional five years if approved by the Secretary of the Treasury. Funds that currently hold such assets will have a much longer period to divest under the same complicated transition relief given to private foundations in 1969.⁴

What is a donor-advised fund?

See "What is a Donor-Advised Fund?" on the Council's website.

What is a business enterprise?

A "business enterprise" is the active conduct of a trade or business, including any activity which is regularly carried on for the production of income from the sale of goods or the performance of services. Specifically excluded from the definition are:

- Holdings that take the form of bonds or other debt instruments unless they are a disguised form of equity
- Income from dividends, interest, royalties and from the sale of capital assets
- Income from leases unless the income would be taxed as unrelated business income

¹ The language is clear that it is only the donor-advised fund—not the sponsoring charity—that is to be treated as a private foundation. Accordingly, it appears that this section does not apply to assets held by the sponsoring charity's investment pools, or assets held by funds that are not donor-advised.

² Thirty-five percent if it can be shown that persons who are not disqualified persons have effective control of the business.

³ Additionally, the donor-advised fund will be barred from holding non-voting stock of an incorporated business unless the disqualified persons collectively own less than 20 percent of the voting stock.

⁴ Excess holdings acquired by purchase must be disposed of immediately. If purchases by disqualified persons cause the donor-advised fund to have excess holdings, the donor-advised fund will have 90 days to dispose of the excess.

- “Functionally-related” businesses and program-related investments
- Businesses that derive at least 95 percent of their income from passive sources (dividends, interest, rent, royalties, capital gains). This will have the effect of excluding gifts of interests in most family limited partnerships, and other types of holding company arrangements.

What is a disqualified person?

Donors and persons appointed or designated by donors are disqualified persons if they have—or reasonably expect to have—advisory privileges with respect to the donor-advised fund by virtue of their status as donors. Members of donors’ and advisors’ families are also disqualified, but the section does not define “family” and does not cross-reference either section 4958 or 4946 for the definition. Finally, the term includes 35-percent-controlled entities as defined in section 4958(f)(3).

What contributions will be affected?

The new rule will mainly affect contributions of closely-held businesses and in most cases will require the donor-advised fund to dispose of the contributed interest within five years of the date of gift because the disqualified persons will generally own more than 20 percent of the business.⁵ The rule will not apply to assets held by the sponsoring charity—as long as they are not held by the donor-advised fund—apparently permitting a sponsoring charity to keep a contributed asset as part of its overall investment portfolio. It will also not apply to gifts to funds—such as field-of-interest or designated funds—that are not donor-advised.

Because they are not “business enterprises,” the rule will not apply to most gifts of real property. The most important exception will be undeveloped land, which may become a business enterprise if the charity that owns it takes extensive steps to subdivide it and prepare it for sale. This is a particularly dangerous situation because this could require immediate divestiture. Interests in investment partnerships and LLCs—including family partnerships, hedge funds, REITs, and so forth—are excluded from the definition of business enterprise as long as 95 percent or more of the entity’s income is from passive sources. Examples of other property gifts that are excluded because they are not business enterprises include:

- Oil and gas interests (non-working)
- Life insurance
- Tangible personal property (as long as it is not inventory)
- Remainder interests in personal residences and farms

⁵ Under the *de minimis* rule, the donor-advised fund could continue to hold an interest that did not exceed two percent of the voting stock and two percent of the value.

What about existing holdings?

The rules that will apply to donor-advised funds holding business interests on the date of enactment of the PPA are quite complex. In Phase one, donor-advised funds that together with their disqualified persons hold more than a combined 50 percent interest in a business will be required to reduce their combined holdings to 50 percent, and, in most cases reduce the foundation's share of the holdings to 25 percent. The time period for doing so is:

- Twenty years if the donor-advised fund and disqualified persons collectively own 95 percent or more of the voting or profits interests of a business enterprise
- Fifteen years if the combined total is 75 percent or more, but less than 95 percent
- Ten years if the combined total is more than 50 percent, but less than 75 percent

Phase two is the 15-year period that begins at the end of phase one. During this period, the combined holdings are limited to 50 percent, but if the disqualified persons' share is two percent or more the foundation may own no more than 25 percent of the total. At the end of phase two, the combined holdings may not exceed 35 percent and the foundation's share may not be more than 25 percent if the disqualified persons' share is two percent or more. ⁶

When does this provision take effect?

At the start of the first full tax year following the date of enactment (August 17, 2006)—January 1, 2007, for calendar-year taxpayers. Note that the transition rules for existing holdings will apply only to assets held on the date of enactment.

DISCLAIMER

The information provided in this booklet is based on our continuing analysis of the bill. Every effort has been made to ensure accuracy of these documents. Please understand, however, that due to the complexity of the bill and the fact that many of these provisions introduce issues that are new to the Internal Revenue Code, this information is subject to change. The information is not a substitute for expert legal, tax or other professional advice and we strongly encourage grantmakers and donors to work with their counsel to determine the impact of this legislation on their particular situations. This information may not be relied upon for the purposes of avoiding any penalties that may be imposed under the Internal Revenue Code.

⁶ Additional rules apply to cover situations such as mergers, redemptions, and acquisitions.

Appendix B

Real Estate Gifts Procedure/Check List

GENERAL

Gifts of real estate (hereinafter referred to as "real estate" or "property") to the Montgomery County Community Foundation ("Foundation") may be made in various ways: outright; into a charitable remainder trust (the Foundation as Trustee); with a retained life estate (the Foundation receives a remainder interest); by a bargain sale; a gift of annuity; as an installment bargain sale; etc. A retained life estate with a gift annuity for the remainder interest may be considered under exceptional circumstances and where adequate funding sources other than endowment or the operating budget are available. Approval by the Board and legal counsel for the Foundation are necessary prior to the acceptance of any gifts of real estate. Prior to acceptance, relevant information about the gift, and the duties of the Foundation with respect to the gifts, shall be ascertained.

I. INFORMATION TO OBTAIN PRIOR TO ACCEPTING GIFTS

- A. The donor, donor's attorney, realtor and/or CPA shall provide the following information to the Foundation before real estate is accepted.
1. **Basic Information.** The basic information shall include, but is not limited to, the following:
 - a. The address;
 - b. The assessor's parcel numbers;
 - c. A copy of the current year's tax bill;
 - d. A statement concerning any delinquent taxes;
 - e. The lot size or acreage;
 - f. A description of any improvements (such as the nature, age and prior uses);
 - g. A description of any outstanding liens;
 - h. The mineral status;
 - i. Easements;
 - j. Any restrictions;
 - k. Whether there is legal access to the property; and
 - l. Any other information which is relevant; such as existing leases or land contracts.
 2. **Preliminary Title Report.** The Donor shall provide the Foundation a preliminary title report on the real estate, including copies of all documents shown as exceptions to title on the report. Upon the transfer of real estate, the Foundation shall receive a policy of title insurance on an American Land Title Association Form. To aid investigation of environmental matters, the title insurer shall identify owners in the chain of title during the preceding fifty (50) years.
 3. **Market Value.** The donor shall provide the Foundation with a current appraisal, or, if none is available, a value opinion letter from a local realtor approved by the Foundation (the Foundation may in its discretion secure its own appraisal of the real estate).
 4. **Current Market Conditions.** The Donor or Donor's realtor shall provide a comparative market analysis of parcels in the same area as the real estate.

It is important to gather as much information as possible about the property. Issues that affect marketability include among other things: Whether the property has been on the market recently? If so, what activity did it see? Is the Donor's expectation of the value in line with the Foundation's analysis of the actual market value? What is the real estate worth to a buyer? How many properties of this type are on the market currently? Do the improvements need repairs? Is the real estate up to local code? Is the site buildable? How long will it take to sell the real estate?

5. **Disclosure – Environmental Problems.** The Donor shall make a written statement of known and/or potential environmental problems stating among other things, the nature and scope of any such problem. For example, the Foundation shall ask the donor to disclose if he or she knows of any existing problem or potential problem regarding:
- a. Hazardous water;
 - b. Excessive noise;
 - c. Polluted air;
 - d. Polluted water, streams or ground water;
 - e. Wetlands;
 - f. Endangered species;
 - g. The presence of asbestos;
 - h. Any other known problem, potential problem or notice of violation.

If the real estate is the site of hazardous substances or underground storage tanks, or is listed in any list of environmental disclosure documents such as that required under the Indiana Responsible Property Transfer Law and real estate subject to disclosure shall be carefully inspected by a qualified environmental consultant at Donor's cost and expense.

6. **Survey.** In some cases, the Foundation should request a survey before accepting a property. The Donor should be asked to contribute an amount sufficient for the survey if one does not exist. For example, and not by way of limitation, the Foundation may desire a survey under the following conditions:

- a. Where survey markers are not visible; and
- b. Where there are known boundary disputes.

- B. **COSTS.** If essential information is not provided by the Donor, the Donor should be requested to contribute an amount sufficient to pay for obtaining it. However, if the donor is not willing to advance these costs, the Foundation should determine whether it is advantageous for the Foundation to do so.

II. **CRITERIA TO USE TO DETERMINE WHETHER TO ACCEPT THE GIFT**

The Foundation shall consider the following criteria in determining whether to accept offered real estate.

- A. **ANALYSIS OF SALE AND HOLDINGS.** The Foundation shall evaluate a present or future sale as well as holding costs. This analysis shall include, but need not be limited to, the following:
- a. The present market value;

- b. The future market value;
- c. Any encumbrances;
- d. The net costs for sale; and
- e. The holding cost (ongoing maintenance and repair costs; debt service; taxes, etc.);

B. HAZARDOUS WASTE OR OTHER ENVIRONMENTAL PROBLEMS. The Foundation shall undertake such investigation of environmental issues relating to the real estate as it deems necessary or appropriate to enable it to determine whether any problems exist, including without limitation an investigation of any problems identified by the Donor's statement under Section (1)(A)(5) above. In addition, the Foundation may, in its discretion, engage a qualified engineering or other environmental assessment firm to undertake environmental review and deliver a report to the Foundation. Specifically, the Foundation shall investigate the potential dangers of current and past hazardous condition on or near the real estate. The following is a list of some of the prior uses that should be investigated by a thorough environmental study before real estate is accepted: underground fuel storage (such as service stations and vehicle fleet servicing), chemical and manufacturing plants, printing facilities, photo developing, dumps, dentist offices and cleaners. This list is by no means comprehensive. Real estate adjoining properties with a past or present industrial use may have been contaminated by that use and may necessitate further examination.

- It is the Foundation's policy to require a Phase One assessment and report unless the Board in its discretion decides not to require such an assessment and report.
- No property containing environmental defects shall be accepted prior to remediation of the defects to assure that the Foundation neither assumes nor incurs liability for such defects.

C. ON-SITE INSPECTOR. An on-site inspection of real estate shall be undertaken by the Foundation officers, staff or its designated representative before it is accepted. If none of the foregoing can make an inspection, a broker, licensed contractor, qualified environmental assessment firm or other appropriate person shall make the on-site inspection. The appointed person shall look for any problems regarding, but not limited to, the following:

1. Environmental conditions [see sub paragraph 1 (A) (5)];
2. Boundaries;
3. If the property is improved, the structural and soil conditions;
and
4. Evidence of occupancy or encroachment.

D. UNSUSUAL CIRCUMSTANCES. No real estate shall be accepted which has excessive environmental or structural problems, or where the holding cost may approach or exceed sale proceeds.

1. There may be situations where the Foundation finds that ownership may be undesirable, yet the gift may be substantial if converted to cash. (By example: a substantial property with a potential environmental problem – the Foundation should not be in chain of title). The Foundation shall attempt to work with the Donor in developing creative solutions to issues, which may be raised by the condition of the real estate, including, without limitation, seeking advice from attorney, tax advisors and other counsel.
2. While giving all the preceding items full consideration, in some “special circumstances” consideration must be given to determine whether rejection of real estate will have other long-term negative effects on the Foundation (i.e. affect future gifts).

III. CRITERIA TO USE IN DETERMINING WHETHER TO HOLD OR SELL A DONATED PROPERTY

A. THE GENERAL RULE. The Foundation shall sell donated real estate as soon as it is practical to do so. However, notwithstanding the foregoing, real estate may be held if the Foundation determines that it will be beneficial to do so.

B. OTHER CRITERIA. The Foundation shall consider such criteria as it deems necessary or appropriate in determining whether or not to hold or sell real property, the criteria may include, but shall not be limited to, some or all of the following:

1. Whether or not the Foundation assumes mortgage payments;
2. Whether or not the property is incoming producing;
3. Whether or not the carrying costs are reasonable;
4. Whether or not the property has a potential for exceptional appreciation in the short term (less than three (3) years);
5. Whether or not the property has potential for exceptional application in the long term (greater than three (3) years);
6. Whether or not it will be beneficial for the Foundation to manage a property which is located out of its general area of activity;
7. Whether or not there are any present or potential managerial problems;
8. The real estate taxes;
9. The utilities;
10. The maintenance and repair costs; and,

11. The insurance expense.

- C. **LIFE ESTATES.** This policy will generally apply in determining whether or not to accept real estate subject to reservation of a life estate, which determination shall always be at the sole discretion of the Foundation. The determination of whether to hold or sell will depend upon the terms of the life estate agreement, which shall include among other things a consideration of and agreement to protect and preserve the Real Estate from environmental defects, as well as indemnifying and holding the Foundation harmless from environmental defects and liabilities.

IV. CRITERIA TO USE IN DISPOSING OF DONATED PROPERTY

- A. **CASH.** Generally, all real estate shall be sold for cash.
- B. **CARRYING PAPER.** The Foundation may consider taking a promissory note secured by a mortgage, if it is advantageous to do so. The Foundation shall consider, among other things, the following criteria in making this determination:
1. The amount of the note;
 2. The security;
 3. The time period;
 4. The interest rate;
 5. The amount of other income (if the property is income producing);
 6. The effect which carrying paper may have on the selling price received by the Foundation;
 7. The effect which carrying paper may have on the value of the real estate, the length of time required to sell the property, or other related issues; and,
 8. The credit worthiness of the purchaser.
- C. **HAZARDOUS INSURANCE.** The Foundation shall obtain hazard and public liability insurance in an amount sufficient to protect itself and the real estate until the real estate is sold.

V. METHOD OF DISPOSING OF DONATED PROPERTY

- A. **BROKER CONSIDERATION.** The Foundation shall undertake an inquiry to determine the manner most advantageous to the Foundation for the disposition of donated real estate. The Foundation may, but shall not be required to, engage a broker in connection with the sale.
- B. **MARKETING PROGRAM.** If the Foundation determines that listing the real estate with a broker is in its best interest, then all potential listing brokers selected by the Foundation shall be required to provide a comprehensive marketing program. The Foundation shall consider such factors as it deems appropriate in selecting a broker which may include the marketing program, the commission rate and the reputation of the broker.
- C. **TRANSFER DOCUMENTS.** Whenever possible, the conveyance should be made "as is" and by quit claim or special warranty deed. The Foundation shall, where possible, receive an express release from liability for environmental matters.

Board approved: January 17, 2022

Board Secretary: Marta Aweik