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## **Making Them and Breaking Them: The Life Cycle of Restricted Gifts**

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# Making Them and Breaking Them: The Life Cycle of Restricted Gifts

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## I. Forms of Gift Instruments

- A. Defining a Gift Instrument: The Uniform Prudent Management of Institutional Funds Act (“UPFIMA”) broadly defines a “gift instrument” as “a record or records, including an institutional solicitation, under which property is granted to, or transferred to, or held by an institution as an institutional fund.”<sup>2</sup> An “institutional fund” means a fund held by an institution exclusively for charitable purposes (and excludes program-related assets, funds held for an institution by a trustee that is not an institution, and funds in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the fund purposes).<sup>3</sup>
- B. Will: Decedents may make restricted gifts to a charity as part of their estate planning. Unless the decedent has provided for a third party (such as the executor or an heir) to negotiate the terms of the gift, the charity is generally unable to negotiate terms imposed on a testamentary gift. Its sole recourse, if the terms are unacceptable, would be either to decline the bequest or seek judicial relief from the restrictions.
- C. Solicitation: Gifts that are received in response to a solicitation from a charity may be subject to the terms of the solicitation. Charities should carefully review

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<sup>1</sup> The author is a partner in the tax-exempt organizations group of the New York law firm of Patterson Belknap Webb & Tyler LLP. The author gratefully acknowledges the assistance of Patterson Belknap Webb & Tyler LLP associate Justin Zaremby in the preparation of this outline.

<sup>2</sup> See Unif. Prudent Management of Institutional Funds Act (“UPMIFA”), Section 2(3).

<sup>3</sup> *Id.* at Section 2(5).

their solicitation documents (e.g., letters to donors, donor brochures and advertisements in magazines or newspapers) to ensure that they do not commit themselves to using solicited gifts in ways that are counter to their strategy or long-term interest. In addition, organizations should also be reminded that state charitable solicitation laws typically require that assets raised for a particular purpose be used for that purpose.<sup>4</sup> Failure to abide by this principle could cause state charities officials to take action to revoke the organization's authority to conduct fundraising if statements about the purpose of the donated funds are not followed.

- D. Deed of Gift/Bill of Sale: When real property or tangible personal property is transferred to a charity, the transfer documents may contain restrictions. Unlike a will, there is a ready-made opportunity to negotiate the terms, because the charity could condition its acceptance of the gift on terms that are agreeable to it.
- E. Other Instruments, Maybe Even Legally Binding Contacts: It has become standard for restricted charitable gifts to be made pursuant to an instrument that is styled as a "gift agreement," "pledge agreement," "letter agreement," "memorandum of understanding" or "letter of intent." There is no magic in labeling; the label does not dictate the meaning of the document or the extent to which the instrument constitutes a legally binding contract. However, the label can heighten ambiguities or be the source of ambiguities about the meaning of the text that follows. It is important that lawyers be involved in the task not only of preparing such instruments (and ensuring that they are as binding or non-binding as the parties intend), but also determining what sort of label is truly appropriate for each such document. Obviously, the key question is what the terms in the instrument actually provide for and whether, for example, they are framed as requirements, conditions, wishes, hopes, etc., or simply a non-binding term sheet. Another key question is whether there is consideration or other grounds for enforceability, ordinarily on a theory of promissory estoppel. Unfortunately, the

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<sup>4</sup> See, e.g., N.Y. Exec. Law. Section 172-d(4).

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