



Carters/Fasken Healthcare Philanthropy Webinar

February 2024





Agenda

- **8:45 am – 8:50 am Welcome Remarks**, *Terrance S. Carter, Managing Partner, Carters Lynne Golding, Partner, Fasken*
- **8:50 am – 9:15 am ONCA Transitioning - Lessons Learned for Healthcare Charities and Foundations** *Lynne Golding, Fasken*
- **9:15 am – 9:45 am The Ins and Outs of the Increased Disbursement Quota** *Theresa Man, Carters*
- **9:45 am – 10:15 am Receipting Challenges for Healthcare Charities** *Corina Weigl, Fasken, and Emily Hubling, Fasken*
- **10:15 am – 10:25 am 10 Minute Break**
- **10:25 – 10:55 am The New Qualifying Disbursement Regime and Healthcare Charities** *Terrance S. Carter, Carters*
- **10:55 – 11:25 am Gift Acceptance Policies for Healthcare Charities** *Sophie MacRae, Fasken*
- **11:25 – 11:55 pm Donor Advised Funds for Healthcare Charities** *Jacqueline Demczur, Carters*
- **11:50 am – 12:00 pm Closing Remarks**, *Lynne Golding and Terrace S. Carter*



ONCA Transitioning: Lessons Learned for Healthcare Charities and Foundations

February 13, 2024

Lynne Golding

FASKEN

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▼ Topics for Today

- Electronic Voting and Attendance
- Proxy Voting
- Casting Votes
- Audit Committee Composition
- Cross-Appointed Directors
- Transition



Electronic Voting and Attendance

▼ Telephonic or Electronic Means

“**telephonic or electronic means**” means any means that uses the telephone or any other electronic or other technological means to transmit information or data, including **telephone calls**, **voice mail**, fax, **email**, an automated touch-tone telephone system, computer or computer networks.

▼ Electronic Voting by Members

- Unless the articles or by-laws expressly provide otherwise, a vote may be conducted entirely by one or more telephonic or electronic means **or** by a combination of one or more telephonic or electronic means and voting in person.
- Notice of a “virtual” members meeting must include ***instructions for attending and participating*** in the meeting by the telephonic or electronic means made available, including, if applicable, ***instructions for voting by such means*** at the meeting.
- Members (and proxyholders) may still demand a ballot, either before or after any vote by show of hands.

▼ Electronic Voting by Members

Original ONCA Language

Voting by mail or by telephonic or electronic means may be used only if,

- a) the votes may be verified as having been made by members entitled to vote; and
- b) the corporation is not able to identify how each member voted.

Current ONCA Language

A corporation may provide in its by-laws for voting by mail or by telephonic or electronic means, in addition to or instead of voting by proxy.

▼ Virtual Members Meetings

A meeting of members held by telephonic or electronic means or by any combination of in-person attendance and by one or more telephonic or electronic means must enable **all persons entitled to attend the meeting to reasonably participate.**

▼ Virtual Directors Meetings

A meeting of directors held by telephonic or electronic means or by any combination of in-person attendance and by one or more telephonic or electronic means must provide that all persons attending the meeting **are able to communicate with each other simultaneously and instantaneously.**



Casting Votes

▼ Second and Casting Votes (Members Meetings)

Second and Casting Vote: An extra vote that may be exercised to resolve a tie (not simply a “casting vote”)

- Unless the articles provide otherwise, each member is entitled to **one** vote at a meeting of the members
- If the chair of the meeting will have a second and casting vote, it must therefore be provided for in the articles
- If the chair is not a member, the chair may not vote at all

▼ Second and Casting Votes (Board Meetings)

- The ONCA is silent on issue of the board chair having a second and casting vote
- At common law, directors have only one vote and so properly the board chair should not have a second and casting vote
- However, historically a clause providing such a right was included in by-laws

▼ For Meetings of Members or Directors

By-Law Options for second and casting votes:

Option 1 – be silent. The chair will not have a second and casting vote

Option 2 – explicitly prohibit it: The chair of the meeting shall not have a second and casting vote

Option 3 – explicitly permit it: The chair of the meeting shall have a second and casting vote (but see prior slides)

▼ First and Casting Vote

- At law, the chair of a meeting has a right to vote if the person is otherwise qualified to vote
- But they do not need to
- Often the chair of a meeting will exercise a **first and casting vote**, meaning the chair will only vote once and only if there is a tie
- This can be codified in the corporation's by-laws

▼ First and Casting Vote

By-Law options for first and casting votes:

Option 1— be explicit: i.e. “the chair will only vote if there is a tie”

Option 2 – be silent which means the chair could vote at any time or only if there is a tie

Either way, the chair of a board meeting is still entitled to exercise dissent rights



Proxy Voting

▼ Proxy Voting

“**proxy**” means an authorization by means of which a member has appointed a proxyholder to attend and act on the member’s behalf at a meeting of the members.

- A member may appoint a proxyholder only if the by-laws provide for it
- A proxyholder need not be a member of the corporation, unless required by the articles or by-laws

Differences from OCA

	Ontario Corporations Act	Ontario Not-For-Profit Corporations Act
Must proxies be accepted	Yes	Only if required by by-laws
Must the corporation permit anyone to be a proxy holder	Yes	No
Must the form of the proxy meet specified requirements	No	Yes
When must the proxy be submitted to the Corporation	If a time is fixed, it may not exceed 48 hours before the meeting excluding Saturdays and holidays	Same as the OCA

Simple Proxy of the OCA

PROXY
ABC CORPORATION (THE "CORPORATION")
ANNUAL MEETING OF MEMBERS TO BE HELD ON [] DAY OF [], 202[] AT [] [OR
VIRTUALLY ON THE [] DAY OF [] 202[]] AT [] AM/PM (EST) (THE "MEETING")

MAIL, EMAIL OR DELIVER THIS PROXY NO LATER THAN [THE COMMENCEMENT OF THE MEETING] OR [[] AM/PM (EST) ON THE [] DAY OF [], 202[]] TO: [NAME], [TITLE] ADDRESS: [] EMAIL ADDRESS: []

A member of the Corporation ("Member") has the right to appoint a proxyholder of their choice, and one or more alternate proxyholders, to attend and act for the Member on the Member's behalf at the Meeting. To exercise this right, and appoint a proxyholder and, if desired, an alternate proxyholder, the Member may insert the name of the desired person(s) (who may but need not be a Member) in the blank space provided herein.

The undersigned, appoints _____ (name), and in the alternative, _____ (name), as proxyholder for the undersigned to attend, act and vote for and on behalf of the undersigned. This proxy is only valid at the Meeting, to be held at [] am/pm on [], 202[], and at any and all adjournments thereof.

Date:

<input type="text"/>	<input type="text"/>
Member's Name	Signature

▼ Form of Proxy

- Written form of proxy must comply with requirements set out in the regulations under the ONCA.
 - Indicate, in bold type, the meeting at which the proxy is to be used.
 - Provide a means for designating a different person as proxyholder, if the form of proxy designates a person as proxyholder.
 - Provide a means for the member to specify if they vote **FOR** or **AGAINST** each matter identified in the notice of meeting (subject to the below).
 - Provide a means for the member to specify if they vote **FOR** or **WITHHOLD** in respect of the appointment and remuneration of an auditor and the election of directors.

Proxy of the ONCA

PROXY
ABC CORPORATION (THE "CORPORATION")
ANNUAL MEETING OF MEMBERS TO BE HELD ON [•] DAY OF [•], 202[•] AT [•] [OR
VIRTUALLY ON THE [•] DAY OF [•] 202[•]] AT [•] AM/PM (EST) (THE "MEETING")

MAIL, EMAIL OR DELIVER THIS PROXY
NO LATER THAN [THE COMMENCEMENT OF THE MEETING] OR [[•] AM/PM (EST) ON
THE [•] DAY OF [•], 202[•]]

TO:
[NAME], [TITLE]
ADDRESS: [•]
EMAIL ADDRESS: [•]

A member of the Corporation ("Member") has the right to appoint a proxyholder of their choice, and one or more alternate proxyholders, to attend and act for the Member on the Member's behalf at the Meeting. To exercise this right, and appoint a proxyholder and, if desired, an alternate proxyholder, the Member may insert the name of the desired person(s) (who may but need not be a Member) in the blank space provided herein.

The undersigned, appoints _____ (name), and in the alternative, _____ (name), as proxyholder for the undersigned to attend, act and vote for and on behalf of the undersigned. This proxy is only valid at the Meeting, to be held at [•] am/pm on [•], 202[•], and at any and all adjournments thereof, in accordance with the instructions identified below.

The undersigned grants authority to the proxyholder to vote in their discretion in respect of any amendments to matters identified in the notice of Meeting or other matters that may properly come before the Meeting. The undersigned instructs the proxyholder to act in accordance with the instructions of the undersigned on any ballot that may be called for on which the undersigned has authorized the proxyholder to vote.

NOTE: TO INSTRUCT AND EMPOWER THE PROXYHOLDER, MARK AN "X" IN EITHER THE "FOR" OR "AGAINST" BOX. IN THE ABSENCE OF CONTRARY INSTRUCTIONS, THE UNDERSIGNED CONFERS AUTHORITY ON THE PROXYHOLDER TO VOTE IN FAVOUR OF THE FOLLOWING MOTION.

1. TO VOTE:

FOR ☐ AGAINST ☐

the approval of minutes of the annual meeting of Members held on [•]

TO INSTRUCT AND EMPOWER THE PROXYHOLDER, MARK AN "X" IN EITHER THE "FOR" OR "WITHHOLD" BOX. WHERE THE BOX IS NOT MARKED, THE VOTE IS WITHHELD, AND THE PROXYHOLDER MAY NOT VOTE FOR THE RESOLUTION.

2. TO VOTE:

FOR ☐ WITHHOLD ☐

The re-appointment of [•] as the auditor of the Corporation to hold office until the close of the next annual meeting of the Members at a remuneration to be fixed by the directors of the Corporation, the directors being authorized to fix such remuneration.

TO INSTRUCT AND EMPOWER THE PROXYHOLDER, MARK AN "X" IN THE "FOR" BOX TO THE RIGHT OF THE CANDIDATES. WHERE A BOX IS NOT MARKED OR THE "WITHHOLD" BOX IS MARKED, THE PROXYHOLDER MAY NOT VOTE FOR THAT CANDIDATE.

3. TO VOTE:

FOR or to WITHHOLD your vote in the election of each of the following candidates as directors of the Corporation to hold office until the close of the 20[•] annual meeting of the Members of the Corporation.

Candidates for Directors

Name	FOR	WITHHOLD
[•]	<input type="checkbox"/>	<input type="checkbox"/>
[•]	<input type="checkbox"/>	<input type="checkbox"/>
[•]	<input type="checkbox"/>	<input type="checkbox"/>

Date: _____

_____	_____
Member's Name	Signature



Audit Committee Composition

▼ Audit Committee

“If the corporation has an audit committee, the audit committee shall **review the financial statements** of the corporation before they are approved by the directors.”

“A director or an officer shall immediately **notify the audit committee**, if the corporation has one, and the auditor or person who conducted a review engagement of the corporation **of any error or misstatement** of which the director or officer becomes aware in a financial statement prepared as part of an audit or review engagement.”

“A corporation **may** have an audit committee **comprising one or more directors** and the majority of the committee **must not be officers or employees of the corporation or of any of its affiliates.**”

▼ Audit Committee Alternatives

1. If a corporation wishes to include non-directors, a “finance committee” may be tasked with certain audit advisory functions (e.g., recommending an auditor, subject to the right of the members to make the appointment)
 - The finance committee **cannot perform** any functions that are specifically assigned to an “audit committee” under the ONCA
 - The board **cannot rely** on the finance committee’s review of the financial statements
2. Involve non-directors as “advisors” to an audit committee (rather than members), without voting rights



Cross-Appointed/ Overlapping Directors

▼ Cross-Appointed or Overlapping Directors

- Charitable organizations and their foundations have a symbiotic relationship – they need each other to succeed
- Imperative that they:
 - are able to contribute to each other's strategic and annual plans, budgets, etc.
 - understand each other's priorities, opportunities and challenges
- Historically, this need has been met, at least partially, by the presence of some directors and officers at the other's board table through cross-appointed or overlapping directors

▼ Directors' Conflict of Interest

- ONCA conflict of interest provisions. Among other things,
 - Applies to both directors **and officers**
 - Applies where director or officer of a corporation is **a director or officer of another corporation** with which the corporation intends to enter a material contract or transaction
- Conflicted directors
 - cannot attend meetings where such matters are discussed
 - cannot vote on resolutions to approve such matters

Material Contract or Transactions between Charitable Organization and Foundation

	Material Contract or Transaction from the perspective of	
Approval of	Foundation	Charitable Organization
Services agreement whereby charitable organization will provide premises, IT and other back-office services to Foundation	Yes	Maybe
Grant of funds from foundation to charitable organization	Yes	Yes
Annual budget of foundation/charitable organization	No	No
Strategic plan of charitable organization/foundation	No	No

Charities Accounting Act Regulation 4/01

Relates to payments made by charities to directors or to others connected to the directors, including corporations. The effect is to regulate, among other payments, a payment between a charity and another entity where:

- A director of the charity is a director of another corporation [“Ordinarily Connected”] (e.g. a director of a foundation is also a director of the hospital)
- A director of the charity is an employee of another corporation [“Extraordinarily Connected”] (e.g. a director of a foundation is also an employee of the hospital)

Where such connections exist, special processes must be followed before a charity (e.g. the foundation) approves the making of any payments to a connected entity (e.g. the hospital) for goods, services or facilities

▼ Charities Accounting Act Regulation 4/01 – Payments when Ordinarily Connected

In this case, payments may be made if they are,

- (a) made with a view to the charity's best interests; and
- (b) in an amount that is reasonable for the charity to pay for the goods, services or facilities that are provided.

Charities Accounting Regulation 4/01 – payments when Extraordinarily Connected

Authorization for the payment by the charity (e.g. the foundation) to the connected entity (e.g. the hospital):

- every director of the foundation and the hospital must agree in writing to a maximum amount of the payment
- every director of the foundation (other than those who are directors of both the foundation and the hospital, the “**Conflicted Directors**”), must agree in writing that they are satisfied that the payment is being made in accordance with these requirements
- the foundation must include information respecting payments in its financial statements for the applicable year and place such information before its members at its annual meeting

▼ Charities Accounting Regulation 4/01 – payments when Extraordinarily Connected

- The number of directors of the foundation (excluding the Conflicted Directors) cannot be less than four
- None of the Conflicted Directors or a person connected to them (i.e. a family member or potentially those with close business connections) may attend any part of a board meeting during which the decision to authorize the payment is discussed, nor vote on the matter

▼ Caution re above



- Other criteria to be met in connection with payments when there is an “Extraordinary Connection”
- Many other criteria for determining whether a person or entity is connected to a director
- Some payments must be approved by a court order.
 - serving as a director and employee of the charity
 - fundraising services or for selling goods or services for fundraising purposes
 - the purchase or sale of real property

▼ Objectives of including Cross-Appointed or Overlapping Directors

- Consider whether this needs to be by way of board appointment
- Consider enshrining in your by-laws or policies observer rights or other standing to attend open portions of board meetings and right to attend closed portions on invitation



Timeline for Transition

▼ October 19, 2024

- After October 19, 2024, *most* non-compliant provisions within a corporation's by-laws will be *deemed* to be amended to be in conformity with the requirements of ONCA
- Certain provisions, if contained within the governing documents on October 19, 2021, will continue to apply after October 19, 2024, until articles of amendment are endorsed:
 - number of directors
 - two or more classes or groups of members and voting rights
 - distribution of the remaining property of a corporation that is not a public benefit corporation on winding up or dissolution

Transition Process

1. Establish roles / timing / approvals for process
2. Consider current governance practices versus what is prescribed in current governance documents
3. Review documents for conformity to desired governance structure
4. Review documents for compliance with ONCA
5. Create term sheet or other summary

Optional/Ideal

1. Create definitive documents (e.g, by-laws and possibly articles and policies)
2. Obtain approvals of board and members
3. Obtain articles of amendment, if required

Minimum Requirements

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Ins and Outs of the Increased Disbursement Quota

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Overview

What is Disbursement Quota

Timeline of DQ

New changes to DQ on January 1, 2023

DQ Rate

Calculate DQ obligation

Meet DQ obligation

Track DQ shortfall and excess

Track DQ in T3010s

DQ obligation reduction

Accumulation of property

Administration and management expenses

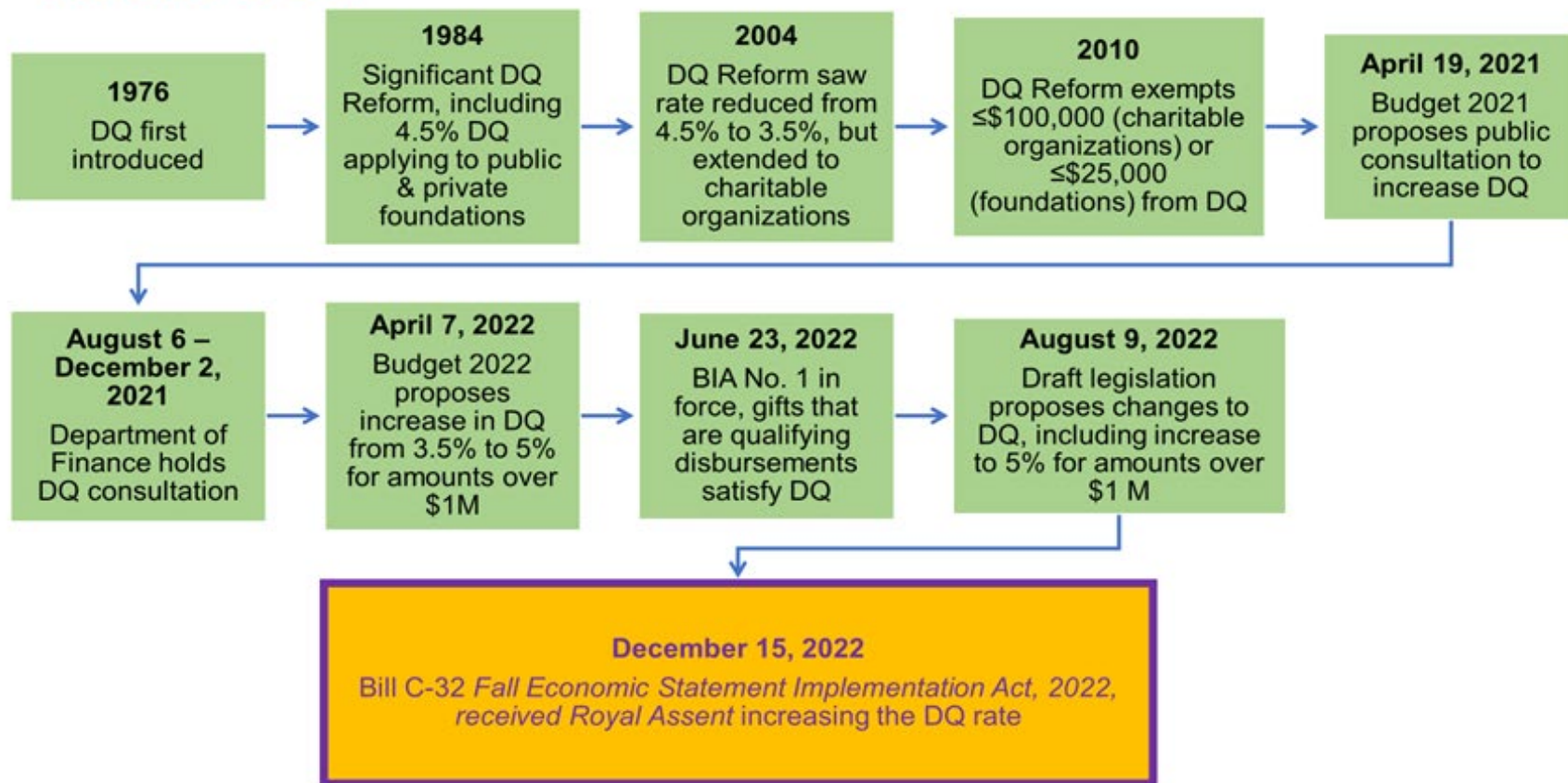
Comply anti-avoidance rules

Challenge to meet 5% DQ

What is the Disbursement Quota?

- Disbursement Quota (“DQ”) is the minimum amount that a charity must spend on its charitable activities or qualifying disbursements (including gifts to qualified donees and grants to non-qualified donees)
- DQ is to ensure that charitable funds are used for charitable purposes and are not simply accumulated indefinitely by charities
- A requirement under the *Income Tax Act* (“ITA”)
- DQ applies to all charities but is of particular relevance to foundations and other healthcare charities that have investment assets that are not being used directly in charitable activities or administration (such as endowments or portions of buildings that are surplus and are rented out)

Timeline of DQ



New Changes to DQ on January 1, 2023

- As a result of sector wide consultations in 2021, the 2022 Federal Budget announced that DQ would be increased to 5% for amounts in excess of \$1 million
- *Economic Statement Implementation Act, 2022 (“Bill C-32”) received Royal Assent* on December 15, 2022
- Amended the ITA to increase the DQ rate from 3.5% to 5% for property held by a charity in excess of \$1 million that is not used directly in charitable activities or administration
- Increased DQ applies to taxation years beginning on or after January 1, 2023

DQ Rate

Charitable organizations with average value exceeding \$100,000 or foundations with average value exceeding \$25,000, DQ is 3.5% for property up to \$1 million, and 5% for property over \$1 million

Type of Charity and Value of Property* held by the Charity		DQ Obligation	
Charitable Foundation	Charitable Organization		
with ≤\$25,000 of property	with ≤\$100,000 of property	Nil	
With >\$25,000 and ≤\$1,000,000 of property	with >\$100,000 and ≤\$1,000,000 of property	3.5% of property	
with >\$1,000,000 of property	with >\$1,000,000 of property	OLD RULE Before Jan. 1, 2023 3.5% of property	NEW RULE Starting Jan. 1, 2023 \$35,000 + 5% of property exceeding \$1,000,000
<ul style="list-style-type: none"> “property” refers to the average value of property owned by the charity in the preceding 24 months that is not used directly in charitable activities or administration as determined under sections 3701 and 3702 of the Regulations 			

Calculate DQ Obligation

- Rules are set out in the ITA, detailed calculation in Income Tax Regulations 3700, 3701, and 3702
- 1. Property to be included - Property not used directly in charitable activities or administration of the charity
 - For example - cash, investments, inventory, stocks, bonds, mutual funds, GICs, land, and buildings
 - If permission was granted by CRA on or before December 31, 2022 to accumulate funds, the accumulated amount is excluded from the asset base
- 2. Time frame – DQ calculation applies for the preceding 24 months (i.e., the 24 months immediately preceding the taxation year)
 - For example, assume year end Dec 31, then DQ for 2022 is based on Jan. 1, 2020 to Dec. 31, 2021

3. Calculate average value in time frame – determine the “average value” of the property of the 24 month period by over 2 to 8 periods
- Charity to choose number of periods to calculate the “average value” of the property
 - To be chosen when the charity files its first information return
 - Future changes of the number of periods requires CRA approval

	Jan. 1 to Dec. 31, 2022	Jan. 1 to Dec. 31, 2023	Current fiscal year Jan. 1 to Dec. 31, 2024
Example of # of periods	24 months before the fiscal year in question		Calculate DQ 3.5% or 5% on the base value
2 periods (i.e. annually)	FMV as of Dec. 31, 2022	FMV as of Dec. 31, 2023	Add the 2 FMV numbers and divide by 2
4 periods (i.e. semi- annually)	FMV as of June 30 and Dec. 31, 2022	FMV as of June 30 and Dec. 31, 2023	Add the 4 FMV numbers and divide by 4
8 periods (i.e. quarterly)	FMV as of Mar. 31, June 30, Sep. 30, Dec. 31 2022	FMV as of Mar. 31, June 30, Sep. 30, Dec. 31, 2023	Add the 8 FMV numbers and divide by 8

Meet DQ Obligation



Only these expenditures can be used to meet the DQ obligation

- Funds spent by a charity on its charitable activities
- Qualifying disbursements on gifts to qualified donees and grants to non-qualified donees



New qualifying disbursements rules provide that qualifying disbursements are disbursements “by way of a gift or by otherwise making resources available”

- Does not appear “making resources available” will satisfy the DQ, as only gifts will count
- See Terrance Carter’s presentation on qualifying disbursements



Global calculation

- Calculate at charity level, not specific asset level – *i.e.*, not restricted to spending 3.5% or 5% of the assets constituting the DQ asset base, all charitable disbursements can be used to meet the DQ
- Sometimes referred to “global” calculation

Track DQ Shortfall and Excess



DQ Excess

- Occurs when a charity spends more on charitable activities or qualifying disbursements than its DQ for that year
- Excess can be carried forward for 5 years or carried back 1 year

DQ Shortfall

- Occurs when a charity spends less on charitable activities or qualifying disbursements than its DQ for that year
- Shortfall can be met using excess from past 5 years or from next year
- Continuous shortfalls may lead to revocation of a charity's registration

Track DQ in T3010s

Track DQ in T3010s

- Charities need to ensure that they properly and fully complete the DQ portion of the T3010 and that they meet their annual DQ obligation
- CRA released version 24 of Form T3010, *Registered Charity Information Return*, (“Form T3010”) on January 8, 2024 – to be used for fiscal year ending on or after December 31, 2023 or later

- **Line 5900** - average value of property not used directly in charitable activities or administration during the 24 months before the beginning of the fiscal period - This is used to calculate the DQ obligation for the current fiscal
 - For example – if T3010 is for fiscal Jan . 1 to Dec. 31, 2024, then line 5900 is for period Jan. 1, 2022 to Dec. 31, 2023
- **Line 5910** – average value of property not used directly in charitable activities or administration during the 24 months before the end of the fiscal period - This is used to calculate the DQ obligation for the next fiscal
 - For example – if T3010 is for fiscal Jan. 1 to Dec. 31, 2024, then line 5910 is for period Jan. 1, 2023 to Dec. 31, 2024

2022 fiscal	2023 fiscal	T3010 for 2024 fiscal
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Line 5900 in T3010 for 2024 – FMV for this 24 month period - To calculate DQ for 2024 fiscal

Line 5910 in T3010 for 2024 – FMV for this 24 month period - To estimate DQ for 2025 fiscal

- New Question 17 and Schedule 8 to track DQ
- **Question 17 (and line 5850)** – asks if the charity has average value of property not used directly in its charitable activities or administration exceeding \$100,000 if the charity is a charitable organization, or exceeding \$25,000 if the charity a public or private foundation
- If so, then their DQ rate is not nil (see table above), and it has to complete Schedule 8
- **Schedule 8** has 2 Steps
 - Step 1 calculates the DQ obligation for the fiscal year the charity is reporting, and whether the DQ is met
 - Step 2 calculates the estimated DQ obligation for the next fiscal year in order that the charity can plan ahead

DQ Obligation Reduction

- CRA has discretion to grant a reduction in a charity's DQ obligation for any particular tax year
- A DQ reduction is available to charities whose expenditures on charitable activities or qualifying disbursements were less than required in the year due to circumstances beyond their control, thus causing the charity to incur a spending shortfall and not meet its DQ obligation
- Before Bill C-32, subsection 149.1(5) of the ITA allowed the CRA to deem a specified amount expended by a charity to be an amount expended by a charity on its own charitable activities in satisfaction of the DQ
- Bill C-32 amended subsection 149.1(5) to allow the CRA to instead deem a charity's DQ obligation to be reduced upon application by the charity

- CRA's policy
 - Purpose of a DQ reduction is an alleviating provision to allow a charity to correct a deficiency in meeting its DQ when the deficiency is the direct result of special circumstances beyond the charity's control that are specific and not general in nature
 - This is not to be used as a mechanism to exempt the charity from meeting its DQ, except in extraordinary circumstances
 - A reduction will only be considered once the charity has exhausted all other available means to make up the shortfall
 - The earliest that a charity can receive approval for a DQ reduction is after CRA has issued a Registered Charity Information Return Summary for the fiscal period following the period in which the shortfall occurred
- Bill C-32 also amended the ITA to allow the CRA to release information to the public pertaining to a charity's application to reduce its DQ obligation, under s. 241(3.2) of the ITA

- Use Form T2094 - *Registered Charities: Application to Reduce Disbursement Quota* to apply for a DQ reduction
- If CRA grants DQ reduction, the charity must amend the T3010 return for the fiscal period in which the shortfall occurred to include the approved amount on line 5750 – Use Form T1240, *Registered Charity Adjustment Request*

Accumulation of Property

- This refers to approvals granted by CRA to exclude accumulated property from the DQ calculation before December 31, 2022
- Before January 1, 2023, a registered charity could request approval from CRA to exclude accumulated property from its DQ calculation
 - This allowed a charity to set aside significant funds for specific qualifying activities without incurring a divestment obligation during the accumulation period
 - If a charity was granted written approval to accumulate property before January 1, 2023, the approval is still valid under the terms indicated until the approved period expires
 - But CRA will not grant extensions to the approved period
- Starting January 1, 2023 - Bill C32 repealed s. 149.1(8), CRA no longer reviews or grant accumulation requests. Charities must include all assets not directly used in charitable programs or administration in their DQ calculation

Administration and Management Expenses

- Bill C-32 added paragraph (d) to subsection 149.1(1.1) of the ITA to provide that administration and management expenditures are deemed not to satisfy the disbursement quota requirements
- CRA has not provided guidance about how charities should calculate which expenditures are used in administration & management of the charity
- Many unanswered questions, for example:
 - Can amounts be allocated on a percentage basis, similar to fundraising expenses?
 - For example - if an employee spends 90% of time engaged in carrying out charitable activities and 10% doing administrative work, is substantially all of the work charitable for purposes of the DQ, as is the case with fundraising expenses?

Comply Anti-avoidance Rules

Rule #1 - Charities must comply with anti-avoidance rules on gifts between non-arm's length charities - to ensure amounts transferred between non-arm's length charities will be used to satisfy the DQ of only one charity

1. Anti-Avoidance Rule

- When a gift is received from a non-arm's length charity, the recipient charity must disburse the entire gift in the fiscal period the gift was received or in the following fiscal period by spending the amount on
 - Own charitable activities
 - Qualifying disbursements to qualified donees or grantee organizations with which it deals at arm's length
- Failure to do so could result in a 110% penalty on the unexpended amount or the revocation of the receiving charity's charitable status

2. Designated Gift

- To avoid 100% expenditure under the anti-avoidance rule, the donor charity may designate that the gift is a “designated gift” - so that
 - The gift is not counted in meeting the donor charity’s own DQ obligation
 - The recipient charity does not have to spend 100% of the designated gift by the end of the next fiscal period
 - If the recipient charity does not use the designated gift in its charitable activities or administration, it will form part of the DQ asset base

- To designate a gift, the donor charity must indicate the gift is a designated gift in its T3010 for the fiscal period in which the gift is made by:
 - Answering yes to Question C3 (line 2000) in T3010
 - Not including the designated gift in line 5050 when reporting total amount of gifts to qualified donees (therefore cannot be used to meet its DQ obligation)
 - See T4033 Guide
 - But T3010 form does not say to exclude designated gift in line 5050
 - Reporting the gift in Form T1236, *Qualified Donees Worksheet / Amounts Provided to Other Organizations*
 - Writing on the blank line below the amount of non-cash gifts, write "designated gift" - See CRA webpage <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/operating-a-registered-charity/receiving-gifts/anti-avoidance-rules-designated-gifts.html>
 - This instruction is not in T4033 Guide or Form T1236

Example

- Charity A and Charity B are non-arm's length
- Charity A transfers \$100,000 to Charity B = this is an inter-charity gift

	Charity A	Charity B
Anti-Avoidance Rule	\$100,000 gift is counted toward meeting A's 3.5% DQ obligation	B must spend the entire \$100K by the following fiscal year
Designated Gift Exception	<ul style="list-style-type: none">• A designates in its T3010 the \$100,000 is a "designated gift"• The \$100,000 does not go towards meeting A's 3.5% DQ obligation	<ul style="list-style-type: none">• B can keep the \$100,000 and spend it anytime it wants• If B does not use the \$100,000 in its charitable activities or administration, then it will form part of the DQ asset base

Rule #2 - Even where charities are arm's length, charities must comply with a broader anti-avoidance rule

- A charity that enters into a transaction (which may include an inter-charity gift) where it “may reasonably be considered that a purpose of the transaction was to avoid or unduly delay the expenditure of amounts on charitable activities” could face a 110% penalty or possibly revocation
- See paragraph 149.1(4.1)(a) of the ITA
- The concept of a “transaction” may now include qualifying disbursements, which would include “otherwise making resources available”
- If an inter-charity transfer is involved, both charities are jointly and severally, or solitarily liable for the 110% penalty and risk revocation

Challenge to Meet 5% DQ

For charities, and in particular, foundations, with endowments or other funds that have restrictions concerning how or when capital can be expended, it may be difficult to meet a 5% DQ with only income generated from the investment available for disbursements

Charities may need to apply to court for an order granting permission to encroach on the capital or realized capital gains of an endowment

Unfortunately, court applications can be costly and time consuming and success is not guaranteed

Difficulty meeting the DQ may prompt charities to possibly pursue riskier investments to obtain a higher rate of return. This might be contrary to their fiduciary obligations under provincial *Trustee Act* legislation



TAKE AWAYS

DQ rules are complicated

Important for charities to carefully track the DQ obligation and ensure that it is met

Challenges for charities with endowments to meet 5% DQ

Challenges to determine what is an eligible qualifying disbursement to meet DQ

Properly and fully complete the DQ portion of the T3010 – prudent to seek legal review of draft T3010 and obtain board approval



RESOURCES

- Terrance S. Carter, Jacqueline M. Demczur & Theresa L. M. Man, “Complexities of the Disbursement Quota Calculation: More Than Just a Number” *Charity & NFP Law Bulletin* No. 498, 25 August 2021 <https://www.carters.ca/pub/bulletin/charity/2021/chylb498.pdf>
- Terrance S. Carter & Theresa L.M. Man, “Reminder for Charities to take the Necessary Steps to Meet the DQ” *Charity & NFP Law Bulletin* No. 507, 24 February 2022 https://www.carters.ca/index.php?page_id=456
- Terrance S. Carter, “Disbursement Quota Reform: Stabilizing a Three-Legged Stool” *Perspectives on Tax Law & Policy*, vol 3, no 1, March 2022 <https://www.ctf.ca/CTFWEB/EN/NEWSLETTERS/PERSPECTIVES/2022/1/220106.aspx>
- Terrance S. Carter, Theresa L.M. Man & Jacqueline M. Demczur, “Draft Budget Implementation Legislation Will Increase DQ and Affect Trust Reporting” *Charity & NFP Law Bulletin* No. 515, 24 August 2022 https://www.carters.ca/index.php?page_id=520
- Terrance S. Carter, Theresa L.M. Man & Jacqueline M. Demczur, “Bill C-32 Will Increase DQ, Affect Trust Reporting, and Make Other Changes to the Income Tax Act” *Charity & NFP Law Bulletin* No. 517, 23 November 2022 https://www.carters.ca/index.php?page_id=554




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Gifting and Receipting Issues

Corina Weigl/Emily Hubling

February 13, 2024

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Overview

- At a high level:
 - What is a gift?
 - General receipting rules
 - Split receipting
 - Consequences of improper receipting
- Unique scenarios:
 - Private benefit and employees
 - Gift directed to activity that will benefit corporation controlled by donor
 - Promotion of sale of items for revenue stream
 - Donations of cryptocurrency
 - Crowdfunding
 - Gifts contrary to public policy
- What to do when gifts go bad
 - Returning gifts

What is a gift?

- Under the common law, “a gift is a voluntary transfer of property owned by a donor to a donee, in return for which no benefit or consideration flows to the donor”. Generally, for purposes of sections 110.1 and 118.1 of the *Income Tax Act* (Canada) (“**Tax Act**”), a gift under common law is made if a taxpayer has donative intent, and all three of the following conditions are satisfied:
 - there must be a voluntary transfer of property to a qualified donee;
 - the property transferred must be owned by the donor; and
 - no benefit or consideration must flow to the donor.
- Certain types of transactions generally do not qualify as gifts. E.g. gifts of service, gift certificates, non-cash gift with indeterminable fair market value (“**FMV**”).

Receipting rules

- To issue an official donation receipt, a registered charity must determine whether or not the donation constitutes a gift.
- A registered charity can only issue an official donation receipt to the individual or organization that made the gift.
- There is no requirement in the Income Tax Act for a registered charity to issue an official donation receipt or that it issue a receipt within a certain timeframe. CRA suggests that registered charities issue receipts by February 28 of the calendar year that follows the year of the donation so that individual taxpayers can claim their donations on their annual returns.
- Once a registered charity has determined that a gift has been made, it must determine the eligible amount of that gift for receipting purposes in order to issue an official donation receipt.

Split receipting

- Split receipting is the method used to calculate the eligible amount of a gift for receipting purposes when the donor has received an advantage (consideration) in return for his or her donation.
- To determine the eligible amount of a gift, a charity must know:
 - The FMV of the donated property
 - The FMV of any advantage provided to the donor (charity must be able to come up with an accurate figure).
- Before the charity can issue an official donation receipt, any advantage must normally be deducted from the FMV of the donation.
- ***De minimis rule*** - advantages that have a combined FMV that is not more than \$75 or 10% of the FMV of the gift, whichever is less, are considered too minimal to affect the amount of the gift. A charity does not have to subtract these advantages from the FMV of the gift when issuing receipts.

Split receipting

- The gift, minus the advantage, still has to constitute a voluntary transfer of property and meet the intention to make a gift threshold.
- When the FMV of an advantage received for a gift is more than 80% of the FMV of the gift itself, the CRA generally considers that there is no true intention to make a gift. Therefore, a charity cannot issue a receipt.
 - Sometimes, the intention to make a gift threshold has not been met but there was a clear intention to make a gift. In these cases, the donor must be able to prove to the CRA that they intended to make a gift.

Consequences of improper receipting

- The consequences of improper receipting could include a penalty, potential suspension of tax-receipting privileges, and potential revocation of registration. These consequences would apply to the receipting charity.
- CRA outlines the following penalties and suspensions for registered charities:

Infraction	Penalty/Suspension for first infraction	Penalty/Suspension for repeat infractions
Issuing receipts with incorrect or incomplete information	5% penalty on the eligible amount stated on the receipt	10% penalty on the eligible amount stated on the receipt
Issuing receipts when there is no gift or when the receipt contains false information (when the total penalties do not exceed \$25,000)	125% penalty on the eligible amount stated on the receipt	125% penalty on the eligible amount stated on the receipt
Issuing receipts when there is no gift or when the receipt contains false information (when the total penalties exceed \$25,000)	125% penalty on the eligible amount stated on the receipt and suspension of tax-receipting privileges	125% penalty on the eligible amount stated on the receipt and suspension of tax-receipting privileges

Scenario: Private benefit and employees

- Charities must operate for purpose of public benefit, not private gain. Nonetheless, CRA's position is that some private benefit may occur when a charity pursues charitable activities. Generally, employee benefits are considered acceptable provided that the benefit in question:
 - arises directly through pursuit of charity's purpose, and as long as it is incidental to achievement of that purpose;
 - is reasonable in all circumstances;
 - is inevitable and necessary for charity to further or achieve its charitable purpose; and
 - does not amount to non-charitable collateral purpose, such as promotion of a business.
- Permissible to compensate employees who are engaged in pursuit of charity's charitable objects, including by paying them salary and providing certain employee benefits. Amount of salary and benefits should be reasonable, having regard to (among other things) resources available to the charity and amount that would be provided by way of benefits by others in the sector that charity operates.

Scenario: Gift directed to activity that will benefit corporation controlled by donor

- Context that arises is whether charity can issue a charitable receipt to an individual (“**Donor**”) or to a corporation that such individual controls (“**Donor’s Corporation**”) for a gift to the charity by the Donor or the Donor’s Corporation to be ultimately used by the charity to: (1) conduct research that will benefit a corporation that the Donor or Donor’s Corporation has a material interest in, or (2) invest in a corporation that the Donor or the Donor’s Corporation has a material interest in.
- In both scenarios, Donor receives an advantage.
- Under the Tax Act, a taxpayer may not receive a charitable receipt for the portion of a donation from which the donor receives an advantage.
 - Risk that the full amount of the donation to be given by the Donor or the Donor’s Corporation would be ineligible for a charitable receipt if it is directed to research with a related corporation.
 - Given the difficulty in determining the value of the advantage (i.e. the increase in the Donor’s or Donor’s Corporation investment), it is likely that a split receipt could not be issued in this instance.

Scenario: Donations of cryptocurrency

- Cryptocurrencies are considered by the CRA to be a commodity for tax purposes, not legal tender.
- Donations of cryptocurrencies are therefore subject to CRA rules for non-cash gifts (gifts-in-kind).
- Determination of FMV and deemed FMV for cryptocurrency donations could be subject to scrutiny by CRA.

Scenario: Donations of cryptocurrency

- CRA rules for gifts-in-kind:
 - Receipt must reflect FMV of the gift.
 - Need to deduct FMV of any advantages from FMV of the gift.
 - When FMV at time of donation, of either a non-cash gift or of an advantage cannot be determined, official donation receipt cannot be issued.
 - Under certain conditions, a receipt issued for a non-cash gift must be issued for the lesser of the gift's FMV and its cost to the donor (or in the case of capital property, its adjusted cost base) immediately before the gift is made. The conditions are:
 - the gift was donated to the charity after December 5, 2003; and
 - the gift received by the charity was initially acquired by the donor as part of a tax shelter arrangement; or
 - the gift was acquired less than three years before the time of donation; or
 - the gift was acquired less than ten years before the time of donation, with one of the main purposes being to gift the property to a qualified donee (for example, a registered charity).

Scenario: Donations of cryptocurrency

- This means that a gift of cryptocurrency acquired by a donor may result in a donation tax receipt for the cost rather than the current FMV.
- Gifts of cryptocurrency above \$1,000 require an appraisal as generally recommended for non-cash donations.

Scenario: Donations of cryptocurrency

- Examples of other gifting issues to consider:
 - What type(s) of crypto would the charity accept?
 - Does the donor have title and custody of the cryptocurrency, or is the cryptocurrency located in a digital wallet that is under the possession and control of a third party? Who has custody of the wallet? Is the custodian reputable?
 - Can the charity hold onto the crypto gift under the prudent investor rule?
 - If the charity will sell the crypto gift, what is the marketability of the cryptocurrency and ease of sale to realize cash for the charity?
 - Consider money-laundering and terrorist financing risks in both receiving a crypto gift and later in selling the cryptocurrency to realize cash.

Scenario: Crowdfunding

- Crowdfunding involves donation-based fundraising by appealing to a “crowd” (broad group or network of small donors) over a limited period of time (typically less than 50 days) and it may or may not involve service fees.
- Crowdfunding campaigns may be supporter-driven or organization-driven.
- Crowdfunding platforms establish their own terms of service governing the use and storage of personal information, the use of intellectual property, liability for representations made, jurisdiction, the withdrawal of funds from an account, and the payment of a flat percentage of each donation and other service fees.

Scenario: Crowdfunding

- Can donation receipts be issued? Generally, yes – for FMV of the gift minus any advantage provided to the donor.
- Many other issues with crowdfunding:
 - Does the charity have control? Organization driven crowdfunding gives the charity greater control over the messages posted on its behalf.
 - Are there restrictions on the use of the funds raised? Need to identify and comply with donor expectations and/or restrictions. This depends on the terms on the crowdfunding page what the funds raised are to be used for.
 - Are they funds for charitable purposes?
 - Crowdfunding models that include donations via cryptocurrencies, or possibly even a “charitable cryptocurrency” offering raise other complicated legal issues, including the use of “smart contracts”.
 - Concerns if donations are made by foreign donors.

▼ Scenario: Gifts contrary to public policy

- A gift that is contrary to public policy or by its terms is contrary to public policy does not qualify as a gift for charitable receipting purposes.
- A gift cannot be illegal, discriminatory or violate any federal, provincial, or municipal laws or regulations. For example:
 - a gift that directly or indirectly “facilitates” terrorist activities, or
 - a gift for a scholarship restricted to only white male protestant university students.

What to do when gifts go bad

- **1. Do not accept the purported gift.**
 - Charity has no obligation to accept a gift.
 - Better to decline an inappropriate gift upfront rather than having to return it.
 - Develop a gift acceptance policy and checklist on when a gift may be declined and how to decline it.
 - Document discussion with donor, reasons for declining the gift, and how the gift was declined.
- **2. Return the gift.**
 - No one-size fits all solution when dealing with policy issues involving return of a gift.
 - More on this later...

What to do when gifts go bad

- **3. Make voluntary disclosure of the purported gift.**

- If a charity found that it has issued a donation receipt inappropriately (e.g., the purported gift is not a gift or the donation receipt reflects an inflated amount), the charity should seek legal advice and consider the possibility of making a voluntary disclosure to CRA.
- Generally better to disclose the error by the charity as part of a voluntary disclosure than run the risk of CRA finding the error on a subsequent CRA audit.

Returning gifts

- **A donation can be a gift at law, even if it is not a gift for tax purposes.**
 - E.g.: court finds that gift cannot be returned because it is valid gift, however, tax receipt cannot be issued for that gift.
- CRA: “in most cases, a registered charity cannot return a donor’s gift”. At law, a gift transfers ownership of the gifted property from the donor to the charity and upon the transfer, the charity is obligated to use the gift in carrying out its charitable purposes.
 - There are exceptions to this rule (e.g. not a valid gift, charity is unable to satisfy the conditions attached to gift, or where the charity’s continued possession of the gift would be contrary to applicable law).
- CRA holds the view that a charity’s return of a charitable gift is more a matter of trust law than income tax law, pointing to provincial and federal legislation and the common law (in particular, the law of trusts) that it says may affect a charity’s ability to legally return a gift.
 - Returning a valid gift could be a breach of trust for directors of a charity.
- A review of the statutes governing charities in Ontario as well as other related statutes yields a conclusion that there is no express statutory prohibition on the return of a gift.

Returning gifts

- Consideration must be given to whether the return of a gift to the donor would constitute the charity making a gift to, or conferring an undue benefit on, a non-qualified donee (namely, the donor), contrary to the Tax Act.
- If the CRA regards the charity's return of the gift as its conferral of a benefit on a non-qualified donee, this could lead to its charitable status being revoked.
- If a charity returns a gift, it has to comply with the statutory procedure established by the Tax Act for the return of a gift, including by completing an information return (which return provides the CRA with a right to reassessment).

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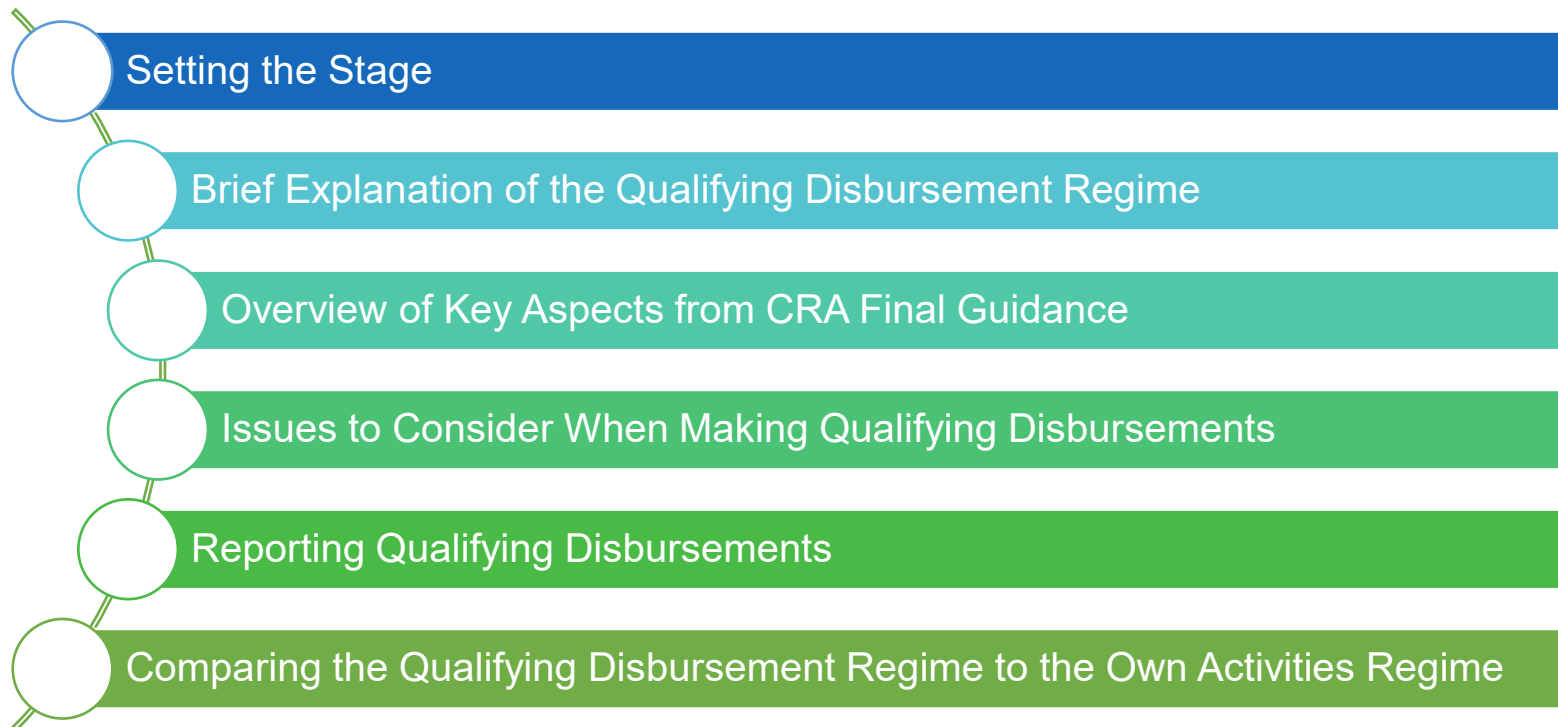
February 13, 2024

The New Qualifying Disbursement Regime and Healthcare Charities

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INTRODUCTION & OVERVIEW



- For a more detailed commentary see the [*Charity & NFP Law Bulletin No. 524*](#)
- Information is current as of February 9th, 2024, but subject to change

A. SETTING THE STAGE

- Implementing effective healthcare philanthropy requires a working knowledge of what healthcare charities can and cannot do with the funds that they raise
- In this regard, many healthcare charities may need to work with other organizations from time to time in order to achieve their charitable purposes
- When those other organizations are Canadian registered charities or other types of qualified donees (“QD”) listed in the *Income Tax Act* (“ITA”), it is possible to do so because a Canadian registered charity is able to make gifts to other QDs
- However, when a healthcare charity is wanting to work with an organization that is not a qualified donee (“Non-QD”), compliance issues become more challenging
- Examples of working with Non-QDs could include:
 - A healthcare charity wanting to fund a community health initiative run by a community organization that is a Non-QD
 - A hospital foundation with broad community purposes wanting to make a grant to a local indigenous healthcare charity that is a Non-QD

- As a result of amendments to the ITA on June 23, 2022 (Bill C-19), there is now a new option of making qualifying disbursements to Non-QDs in the form of either a “gift” or “otherwise making resources available” as discussed below (“Qualifying Disbursement Regime”)
- The CRA describes this as making a “grant” to a Non-QD
- CRA released a draft guidance on November 30, 2022 (“Draft Guidance”), followed by the release of its final guidance on December 19, 2023, [CG-032 Registered charities making grants to non-qualified donees](#) (“Final Guidance”)
- The Final Guidance is a significant rewrite of the Draft Guidance
- This presentation reviews the following:
 - What the new Qualifying Disbursement Regime involves
 - A brief overview of key aspects of the Final Guidance
 - Issues to consider with the Qualifying Disbursement Regime
 - How the new Qualifying Disbursement Regime compares to the existing Own Activities / Direction & Control Regime (“Own Activities Regime”)
 - Some practical comments that healthcare charities may want to consider

B. BRIEF EXPLANATION OF THE QUALIFYING DISBURSEMENT REGIME

1. Before Bill C-19 Amended the ITA on June 23, 2022

Canadian registered charities could only use their resources in one of two ways under the ITA:

1. Conducting their own activities by devoting their resources to charitable activities carried on by their own staff and volunteers or through intermediaries under direction and control

2. Making gifts to qualified donees (“QDs”)

If a charity wanted to work with an organization that was not a QD, it had to demonstrate that it was conducting its own activities by exercising direction and control over the Non-QD organization concerning how it utilized any funds or other resources provided by the charity

2. Bill C-19 Introduced the New Option of Qualifying Disbursement Regime

- It is very important to read the actual ITA wording

ss. 149 (1) of ITA “***qualifying disbursement*** means a disbursement by a charity, by way of a gift or by otherwise making resources available,

(a) subject to subsection (6.001), to a qualified donee, or

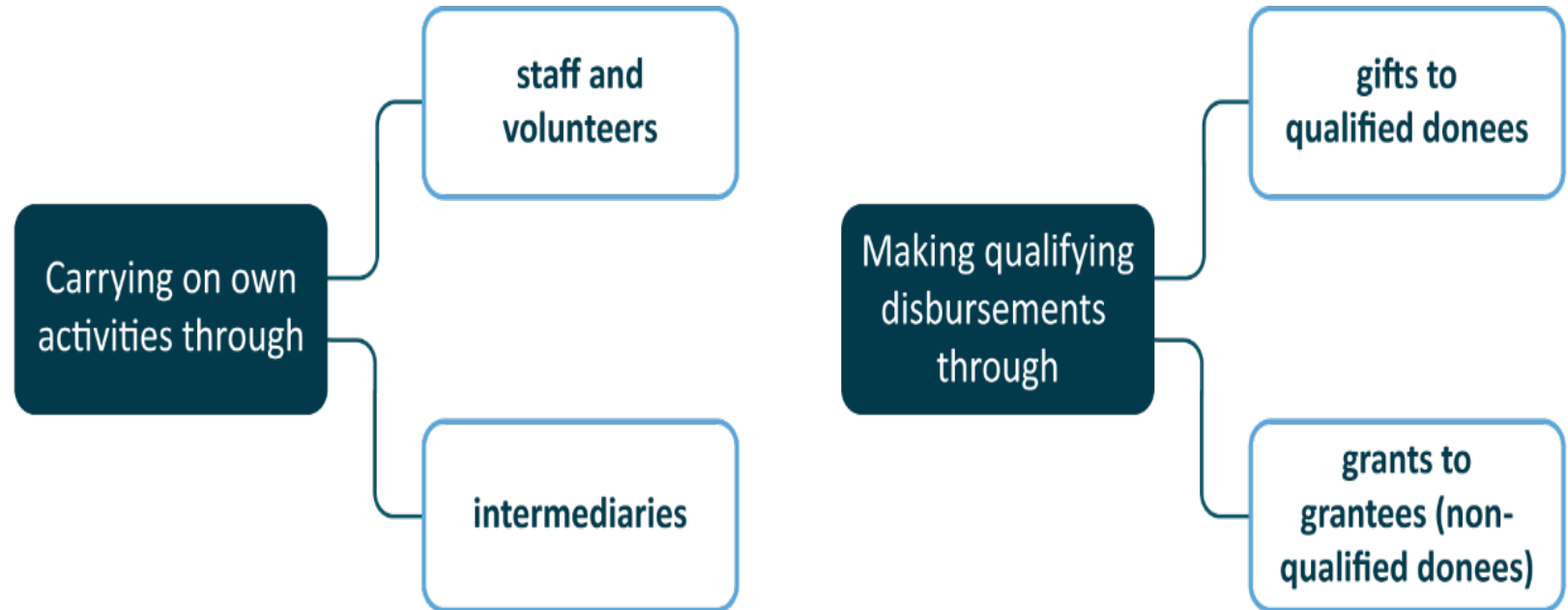
(b) to a grantee organization, if

- (i) the disbursement is in furtherance of a charitable purpose (determined without reference to the definition charitable purposes in this subsection) of the charity,
- (ii) the charity ensures that the disbursement is exclusively applied to charitable activities in furtherance of a charitable purpose of the charity, and
- (iii) the charity maintains documentation sufficient to demonstrate (A) the purpose for which the disbursement is made, and (B) that the disbursement is exclusively applied by the grantee organization to charitable activities in furtherance of a charitable purpose of the charity;”

“grantee organization”
includes a person, club, society, association or organization or prescribed entity, but does not include a qualified donee;

3. After Bill C-19 Became Law on June 23, 2022

- Canadian registered charities now have two regimes to choose from as graphically depicted in the Final Guidance:



C. OVERVIEW OF KEY ASPECTS FROM CRA FINAL GUIDANCE

1. Section 1.1: Background and Approach by the CRA

- In Section 1.1, the Final Guidance provides background information in relation to its use by the reader, stating that “[t]his guidance is not law”
- Rather, it is explained that the Final Guidance contains recommended ways that “a charity can meet the Income Tax Act requirements while taking reasonable, flexible, and proportionate measures based on the nature of each grant”
- This is a helpful clarification for those in the charitable sector who do not have a legal background and may otherwise assume that a guidance from the CRA is law
- The reality is that CRA’s recommendation in the Final Guidance will become de facto law over time because there is nothing else to guide a charity on what a qualifying disbursement involves

2. Section 1.4: Explanation of CRA's Interpretation and Approach to Qualifying Disbursements

- Section 1.4 includes a summary chart setting out the various qualifying disbursement requirements contained in subsection 149.1(1) of the ITA, and then explains how CRA intends to interpret each requirement and apply the related accountability requirements
- The chart also contains CRA's related recommendations for each requirement and where in the Final Guidance more detailed comments from CRA can be found
- This is a helpful resource for charities to consult in determining how best to fulfill CRA's accountability requirements
- CRA acknowledges that despite its best efforts, a charity may not be able to ensure that grant resources will be applied as intended
- CRA states that it aims to adopt a reasonable, flexible, and proportionate approach to granting

3. Section 2: How Can a Charity Operate?

- Explains how “granting” under the Qualifying Disbursement Regime differs from “direction and control” under the Own Activities Regime
- A charity may convert its relationship with a Non-QD (e.g. change from direction and control to a grant) but the charity must meet all accountability and direction and control requirements at time of change, and needs to document this change in its books and records

4. Section 3.0: Due Diligence Review

- “due diligence” is defined as “steps taken to satisfy the legal requirements for granting under the Income Tax Act” through accountability tools
- “accountability tools” refers to due diligence measures to meet accountability requirements
- “accountability requirements” refer to ITA requirements for making a grant
- The ITA requirements that are referenced as part of the “accountability requirements” include ITA terms of: “ensures”, “exclusively applied”, “in furtherance of a charitable purpose” and “maintains documentation sufficient to demonstrate”

- In Section 3, the CRA recommends the following “due diligence” steps be taken by charities who wish to make grants:

3.1: Establish how the grant activity furthers the charity’s charitable purpose

- A charity’s grant activity must further at least one of its own charitable purposes as set out in its own governing documents, *i.e.* a grant by a charity which furthers any charitable purpose more generally (but is not one of the charity’s own purposes) is not sufficient to be a legitimate grant under the Qualifying Disbursement Regime
- As such, before a charity can make grants to Non-QDs, the charity will first need to review and possibly even amend its charitable purposes, with any amended purposes to be first approved by the CRA

3.2: Assess the grant’s risk level

- The Final Guidance sets out a risk matrix of low, medium and high risk that is intended to help as a guideline to explain risk factors a charity should consider, although the listed factors are described as “non-exhaustive”
- However, if there is a significant change in grant conditions, then the charity should assess whether the grant’s overall risk level has changed, and work with the grantee to adjust the grant’s terms accordingly

- The factors set out in the risk matrix include: (1) the charity's experience, (2) the grantee's experience, (3) purposes and governing documents of the grantee organization, (4) governance structure of the grantee organization, (5) the grantee's regulation and oversight, (6) private benefit concerns, (7) grant activity, (8) grant amount, (9) nature of resources granted, and (10) grant duration

3.3: Determine how much due diligence the charity needs to apply through accountability tools based on the risk level

- The Final Guidance provides another risk matrix which contains guidelines to help a charity determine whether the use of accountability tools can be limited where there is a low risk, moderate where there is a medium risk, or extensive in a high risk situation
- These accountability/risk assessment tools in the matrix include, amongst others, (1) assess and review of grantee (such as grantee's staff and reputation of the grantee), (2) description of grant activity, (3) written agreement, (4) reporting plan, (5) transfer schedule, and (6) separately tracked funds

3.4: Apply the accountability tools in collaboration with grantee

- Charities are encouraged to work together with grantees to ensure that the accountability requirements set out in the Final Guidance are met

3.5: Document the charity's due diligence over the grant's duration

- Charities are reminded that they are required under the ITA to keep adequate books and records, which contain sufficient information to allow CRA to determine whether they are operating in accordance with all applicable legal requirements
- For grants, a charity's books and records must allow CRA to check whether:
 - The charity's grants meet the accountability requirements,
 - The grantee's use of the charity's resources can be verified through appropriate supporting documentation, and
 - The grantee continues to use the granted resources for the purposes and activities set out in the grant's terms
- A charity making grants which does not keep adequate books and records could be subject to possible CRA audit and compliance measures

5. Section 4: Special Topics

The last section of the Final Guidance goes over several “special topics” that are related to grant making, consisting of:

- Qualifying Disbursement Limit for Charitable Organizations
- Directed Gifts and Acting as a Conduit (commented on below)
- Reporting Grants in the T3010 Registered Charity Information Return (commented on below)
- Pooled Grants with Multiple Organizations (commented on below)
- Granting Charitable Goods (commented on below)
- Granting of Real Property (e.g., land and buildings) – this is considered high risk and the charity should implement adequate documentation to ensure that property will be used only for charitable activities that further its charitable purposes
- Anti-terrorism Considerations – charity must not support terrorist activities by making a grant to an individual or group engaged in or supporting terrorist activities (but see also the humanitarian exemption and authorization regime in the *Criminal Code*) – refers to [CRA Checklist for charities avoiding terrorist abuse](#)

D. ISSUES TO CONSIDER WHEN MAKING QUALIFYING DISBURSEMENTS

1. Defined Terms of “Grants” & “Grant Making” Not in the ITA

- The Final Guidance states that it focuses “on making grants to grantees”, but the terminology of “grants” and “grant making” are not terms that are used in the ITA
- The ITA uses the terms “qualifying disbursement” and “grantee organizations”

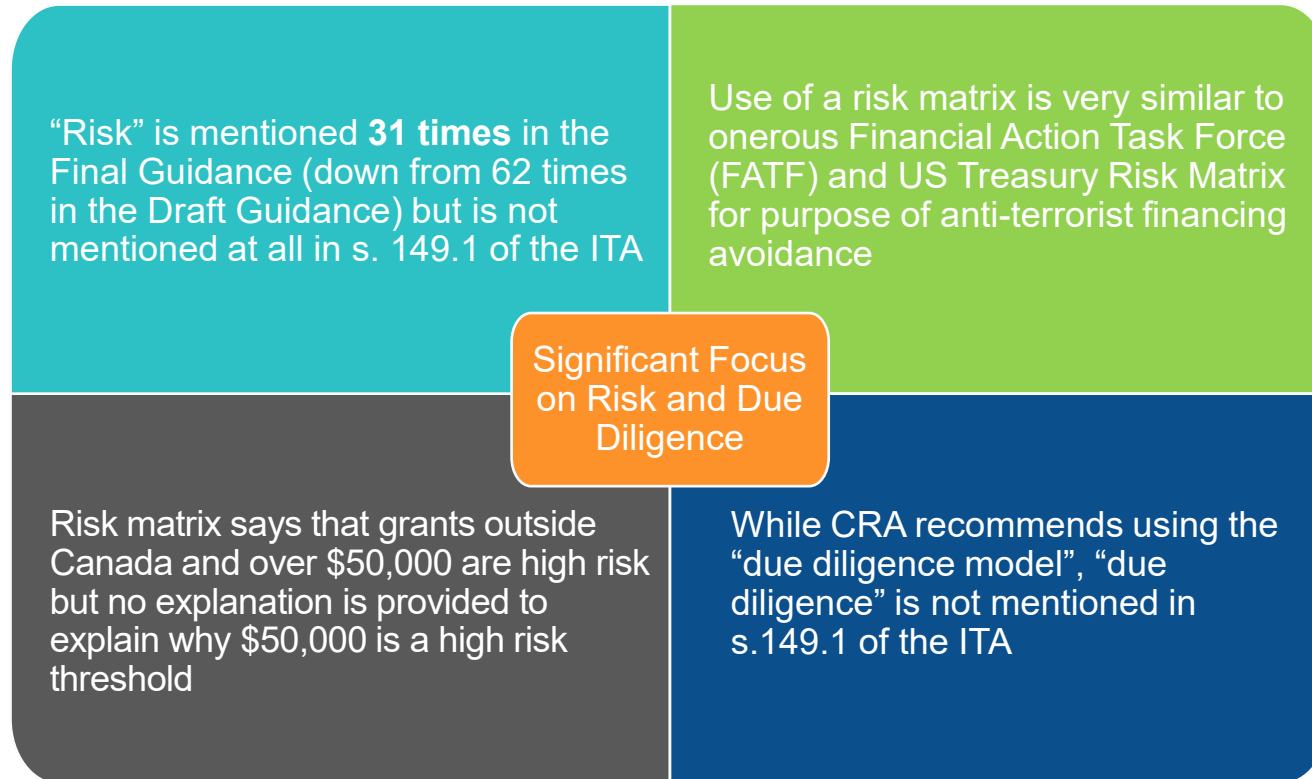
Language in ITA	Language in Final Guidance
qualifying disbursement means a <u>disbursement</u> by a charity, by way <u>of a gift</u> or by <u>otherwise making resources available</u> to a qualified donee, or a grantee organization	“grant” refers to a “ <u>qualifying disbursement</u> ” made to a “grantee organization”, as defined in the ITA. A grant can include both <u>cash and non-cash resources</u> . While the term “grant” is commonly applied to other arrangements within the charitable sector, <u>this guidance uses the term “grant” in relation to the ITA requirements</u> for making a “qualifying disbursement” to a “grantee organization”

- Courts expect charities to comply with legislation as opposed to a CRA guidance, so these differences are important to keep in mind, as they could have significance on a CRA audit that was subsequently reviewed by a court

2. Need to Review Charitable Purposes of the Charity

- A qualifying disbursement is about furthering the charitable purpose of the transferor charity and cannot be done if it is outside of the transferor charity's own charitable purposes
- Therefore, it is essential to review the charitable purposes of the transferor charity before considering making a qualifying disbursement
- Foundations that have only a single purpose of making gifts to QDs will not be able to make qualifying disbursements to grantee organizations, e.g. Non-QDs, since grantee organizations are not QDs
 - As such, foundations with a single purpose of only making gifts to QDs will need to review and expand their charitable purposes if they are intending to make qualifying disbursements to Non-QDs

3. The Imposition of Additional Requirements Not in the ITA



Extensive Accountability Requirements

- “Accountability” is mentioned 66 times in the Final Guidance, up from 46 times in the Draft Guidance, but is not mentioned at all in section 149.1 of the ITA
- “Accountability requirements” and “accountability tools” have been defined in the Final Guidance as referenced on slide 10 above
- Suggested accountability tools are similar to the requirements for “expenditure responsibility” for US private foundations and as such are complicated
- The accountability tools are similar to the requirements that were in the proposed ITA regulations but were removed from Bill C-19 when adopted
- The accountability requirements of the Qualifying Disbursement Regime are more onerous than the direction and control requirements of the Own Activities Regime

Pooled Grants with Multiple Organizations

- Before a charity can make a pooled grant with one or more Non-QDs, the Final Guidance recommends the charity must sign onto at least one written agreement with all parties (“ideally”, or if not feasible, then other accountability arrangements may be acceptable), along with interim and final reports
- Otherwise, the Draft Guidance recommends approaching pooled grants cautiously
- In light of this, charities may be hesitant to make pooled grants because of the complexity and risk involved

Charitable Goods

- Charitable goods (*i.e.* goods that can only reasonably be used for charitable purposes, such as medical supplies) will be subject to specific “accountability tools”, including written agreements and final reports on how goods were used
- These requirements are more onerous than for “charitable goods” under the direction and control regime in CRA’s CG-002 Guidance, [Canadian registered charities carrying on activities outside Canada](#)

4. Unclear Explanation of “Otherwise Making Resources Available”

- The ITA clearly indicates that a charity can make “gifts” to Non-QDs as well as “otherwise making resources available” to Non-QDs but does not explain what the phrase “otherwise making resources available” means in practice
- The Final Guidance does not mention “otherwise making resources available” except when setting out the definition of “qualifying disbursement” in the ITA
- There are two possibilities for what the phrase “otherwise making resources available” could mean in practice
 - The charity is gifting monetary and non-monetary resources to a Non-QD or
 - The charity is making available monetary and non-monetary resources to a Non-QD, such as use of space, staff, administration services, volunteers, directors, use of branding, and loans of funds including impact investing
- The latter interpretation is likely correct but this question will be important to consider when preparing agreements that go beyond gifting funds, such as one between a hospital and a hospital foundation for space and administrative services when calculating how to meet the disbursement quota (see below)

5. Some Qualifying Disbursements Do Not Meet Disbursement Quota (“DQ”) Obligations

- The Final Guidance mentions that “[f]or reporting purposes, and to help the charity meet its disbursement quota, the charity must be able to determine the fair market value of non-cash grants”
- However, the Final Guidance does not provide an explanation of what this determination process would involve
- Only qualifying disbursements that are gifts to QDs and Non-QDs can be used to meet the DQ obligations of the granting charity
 - Many charities may find this confusing to track or difficult to comply with in light of the increased DQ of 5% for investment property in excess of \$1 million
- Qualifying disbursements made by “otherwise making resources available” to either QDs or Non-QDs will not be counted towards the DQ, which means that making space, staff and volunteers available, as well as engaging in micro-finance loans and other types of impact investing are not DQable

6. Does Not Reflect The Wording in ITA About Directed Gifts

- New paragraph 168(1)(f) of the ITA states that CRA can revoke a charity's charitable registration if it accepts a gift "the granting of which was expressly or implicitly conditional on the charity [...] making a gift to another person, club, society, association or organization other than a qualified donee"
 - e.g. Charity A accepting a gift that is "expressly or implicitly conditional" on Charity A making a gift to Non-Charity B
- The Final Guidance states that paragraph 168(1)(f) of the ITA is intended "to prevent organizations from acting as conduits in the making of a directed gift" to a Non-QD, and refers to the Explanatory Notes from Finance
- However, there is no explanation concerning what a "conduit" is or what "acting as conduits" mean other than to recommend that a charity should retain "authority over the use of its resources, and clearly communicate this to the donors", for example communicating that:
 - Ultimate authority over the donation rests with the charity
 - If donor preference for the gift is not met, charity will not return the gift

- Conditional gifts, though, have a particular meaning at common law that is not explained in the Final Guidance
- The Final Guidance uses an example to explain what “expressly conditional” gifts are, which correctly includes the right of reversion to the donor if the condition is not fulfilled
- However, the Final Guidance is not clear what an “implicitly conditional” gift is when it gives as an example a charity that has the name of a Non-QD in its name, purposes, or other formal documents but no right of reversion
- The interpretation of directed gift in the Final Guidance could limit the fundraising abilities of healthcare charities involved in grants to Non-QDs
- The Final Guidance, though, states that the directed gift provision does not apply to a charity carrying out its own activities through an intermediary under the charity’s direction and control, presumably because it does not involve making a “gift”
- This could result in charities being reluctant to use the Qualified Disbursement Regime when public fundraising is required

E. REPORTING QUALIFYING DISBURSEMENTS

- Regulations under the ITA state that a charity that makes a qualifying disbursement to a grantee will need to include on its annual return (i.e. Form T3010) the following information for each grantee organization that receives in excess of \$5,000 in the taxation year:
 - a) The name of the grantee organization;
 - b) The purpose of each qualifying disbursement; and
 - c) The total amount disbursed by the charity to each grantee organization
- The charity must be able to determine the fair market value of non-cash gifts (e.g. “property, such as land, artwork, equipment, and pharmaceuticals”) that are made to grantees on its Form T3010
- In May 2023, the CRA updated the [T3010 Registered Charity Information Return](#) to report grants made to Non-QDs and introduced the new [T1441 Qualifying Disbursements: Grants to Non-Qualified Donees](#) requiring detailed information about these grants
- These Forms were further updated on January 8, 2024 and charities must ensure that the correct version of Form T3010 is filed depending on its fiscal year end – for a more detailed commentary, see [Charity & NFP Law Bulletin No. 525](#)

- Form T3010 asks:

- If the charity has made qualifying disbursements via grants to Non-QDs
- If any of these grants totaled more than \$5,000 in cash and non-cash grants in one fiscal period
- The number of grantees receiving grants totaling \$5,000 or less
- Total amount paid to grantees totaling \$5,000 or less in a fiscal period
- The new Form T3010 (v. 24) also asked for the total value of qualifying disbursements from donor advised funds in a fiscal period

- Form T1441, which records all grants individually, must include

- The number of grantees that received grants totaling more than \$5,000
- Report each grant separately, even if it's to the same grantee
- The name of the grantee
- The purpose of the grant
- The total amount of cash and non-cash disbursements separately
- The country and country code of where grant activities were carried out, (unless permission is obtained due to safety concerns)
- CRA has updated [T4033 Completing the Registered Charity Information Return](#) to assist charities

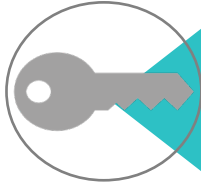
F. COMPARING THE QUALIFYING DISBURSEMENT REGIME TO THE OWN ACTIVITIES REGIME

- Since registered charities can now choose between two regimes when working with Non-QDs, what are the differences?

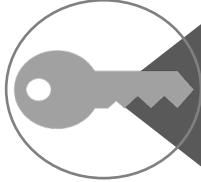
Own Activities Regime	Qualifying Disbursement Regime
1. Focus on the charity being the <u>directing mind</u> with an intermediary <u>carrying out instructions</u> received from the charity	1. Focus on <u>supporting the activities of the grantee organization</u> but only in furthering a charitable purpose of the donor charity
2. More of a <u>hierarchical top down</u> relationship	2. More of a <u>collaborative relationship</u>
3. The funds or resources are <u>not gifted</u> , instead they are transferred to an intermediary as <u>an extension of the charity</u> by means of a contractual agreement	3. The funds or resources <u>are either gifted or are otherwise made available</u> to the grantee, allowing the grantee autonomy to carry on its programs as an independent party
4. The applicable <u>regulatory due diligence</u> is in the form of <u>ongoing direction and control</u> by the charity over the activities of the intermediary	4. The applicable <u>regulatory due diligence</u> is in the form of <u>applying risk matrices</u> and following <u>extensive accountability requirements</u> rather than providing ongoing direction and control

Own Activities Regime	Qualifying Disbursement Regime
5. An <u>agreement is needed</u> to reflect <u>direction and control</u> over own activities of the charity e.g. contract for service or co-operative participation	5. For qualifying disbursements <u>above \$5,000 (or below but expected to be made on an ongoing basis)</u> , a <u>grant agreement is recommended</u> to address a significant degree of risk assessment and accountability requirements
6. As the intermediary is acting as an <u>extension of the charity</u> under the direction and control of the charity, the charity <u>may be exposed to liability</u> by the intermediary	6. Grant arrangement could <u>avoid the unintended consequences</u> for a charity carrying on its <u>own activities through an intermediary</u> , such as incurring liability to third parties under an agency relationship
7. Charitable programs done through an intermediary <u>will count toward the disbursement quota</u> of the charity	7. Qualifying disbursements in the form of <u>“otherwise making resources available”</u> will not count towards the <u>disbursement quota</u> of the charity
8. Contracting with an intermediary to allow the intermediary <u>to purchase land</u> is subject to <u>significant restrictions</u>	8. <u>Gifting of real estate</u> should be carefully documented but is generally <u>less restrictive</u>
9. Contracting with an intermediary in Canada <u>“may” attract HST/GST</u> (need expert HST advice)	9. Making a qualifying disbursement to a grantee in Canada <u>will not attract HST/GST</u> (need expert HST advice)
10. <u>Less onerous</u> reporting requirements in Form T3010	10. <u>More onerous</u> reporting requirements in Form T3010 and Form T1441

G. KEY TAKEAWAYS



The new Qualifying Disbursement Regime is an important new option for registered charities to consider



However, there are complexities and significant due diligence requirements that must be carefully reviewed before deciding to make a qualifying disbursement to a grantee organization



Whether or not a registered charity should embark on making a qualifying disbursement to a grantee organization or choose to continue with the Own Activities Regime is a decision that should be carefully reviewed with legal counsel for the registered charity



It is important to stay up to date for any changes that the CRA may implement to the reporting requirements in Form T3010 and possible updates from the CRA on the Final Guidance, as the Final Guidance is intended to be an “evergreen” document



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Gift Acceptance Policies

Sophie MacRae

February 13, 2024

FASKEN

Own tomorrow



Outline

- Purpose
- Drafting
- Incorporating policies by reference into gift agreements
- Due diligence
- Accepting and declining gifts
- Mission, vision and values
- Donor recognition

▼ Why Have a Policy?

- Supports compliance with applicable laws and the charity's purposes, mission, vision and values.
- Manages staff and donor expectations – particularly helpful and important if a gift, or certain desired conditions, will not be accepted.
- Provides directors, officers and staff with guidelines to be followed and principles to consider when accepting gifts.
- Identifies what types of gifts will be accepted and what types will not, and on what terms.
- Encourages giving while minimizing and managing the burden and risk to the charity and other issues (in other words, ensuring the benefit of a gift outweighs the cost of a gift to the charity).

Drafting Considerations

- Will there be one policy covering all areas - e.g.,
 - accepting gifts (what kinds of gifts will be accepted)
 - declining gifts (what kinds of gifts will not be accepted)
 - due diligence
 - donor recognition
 - determining fair market value
 - receipting (when receipts will be issued, procedures, etc.)

or multiple, shorter policies?

- The policy should be flexible and not exhaustive – include common types of gifts and issues but provide broader principles that can guide circumstances that are not directly addressed. Complex arrangements might not be anticipated.
- The policy should be reviewed regularly to ensure it reflects developments in the law and best practices. Canada Revenue Agency (CRA) has policies applicable to certain types of gifts.
- Coordination between the foundation and the charity (hospital / institution), if applicable.
- Who will have oversight?

Incorporating Policies by Reference

- Gift agreements should align with the policy, and a form of gift agreement may be attached to the policy.
- Many charities are looking for ways to shorten and simplify their gift agreements. One of the ways they are doing so is by incorporating their policies by reference (e.g., this Agreement and the Gift are subject to the terms of the Gift Acceptance Policy), which could be done by attaching it as a schedule, separately providing a copy, or including a link to an online version.
- **Caution:** Consider whether changes to the policy will be enforceable.

Due Diligence

- What due diligence will be undertaken before accepting a gift?
- Due diligence on the donor may include searches (e.g., litigation, PPSA), investigating the source of the funds, and talking to other organizations who have received gifts from the donor (subject to confidentiality).
- Due diligence on a gift may include searches (e.g., title), considering the terms of the gift and the cost of implementation, ensuring the gift is consistent with legal obligations, and investigating the value or how the value will be determined.
- May include legal, tax or accounting advice.

What types of gifts will be accepted

- There are legal and practical considerations.
- Does the gift impose unacceptable legal, financial, reputational or other risk?
- **Non-cash gifts:**
 - Charities will often only accept in-kind gifts that are easily convertible to cash (e.g., publicly traded shares).
 - For gifts like private company shares, or less common gifts like cryptocurrency or gift certificates, charities may wish to consider the cost of due diligence and converting the gift to cash versus the value of the gift.
 - Can the property be easily sold? If the property cannot be sold for a period of time, can the charity hold the property?
- **Receipting:**
 - What types of gifts will be receipted, and how will fair market value of in-kind gifts be determined. The policy may include when an appraiser will be used – CRA recommends an independent appraisal for gifts over \$1000.
 - CRA prescribes a process to be followed for issuing receipts in respect of anonymous gifts.

▼ What types of gifts will be accepted (cont.)

- **Interests in real estate:**

- For example, real property, leasehold interests, co-tenancy rights.
- Real estate requires additional due diligence. There may be a higher potential for liability (e.g., environmental).
- Can the property be sold, and if no, what will it be used for?

- **Donor restricted gifts**

- Restrictions may include the purpose/how/when the gift may be used. Restrictions must be reviewed before the gift is accepted. Consider if the terms are illegal or may otherwise be inconsistent with public policy.
- Administrative costs of ensuring the restrictions are adhered to – consider whether future expense is acceptable.
- Charities may consider only accepting restricted gifts over a certain size, given the cost of understanding and adhering to the restrictions.

▼ Mission, Vision and Values

- Gifts may not be accepted if the gift or a condition of acceptance does not align with the charitable purposes, or the mission, vision or values of the charity.
- Consideration may also be given to whether the donor's history or actions align with the mission, vision or values of the charity.
- This may be general and left for the board to determine; it may include specific examples.

▼ What types of gifts will be accepted (cont.)

- **Declining gifts**

- May be based on the type of gift
 - May be because of the restrictions sought by the donor
 - May be because the gift or the donor does not comply with the purposes, mission, vision or values of the charity
 - The gift cannot be accepted in a manner that complies with applicable law or doing so in a compliant manner will be too costly or onerous
 - Based on other legal, public policy or reputational risks
- Communication with staff and the donor will be important if a gift is to be declined.
- Consideration should be given to when board approval is required (e.g., does the board need to approve declining a gift over a certain value).

Donor Recognition - Naming Rights and Other Forms of Acknowledgement

- Will be subject to the hospital/institution naming policy, if applicable.
- Due diligence is particularly important prior to agreeing to grant naming rights and other public recognition.
- Recognition may impact receipting.
- Consideration should be given to:
 - including restrictions, for example a time-limit
 - providing that the naming right is not triggered until a certain percentage of the overall donation is received
 - making the grant of naming rights revokable on certain terms

Carters/Fasken Healthcare Philanthropy
Webinar 2024

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Donor Advised Funds for Healthcare Charities

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INTRODUCTION & OVERVIEW

- There continues to be considerable interest in donor-advised funds (“DAFs”) throughout the charitable sector - given this, healthcare charities may want to review if DAFs could be a giving vehicle to add to their “arsenal”
- If so, then it is important for DAFs to be properly set up and managed from the outset, with clear understanding of what they are at law and their current issues
- More information is set out in the paper, “Primer on Donor Advised Funds and Current Issues – Revisited”, May 15, 2023
<https://www.carters.ca/pub/seminar/charity/2023/Paper-Primer-on-Donor-Advised-Funds-and-Current-Issues-Revisited-2023-05-12.pdf>
- This presentation will review:
 - What are DAFs and Why are They so Popular?
 - What a DAF is at Law, including Recent Case Law?
 - Survey of Current Legal Issues Related to DAFs
 - Practical Considerations when Working with DAFs

A. CONTEXT OF DAFS – WHAT IS A DAF?

- A DAF is a type of charitable giving vehicle, established when a fund is created by a donor through an initial donation to a registered charity (“DAF Holding Charity”), and the fund’s capital and/or income is then used to make gifts to registered charities, including healthcare charities
- The gifts by the donor (usually a single person or family) to the DAF are irrevocable, and charitable donation receipts are issued for the gifts by the DAF Holding Charity
- The DAF Holding Charity itself then gifts amounts from a DAF (from capital if the DAF is not perpetually endowed, as well as from income) to either:
 - Qualified donees (e.g. registered charities), or
 - Grantee organizations (subject to the new qualifying disbursement rules)
- For a healthcare-related DAF Holding Charity, the gifts from the DAFs could be directed either to different healthcare charities or possibly to different program areas within a dedicated healthcare charity beneficiary

- In a DAF, the donor is given the unique role of making non-binding suggestions to the DAF Holding Charity regarding the distribution of assets from the DAF to qualified donees or grantee organizations
- However, despite this donor advice, all administrative, operational and governance matters (including compliance with *Income Tax Act* [“ITA”] and CRA policies) are the **sole responsibility** of the DAF Holding Charity
 - This is because DAFs are the property of the DAF Holding Charity alone, **not** the donor
- Failure by a DAF Holding Charity to properly hold and maintain DAFs in compliance with tax/trust law could erode donor confidence and result in potential liability and credibility damage for the Charity

B. WHY ARE DAFs SO POPULAR NOW?

- DAFs are a practical and appealing alternative for donors who do not have the ability, interest or time to operate their own private foundations
- Relatively inexpensive to establish a DAF with a DAF Holding Charity versus operating a private foundation
- More anonymity and flexibility in structuring for donors

Some DAF Holding Charities do not impose minimum initial donations, or they can be as low as \$5,000, with ongoing fees also being moderate

Private foundations (unless established to facilitate flow through donations to qualified donees) are generally established with at least a \$1-\$2 million capital asset base, with ongoing annual operational costs

C. WHAT IS A DAF AT LAW?

1. It Is a Charitable Gift

- A voluntary transfer of property owned by a donor to a donee, for which the donor receives no consideration

2. It Could Also Be a Donor Restricted Charitable Gift

- Unrestricted charitable gifts must be applied to a charity's charitable purposes, but there are no other donor restrictions
- Restricted charitable gifts are subject to restrictions imposed by the donor from the outset, which constrains or limits a charity's use of the gift in the future, such as use in health care capital projects, for the purchase of equipment or carrying out a particular health care program/area of care

3. It Can Be a Gift for Income Tax Purposes

- CRA accepts the common law definition
- A gift meeting all ITA requirements can be receipted

D. HOW DOES THIS ALL RELATE TO A DAF?

- Original gift from the donor establishing a DAF in a DAF Holding Charity could be unrestricted or be subject to one or more donor restrictions, *e.g.* how long capital to be held, how income is to be used, how investment is to be done, *etc.*
- DAFs will then have a donor-advised “feature” added to the gift, providing the original donor (and possible successor “fund advisors”) with the ability to offer ongoing advice to the DAF Holding Charity
 - This advice can be on various aspects of the DAF, but usually relates to the gifts to be made
 - Often the donor advice is provided annually but it could be more frequently depending on the specific fund agreement’s terms
 - However, this donor advised feature does not impose a legal obligation on the DAF Holding Charity to act as the donor directs, although there is a moral obligation for the Charity to consider these donor suggestions

- A DAF Holding Charity must clearly inform its donors from the outset that their advice/input/suggestions are advisory only and that all decisions related to the DAF are ultimately to be made by the Charity
 - This is imperative to do in order that all donations by donors to DAFs are true gifts at law and can be properly receipted under ITA
 - This reflects that the DAFs are the Charity's own charitable property over which it must exercise ongoing direction and control
 - If there is excessive ongoing control by the donor over the gifted property to a DAF, then it may lead to the CRA considering the gift to be a “directed gift”, which could then be defeated or negated
 - This could lead to issues with any charitable donation receipt issued for a defeated gift – for the charity and the donor - and should be avoided as much as possible

The Joseph Lebovic Charitable Foundation v Jewish Foundation,
2022 ONSC 4012 (“Lebovic Case”)

- This decision of the Ontario Superior Court confirmed that while a donor is free to make recommendations to a DAF Holding Charity on how monies in their DAF are to be granted, the DAF Holding Charity is under no obligation to follow those recommendations
- In this case, after the death of the original DAF donor, the donor’s brother assumed responsibility as the DAF’s fund advisor with the Jewish Foundation of Greater Toronto (“JFGT”)
- Brother brought motion to prevent JFGT from spending a small portion of funds from the DAF contrary to his requests
- Court found the brother lacked grounds for his motion – stating that unless restrictions are imposed by a donor at the time a gift is made, the donor (or any future fund advisor) is not able to later direct how any charitable gifts are spent by the DAF Holding Charity

E. CURRENT ISSUES ASSOCIATED WITH DAFs

1. Disbursement-Related Issues – “Languishing” Assets in DAFs

- The 2019 Report of the Special Senate Committee on the Charitable Sector recommended that consideration be given to:
 - “means of ensuring that donations do not languish in donor-advised funds, but are instead used to fund charitable activities in a timely fashion.”
- This recommendation has been criticized as conflating DAFs in Canada with certain features of US DAFs
- DAFs in the US can be used as a loophole for private foundations to avoid minimum payout requirements

- However, in Canada, there are:
 - Annual disbursement quota requirements, being the minimum calculated amount that a registered charity is required to spend each year (please see next slide)
 - Inter-charity transfer rules which prohibit transfers between non-arm's length charities for the purpose of avoiding minimum payout obligations
- Given these requirements, it is not clear why specific concerns about DAFS languishing are being raised in the Canadian context
- By way of comparison, endowments and other restricted gift funds provide donors with immediate tax benefits through donation receipts while the asset distribution from these types of restricted funds takes place over time, but without the same level of criticism as is directed towards DAFs

2. Disbursement Quota (“DQ”) Increase for Tax Years on/after January 1, 2023

	Property* in excess of \$25,000 (foundations) or \$100,000 (charitable orgs) up to \$1 million	Property* in excess of \$1 million
DQ Rate	3.5%	5%

- A DAF Holding Charity meets its DQ obligations in any given year on a **global calculation basis on all charity assets**, not on a **specific fund-by-fund** basis
- Some have questioned if individual DAFs should be required to disburse sufficient income each year
- Meeting the new 5% DQ could be challenge for charities with endowments or other funds with restrictions on how/when capital can be expended – they may need costly and time consuming court orders authorizing encroachment on capital or realized capital gains in order to cover increased DQ obligation
- See “The Ins and Outs of the Increased Disbursement Quota” presentation by Theresa Man for more details

* “Property” refers to the average value of a charity’s property in the preceding 24 months not used directly in charitable activities or administration

- In Canada, it is estimated that only 10% of DAFs hold assets over \$1 million
 - So, if a DQ were in theory imposed at an individual DAF level (not on global calculation basis), a DAF Holding Charity would have lower overall DQ obligation given 3.5% DQ rate for assets under \$1 million, but could have additional administrative costs
- Average granting rate from DAFs in 2021 was 9.8% of assets, which is well in excess of the 5% DQ imposed on amounts above \$1 million (2023 CAGP Report) and many DAF Holding Charities impose own internal DQ on each DAF
- Bill C-32 also provides that (1) administrative and management expenses are deemed to not satisfy DQ obligations and (2) charities can apply for reduction in DQ obligations but these applications could be made public by the CRA
- T3010s have recently been amended by the CRA to gather more DAF-related information (please see next slide)

3. New Version of T3010 Form

- CRA released version 24 of the T3010 on January 8, 2024 - it reflects anticipated changes set out in Budget 2022 aimed at improving collection of information from charities on their investments and DAFs
- Which version is to be used?
 - Version 23 - For charities with fiscal periods ending **on or before Dec. 30, 2023**
 - Version 24 – For charities with fiscal periods ending **on or after Dec. 31, 2023**
- Key changes in version 24 include:
 - New set of questions for charities holding DAFs, need to provide: (1) total number of DAFs held at end of the fiscal period (“FP”); (2) DAFs’ total value at end of the FP; (3) total value of donations to DAFs received during the FP; and (4) total value of qualifying disbursements made from DAFs during the FP
 - New question C17 on the DQ– if charity meets DQ threshold question, then must complete the new Schedule 8 on DQ calculation and reporting
 - Question C2 about Programs and the Activities outside of Canada schedule have been changed to add qualifying disbursements

4. Qualifying Disbursements –Gifts to Grantee Organizations

- ITA was amended effective June 2022 to allow registered charities to make qualifying disbursements to grantee organizations if 3 requirements are met:
 - a) the disbursement furthers one of its charitable purposes
 - b) the disbursement is exclusively applied to charitable activities to further its own charitable purposes
 - c) documentation is maintained to demonstrate (a) and (b)
- DAF Holding Charities with sole charitable purpose of making gifts to qualified donees cannot make gifts to grantee organizations
- Instead new charitable purpose(s) of an active nature will be required to be added, which will take time and money to put in place as well as CRA approval
- Final CRA Guidance released on December 19, 2023
- It continues to impose additional requirements to carry out qualifying disbursements: (1) focus on risk matrix and (2) accountability tools
- See “The New Qualifying Disbursement Regime and Healthcare Charities” presentation by Terrance Carter for more details

5. Anti-Directed Giving Provision

- Paragraph 168(1)(f) of the ITA states that a registered charity that accepts a gift “the granting of which was expressly or implicitly conditional” on it making a gift to “another person, club, society, association or organization other than a qualified donee” may have its registered charitable status revoked
- Not clear what is meant by “implicitly conditional”
- Could a donation to a DAF followed by a donor request that a gift be made from the DAF to a local non-profit organization as a qualifying disbursement trigger this provision?
- Charitable sector had hoped for clarity in the CRA Final Guidance
- While some clarity was provided on “expressly conditional” gifts, “implicitly conditional” gifts remains unclear and is of potential concern for charities
- See “The New Qualifying Disbursement Regime and Healthcare Charities” presentation by Terrance Carter for more details

6. Impact of Alternative Minimum Tax

- Budget 2023 proposed alternative minimum tax (“AMT”) changes – AMT is the alternative method to calculate income tax liability for high-income individuals so that they pay higher tax than would be paid under the “regular” tax rules – with these changes to take effect for tax years after 2023
- Key proposed changes: (1) 30% of capital gains on donations of publicly listed securities to be included in the AMT (currently not included) (2) 50% of donation tax credits (among others) will not reduce the AMT payable
- In August 2023, draft legislation to implement these changes was released and concerns were raised by various stakeholders during the consultation period – to date, these proposals remain under development since they were not included in Bill C-59 (related to the Fall Economic Statement) tabled on November 30, 2023
- If changes become law, they could impact high net-worth donors’ giving patterns, e.g. significant donations to DAFs following special events, such as property or business sales with substantial capital gains

7. Clarity Finally on Trust Reporting by Charities

- Depending on how is set up, a DAF (and all donations made to it) may be donor-restricted charitable gifts held in trust by the DAF Holding Charity
- Earlier amendments to the ITA raised concerns that some DAFs might constitute internal express trusts of a charity and, as a result, “T3s” may need to be filed
- While CRA’s long-standing administrative policy has been to not require charities to obtain separate charitable status for their internal express trusts, the charitable sector called for clarity on this issue
- This clarity from CRA finally came on November 10, 2023, when it confirmed that registered charities are not required to file “T3s” for internal trusts – this includes DAFs held by DAF Holding Charities
- Instead registered charities will continue to file T3010s, which must include aggregate information about a charity’s property, including any internal trusts

8. Importance of Granting Policies

- Need to ensure gifts from DAFs over to qualified donees are not offside of the ITA – if they are, then could result in complaints, audits, penalties and/or sanctions
- Some DAF Holding Charities place limitations on the type of qualified donees able to receive gifts from their DAFs, e.g. geographic, religious, cultural/philosophical or program-based
 - Need to make all of these restrictions clear to donors in granting policy or guidelines, which should then be cross-referenced in the DAF agreement itself
- Granting policy should also make clear that DAF gifts cannot result in any private benefit for the donor/their family, such as paying for charity-related membership fees/dues, tuition fees, or tickets or goods purchased for charitable fundraising
- But it is not enough to have such a granting policy - there also needs to be ongoing monitoring and enforcement by the DAF Holding Charity

9. Successor Fund Advisors of DAFs

- A DAF Holding Charity may receive recommendations about gifts to be made from a DAF from a successor fund advisor(s)
- Where the DAF agreement is silent, a donor's attorney (under power of attorney) or executor may have ability to act as the successor fund advisor
- The DAF agreement (or cross-referenced policies in the agreement) should address various scenarios:

– Can the donor appoint a fund advisor and how?

– What to do if donor does not designate a successor fund advisor?

– How many successor fund advisors can be appointed?

– How to deal with multiple successors giving contrary recommendations?

– Whether successor fund advisors must only be individuals, e.g. not a corporation or a group of unrelated people?

10. Impact of “Anonymous” Donations from DAFs

It is possible for a donor to a DAF to remain anonymous when the DAF Holding Charity subsequently makes a gift to a charity out of that DAF

The recipient charity may find it difficult to keep the donor informed about the effectiveness of the DAF gift

The recipient charity may also not have the information it needs to determine if it should decline the gift (*e.g.* because of concerns about foreign interference or conflicts of interest)

F. PRACTICAL ADVICE FOR HEALTHCARE CHARITIES WITH DAFS

- **Do your homework**

- Do due diligence so that your healthcare charity knows how to establish and then manage DAFs correctly based on trust/tax law

- **Create templates**

- Develop and implement written gift acceptance and granting policies for DAFs and other gifting vehicles
- Prepare template DAF agreements of various kinds

- **Ensure your charity runs the process**

- Your healthcare charity – not the donor or their legal counsel – should be in control in establishing DAFs, utilizing consistent procedures as set out in the original gift agreements and all related policies

- **Be vigilant**

- Avoid language suggesting that (1) DAFs belong to the donors (2) donors are “clients” with “accounts” with your charity and (3) a DAF is a donor’s own private foundation

- **Identify opportunities**

- DAFs represent opportunities for healthcare charities to have ongoing connection and engagement with their donors
- DAFs could also be a new way for healthcare charities to attract more gifts and potentially larger ones from donors
- Donors may appreciate the flexibility of DAFs
- A DAF could be structured so that the donor advice could be to request gifts be made to different programs within the healthcare charity beneficiary from one year to the next
- However, healthcare charities need to be mindful of the additional administrative work associated with DAFs – including whether they have sufficient staff available to work with donors providing DAF-related advice on an ongoing basis



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