Who Can Make a Pledge – And Who Can Pay It Off?
&
Pledges with Benefits

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> I provide the following information as a guide. **The ultimate determination regarding appropriate actions within an institution always rests with the lawyer and auditor tasked with ensuring compliance with that institution's legal and financial regulations.**

A pledge, for purposes of this paper, is an obligation by a donor to a donee. The commitment must meet the criteria for "contributions" in the form of **unconditional promises to give** as outlined by the Financial Accounting Standards Board (FASB), who first established the standard. The Government Accounting Standards Board, or GASB, has similar criteria.

As outlined on page 30 of FASB Statement of Financial Accounting Standards No. 116, the definition of a promise to give is "a written or oral agreement to contribute cash or other assets to another entity. **A promise carries rights and obligations** – the recipient of a promise to give has a right to expect the receipt of promised assets in the future, and **the maker has a social and moral obligation, and generally a legal obligation, to make a promised transfer**." [emphasis added] Once a donor makes such a promise, the maker of the promise assumes an offsetting liability to the extent it may be recorded as an asset by the nonprofit. Page 31 of the above document – quoting from Concept Statement 6 – states that "liabilities are probable future sacrifices of economic benefits arising from present obligations of a particular entity to transfer assets or provide services to other entities in the future as a result of past transactions or events."

Thus, a recordable/enforceable pledge or promise to give may only be made by the entity assuming liability and responsibility for that commitment's satisfaction. The maker has no authority to obligate another entity over whom they have no legal or financial control. They assume complete and total responsibility for the fulfillment of the obligation.

To further illustrate, the 1st edition of the CASE Global Reporting Standards (2021)[1] states on page 34 (and is repeated on page 276):

> "Pledges are commitments to make future gifts. Only the entity exercising legal control over the assets to be given can make a pledge. Therefore, an individual cannot make a pledge that includes an amount that is based on anticipated matching contributions from an employer or some other source. Nor can an individual commit funds that may come

[1] This language is consistent with that found in the 2009 4th edition of the CASE Reporting Standards & Management Guidelines, superseded by the Global Reporting Standards, 1st edition.

from a donor-advised fund or community foundation. An enforceable, countable pledge includes only those funds that will be given by the legal entity that controls the asset and the transfer."

Regarding the above FASB quote about "a written or oral agreement," there are broad interpretations among auditing firms stipulating the form of documentation necessary to consider the pledge "enforceable." Therefore your auditor typically makes this determination for each institution. As stated in the 1st edition of the CASE Standards (page 58):

> "To record and report on a pledge, you should have a signed document detailing at least the amount, purpose and payment period for the donation. A letter from the donor can suffice, as can a letter from the institution to the donor, outlining the same details based on a conversation held with that donor, as a bona fide commitment. CASE suggests, however, that such a letter require the signature of the donor with a copy returned to the institution. If you are booking pledges into your institution's financial records, you should check with your auditor, general counsel and CFO about what form of documentation is acceptable."

Therefore, an entity may make a binding pledge, or promise to give, only if they are willing to assume full personal responsibility and liability for the entire amount. The individual generally cannot encumber another entity – they are literally "on the hook" for the whole amount. But this does not mean that another entity cannot pay toward satisfaction of that commitment. Much depends on the relationship between maker and payer. Much also rests on the legal nature (tax classification) of the entity rendering a payment.

It is not legally possible for specific categories of foundations or charities (specifically private foundations), frequently referred to as "family foundations," to satisfy another entity's pledge or promise to give. In IRS-speak, this is considered self-dealing. A Council on Foundations article from 2003 explains further (only the portion of the article on pledges and fundraising activities are included in this quote):

> "The main prohibition for family foundations is "self-dealing." Simply stated, a family foundation can not enter into any financial transaction with certain related parties, defined in the law as "disqualified persons." A disqualified person is any officer, director, trustee or employee with the authority to act on behalf of the foundation and substantial contributors.

"The list of prohibited transactions between a private foundation and a disqualified person includes:

> * Satisfying the enforceable pledge (such as a donation) of a disqualified person"
>
> "Some specific examples of self-dealing are:

* Personal family pledges- A legally binding pledge (personal pledge to charity, etc) is a personal debt, and if a disqualified person makes such a pledge, its an act of self-dealing for a foundation to pay that debt.

* Attending fundraisers - If the foundation buys a ticket to a fundraising event, and the ticket price includes payment for goods and services (dinner and entertainment) the ticket cannot be used by a disqualified person."

The IRS previously prohibited using a gift from a donor-advised fund (DAF) from satisfying a personal pledge. However, the IRS proposed a change in that stance on December 5, 2017, in IRS Notice 2017-73. The proposal would allow treatment of DAF gifts as pledge payments provided:

1. The DAF sponsoring organization makes no reference to the existence of any charitable pledge when making the distribution from the donor's DAF (references to the name of the person who advised on the distribution are permitted);

2. No Donor/Advisor receives, directly or indirectly, any other benefit that is more than incidental on account of the DAF distribution (such as those described below or set forth in future guidance); and

3. The Donor/Advisor does not claim a charitable contribution deduction for the DAF distribution, even if the charity receiving the distribution mistakenly sends the Donor/Advisor a tax acknowledgement.

This proposal was out for public comment until March 2018. It allowed for acting on the recommendation until further guidance was issued. As of this writing, no other word has been uttered by the IRS. **HOWEVER**, donor-advised funds continue to clearly state that their gifts cannot be used to satisfy pledges. Therefore, even if the three conditions listed above were met, the DAF still has the final say about the use of *their* gift.

On a separate but related note, the preponderance of corporations offering employee matching gift programs clearly state in their guidelines and frequently in the match application form that **their** contribution may not be used to satisfy a personal obligation of their employee. Many such programs require that **their** contribution go towards a specific fund or program and not necessarily where their employee made the original gift.

However, there are some instances where someone other than the maker can make a payment toward another entity's pledge. A typical example is a spouse and other family members. There may also be times when the individual owns a business or is one of its principals and causes a gift to be made toward that pledge. However, given some of the potential tax issues revolving around these situations, it is **always** best to have it stated clearly in writing by the payer that the payment may indeed be applied to that other entity's pledge.

Nonbinding Statement/Letter of Intent

Often, organizations contemplate recording an SOI or LOI when a donor anticipates recommending gifts through a donor-advised fund or private foundation in support of these nonbinding commitments. Such an instrument does not constitute a legally enforceable commitment. Therefore, they cannot be recognized as assets on accounting systems.

The CASE Global Reporting Standards acknowledge the growth of these forms of commitments. As such, beginning in 2021, educational institutions may recognize these in official campaign totals. However, they do not carry as much weight as a binding and enforceable pledge. Therefore, CASE urges recognizing these commitments separate from those binding pledges.

This paper urges organizations always to endeavor to secure binding commitments from donors. This requirement applies even when a donor anticipates a gift from a third party. To accommodate the best of both worlds, language along the following lines for booking and counting a bonafide pledge at total value may satisfy institutional needs:

"The undersigned acknowledge that for our commitment to be fully recognized as a commitment to [Organization Name], I/we are personally responsible for its satisfaction. We may not make commitments on behalf of others. Should, however, related payments be received from third parties, [Organization Name] may voluntarily reduce our personal obligation by a like amount."

The above notwithstanding, CASE does, now, permit the inclusion of SOI/LOI commitments in official campaign totals. Here is the related language from page 58 of those Standards:

> "In some cases, a "Letter of Intent" or "Intent to Give Agreement" may be used in lieu of a formal pledge agreement. This is similar to receiving a letter from a donor to memorialize a pledge, but is often used when the commitment may be made or fulfilled using multiple donor funding sources such as a combination of personal individual gifts, foundations gifts, or donor-advised fund distributions. The donor or donor advisor avoids any potential issues regarding substantive benefit (also known as self-dealing or inurement in some countries/regions) by not having a legally binding pledge, but the institution is able to document, memorialize, recognize and count gift intentions.
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> "When reporting Funds Received in CASE AMAtlas^{SM} surveys, only the corresponding payments / gifts resulting from Intents to Give should be included in the years they are received.
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> "When reporting New Funds Committed in CASE AMAtlas^{SM} surveys, Intents to Give may be counted and reported with Pledges. CASE recommends that institutions consider reporting Intents to Give separately from Pledges and Conditional Pledges in their own internal / external reports.
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> "When reporting Campaign totals, Intents to Give may be counted and reported with Pledges."

Bifurcated Payment (Pledges with Benefits)

While not directly related to who can make a pledge and who can pay it off, it is essential to note the IRS concern regarding the delivery of benefits to donors because of gifts made by either DAFs or private foundations. In both cases, no tangible benefit can be given in exchange for donations made through these sources. These benefits include invitations to special recognition events or galas. These donors cannot be invited to these events if they have a fair market value benefit.

Some have questioned whether these rules can be circumvented by allowing the individual to pay a fee equal to the fair market value to attend. The short answer is "No." In a discussion about private foundations on this topic, the *Tax Economics of Charitable Giving* states:

"If a private foundation purchases tickets to charitable fundraising events, care must be exercised to be certain that no self dealing results. The IRS held there was self dealing where the chairman of a corporate donor, who was not an officer or director of the foundation, used tickets purchased by the company's private foundation. The IRS has also ruled that bifurcation of the purchase costs of attending a fundraising event between a disqualified person (who pays for the quid pro quo portion) and a private foundation (which pays for the charitable portion of the ticket) would result in self dealing."

Along the same lines, the IRS reinforced its prohibition of delivery of benefits to donor in exchange for DAF gifts in Notice 2017-73. Quoting from a summary provided by Ropes & Gray, LLC:

"**Charity Events and Membership Fees:** Grants from a DAF that enable a Donor/Advisor to attend or participate in a charity-sponsored event would result in a more than incidental benefit, even if the Donor/Advisor pays the non-deductible portion of the cost of the ticket. This would result in a penalty excise tax on any Donor/Advisor who advises as to the distribution or who received the benefit of the payment from the DAF. The IRS has previously indicated informally that it views grants that enable a Donor/Advisor to attend an event as a violation of the rule prohibiting more than incidental benefits from DAFs. Similarly, a grant from a DAF to pay on behalf of a Donor/Advisor the deductible portion of a charity membership fee that has deductible and non-deductible portions would also result in a more than incidental benefit and penalty excise tax."