NINE STEPS TO NEGOTIATE CHARITABLE NAMING RIGHTS

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A young performer asks a New Yorker upon disembarking at Penn Station, "How do you get to Carnegie Hall?" The New Yorker replies, "Practice, practice, practice."

Of course, that wasn't how Andrew Carnegie got there. Philanthropy was his ticket; he paid for Carnegie Hall's construction and for much of its upkeep until his death in 1919, and because his name is on the building, he'll be remembered long after most of the musicians who have played there are forgotten. Others have had their names emblazoned on Carnegie Hall as well; more recently Sanford Weill and the Weill Family Foundation topped the $100 million mark for combined contributions to Carnegie Hall. As a result of that massive gift, much of which came from the Weill Family Foundation, there's now a Joan and Sanford I. Weill Recital Hall, the Weill Music Institute, the Weill Terrace, and the Weill Terrace Room.

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How could Sanford use his private foundation ("PF") for this purpose? The first rule of PF operation that most donors and PF managers learn is: "Thou shalt not personally profit from your relationship with the PF." Because of the strict self-dealing rules of Internal Revenue Code Section 4941, almost any financial benefit to a donor or insider from a PF's activities, whether that benefit is direct or indirect, is forbidden. So how is it that the Weill Family Foundation apparently benefited Sanford very significantly—cementing his legacy for many years to come—by making grants to Carnegie Hall in exchange for these naming rights? And why go through a PF at all, rather than from Sanford's own resources?

A "merely incidental" benefit

While it's certainly true that PFs generally aren't allowed to provide benefits to donors, the tax rules generally treat public recognition, including naming rights, as a benefit that's "merely incidental" to the charitable purposes served by the grant. This seems counterintuitive. Staples paid almost $120 million in 1999 to put its name on the Los Angeles arena now known as the Staples Center for a 20-year period. Surely, naming rights have real monetary value, and having a PF pay for those naming rights to benefit an individual or

corporation affiliated with the PF certainly seems like a self-dealing transaction. However, perhaps out of recognition of the importance of facilitating naming gifts for public charities that generate a lot of revenue this way, Internal Revenue Service rulings have generally blessed the use of PFs to make grants in exchange for naming rights.

This doesn't mean that there's no risk, and much may depend on how the distribution is framed. The rulings blessing this sort of arrangement involve transactions framed as charitable grants, with naming rights as incidental aspects of a fundamentally charitable transaction, rather than as commercial-like contracts. One could construct a "Staples-like" naming rights contract with a grantee that might indeed be treated as providing a more than incidental benefit if framed more like a commercial contract. Or a tax could be triggered if a grant (whether connected with naming rights or otherwise), is made from a PF in satisfaction of an insider's legally binding pledge or if there's some other sort of financial benefit beyond name recognition. However, if done correctly, using a PF to secure naming rights has a long-accepted track record of success and shouldn't present tax risks.

Advantage over individual gifting

Furthermore, using a PF to make such a gift may have some benefits when compared with making gifts individually. Many donors use their PFs for this purpose in part to help ensure that there's a party to the contract that will endure beyond the donor's death. In general, the law regarding who has standing to enforce a naming rights agreement is very unclear and can differ based on the facts of a particular situation and the laws of the various states. However, the law is generally consistent in denying heirs the right to enforce naming rights agreements entered into by individuals. A PF, however, can endure indefinitely, ensuring that there's a party in existence to monitor the grantee's compliance with the agreement and to try to enforce it if necessary. In addition, it's much easier to negotiate for return of funds in the event of breach of a naming agreement when the donor is a PF rather than an individual.

There may also be tax benefits to using a PF. From a tax perspective, the preferred method depends on a number of factors, including the identity of the donee, the donor's adjusted gross income, the assets used to make the gift, the timing of gift installments, and the donor's other charitable gifts. In some circumstances, the donor may be better off (from a tax perspective) making some or all of the gift directly. For example, if the charity isn't a U.S. charity, the donor will almost certainly be better off using a PF, as an individual can't get a tax deduction for a gift to a non-U.S. charity. For tax and other reasons, many donors find a PF to be a much stronger base from which to make naming gifts.

Naming through a PF

Let's say your client is a donor who has a PF. Once your client decides how to make the gift, he or she will need to negotiate an agreement with the chosen charity to secure the desired naming rights. Many charities have policies that will set out the level of naming rights that can be obtained for a grant of a particular size. In a capital campaign, for instance, an organization will often provide a "price list" that can tell a prospective donor that naming a building will cost, say, several million, while naming a single room may cost a few thousand dollars. Further, an institution may have different policies and guidelines depending on what will be named—physical spaces, programs, faculty positions, endowments, scholarship funds and so forth. For major gifts, of course, almost everything is negotiable.

The substance of the negotiation will include many or all of the following elements, which ultimately should be included in a written gift agreement between the PF and the charity:

1. The parties to the agreement. Usually these will be the PF making the grant and the charity receiving the grant. There may be instances in which the grant may go to an affiliate of the charity, such as a supporting organization, while the naming will occur on a building directly owned by the charity. All parties involved should be named, and an individual with appropriate authority for each party should sign.

2. The amount and timing of the grant. Some grants will be made in a predetermined lump sum at the time of signing the gift agreement. When the grant is funding a construction project, however, the grant may be spread out over the period of construction, and its size may be conditioned on the actual costs of construction as they arise. Grant installments may also be conditioned on meeting certain milestones, to keep the institution incentivized to move forward expeditiously, to keep the donor informed of progress and to limit a donor's downside if the project or

initiative to which the naming rights will attach dies on the vine. In addition, the agreement may provide that, while the PF is the party to the agreement, installments may come in from other sources, including individual donations, donor-advised funds ("DAFs") grants or gifts from other family members. While you would never want a PF to satisfy an individual's binding pledge (because of the self-dealing rules), it's fine for individuals to satisfy pledge obligations of the PF, and in certain circumstances a DAF can do so as well.

3. The name. Your client, of course, will want to specify how the name will read. There's no need to mention the client's foundation if the client doesn't want to; even if the funds are coming from a PF, it's okay to honor the name of the individual who established the PF (or someone else). This is how the Weill Family Foundation was able to support naming rights for Joan and Sanford Weill individually. In the case of a corporate name or logo, the company will have to give permission for their use. Your client may also wish to specify when the naming rights will take effect – immediately, after certain milestones are reached or contingencies satisfied or after the death of the individual whose name will be attached.

4. How the name will be displayed. This can, at times, be very specific, such as requiring that the name appear in a particular location on a building in letters in a particular font and size. Attaching diagrams or renderings to show how the name should look may help avoid later disputes.

5. To what the name attaches. Charities will want flexibility to offer other naming opportunities in and around the building. For example, they may want to offer someone else the right to name the surrounding grounds or individual rooms or centers within the building. The agreement should be clear on the extent to which these other naming opportunities will be offered and, in particular, should ensure that no other naming opportunity will be afforded more prominent treatment. For example, if a building is to be named with letters 10 inches high over the front door, the agreement might specify that any recognition to any other donors shall never appear in a more prominent location and shall use letters no larger than 6 inches high.

6. Destruction. What happens if the building or space that's named is destroyed and not rebuilt during the term of the naming right? Can the name be transferred to another building or space? Who has to approve a transfer? Can it be done unilaterally by the charity, or must the original donor agree?

7. Publicity. Must all publicity regarding events at the building use the full name of the building? Must the name be used in the formal postal address for the building? Will the building be formally opened with a ceremony at which the individual for whom it's named will have the right to speak or attend? To what extent will the PF or others have the right to pre-approve promotional materials involving the name?

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8. Time limits and morality clauses. More and more, charities are seeking to put time limits on naming rights and to ensure that they have a way out if circumstances change—in particular, if the name on the building becomes a source of concern or embarrassment. Questions regarding acceptance of "tainted money" and promotion of individuals or companies that may become notorious have plagued charities for so long as they've been raising money. However, recent situations, such as those involving the Sackler family, Bill Cosby, Jeffrey Epstein and others, have made charities more sensitive to these concerns and, consequently, more likely to put boundaries on naming rights and ensure mechanisms for escaping these arrangements if necessary. These provisions are highly sensitive and are often carefully negotiated between the donor and/or the PF and the recipient charity. It's important in these negotiations to be sensitive not only to the donor's wishes but also to the needs of the charity to protect its reputation and charitable mission. Compromises may include time limits, objective standards for determining whether to take naming rights away and "cy pres" clauses that require the charity to find a solution that hews as closely as possible to the original plan while addressing the concern requiring the change.

9. Remedies for violation of the agreement. In many jurisdictions, the default position under the law is generally that a donor doesn't have the standing to enforce the terms of a charitable gift unless it expressly provides for that in the agreement. Accordingly, if your client wants to impose some consequences for breach of the agreement, the agreement must clearly state so. Remedies may include reversion of funds; "gift-over" provisions, whereby breach of the agreement results in transfer of funds to another charity; or coordinated alternative solutions. Consider this scenario, which illustrates how granting through a PF may better facilitate a donor's goals than making a gift as an individual: A charity is far more likely, if it decides it needs to take the donor's name off of a room or building, to be willing to give money back to a charitable foundation than it would be to give money back to an individual whose actions have, in the charity's opinion, required removal of the name.

Set clear terms

A naming rights agreement isn't, by its nature, a commercial contract. A certain amount of trust and faith goes into a charitable grant, including one involving naming rights, and many donors are comfortable providing more flexibility to the institutions that they love and generally making the process as seamless as possible. However, naming rights arrangements inevitably involve a lot of money, and circumstances may change. Accordingly, it's appropriate for a donor to want to ensure that the terms of the donation or grant are clear and to seek to impose some reasonable restrictions and accountability on such a transformative gift. When all parties to a naming agreement respect the needs and imperatives of the other, with appreciation for both the donor and the mission of the charity, naming rights agreements can align both sets of goals, providing much needed resources to the charity and cementing the donor's philanthropic legacy for many years to come. ■