



GUIDELINES ON ENDOWMENTS FOR CHARITIES DUE TO COVID-19

The COVID-19 health crisis has caused many Massachusetts non-profit organizations to suffer disappearing revenue streams, and many such organizations are unable to lower their operating costs sufficiently to avoid substantial losses. Non-profits that have endowment funds may be wondering if they can eliminate the donor-imposed restrictions so that the funds become generally available for operations. Answer: not without very good reason and a court order.

The Massachusetts Attorney General's Office ("AGO") recently issued "**Guidance on Endowments for Charities Facing Financial Challenges Due to Covid-19**" to answer some questions about how to use donated funds and what to do if you need to modify a donor-restricted endowment. Before seeking judicial modification, the AGO recommends that charities:

- **Review their funds**

Before a charity seeks to modify the use of a fund, it should verify the restrictions imposed on it. The law imposes strict limitations on the use of donor-restricted endowment funds, which are intended to be invested and used to sustain charities and their missions in perpetuity. On the other hand, board-restricted funds (i.e., funds that a board has voted to treat as if they were endowments for spending purposes, but in reality, are generally available for use by the organization) can be made available by board vote.

- **Seek alternative funding sources**

Organizations are advised that, prior to seeking permission or approval to use donor-restricted endowment funds, they should seek new donations, any available federal funding (e.g., CARES Act, Small Business Recovery Loan Fund and Economic Injury Disaster Loan Program), private foundation grants and any bank financing or other financing options that may be available.

- **Explore options for releasing donor-restricted funds that do not require judicial approval**

If donor-restricted endowment funds appear to be the only resort to keep an organization viable, state law may provide options for accessing those funds without going to court: 1) if the donor is living, seek the donor's consent to modify or release the restriction; 2) increase the endowment spending rate in the current year (subject to continuing fiduciary responsibility and legal requirements, so this will not provide much relief); or 3) for endowments that are more than 20 years old and under \$75,000 in amount, pursue administrative modification by the AGO.

If alternative funding sources are insufficient and the other options that do not require judicial approval fail to meet an organization's needs, the organization may seek judicial approval for modification of a donor-restricted endowment. Generally, to obtain judicial approval, the organization must show that the restriction is no longer lawful, is impracticable, impossible or wasteful, or, in particular circumstances, that the modification will actually further the fund's purposes. The AGO takes the position that both **borrowing** from or making **excess distributions** from a donor-restricted endowment fund require judicial approval.

Such court petitions can be filed in Massachusetts Probate and Family Court. Alternatively, in an attempt to streamline and expedite the process, such court actions may be brought before a single justice of the Massachusetts Supreme Judicial Court. In either event, the AGO must be made a party to the court action. Prior to filing a court petition, an institution is advised to contact the AGO for their assent and be prepared to show: 1) what led to the financial condition, steps taken to correct the situation and what alternatives have been explored; 2) if seeking to borrow from the fund, a business plan for repayment and institutional viability post-crisis; 3) the facts and circumstances that necessitate the request for relief; 4) how the requested relief will further the purposes of the endowment fund and the donor's probable intent (deviation) or are as near as possible to the charitable purposes expressed in the gift instrument (*cy pres*); and 5) that the organization will make periodic reports to the AGO about its financial health, as appropriate.

If your non-profit organization has further questions about how or whether it can use donor-restricted endowment funds to weather the current crisis, attorneys at Bulkley Richardson can help you.



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