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Corporate Philanthropy: Giving Strategies in a Challenging Economy



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Businesses in North Carolina, including law firms, have a long tradition of supporting charitable organizations throughout the State. Our gifts have strengthened a range of organizations including schools and universities, health and human service agencies, and cultural institutions. Corporate philanthropy is also a powerful marketing and employee satisfaction tool that should not be abandoned in difficult economic times. Businesses that achieve the greatest benefits from their philanthropy recognize that a comprehensive philanthropic program involves much more than simply making direct charitable contributions. The most effective philanthropic programs often include employer matching gifts, commercial coventures, and employee volunteer programs. Each of these strategies has specific benefits but also presents unique legal issues.

Corporate Gifts to Public Charities

As would be expected, direct corporate giving is on the decline in the current economic downturn. In spite of this trend, for many businesses the tax benefits derived from charitable gifts provide sufficient incentives to continue giving. Contributions are deductible from a corporation's taxable income, subject to certain limitations and with contributions of assets other than cash subject to special rules. Such charitable contributions are limited to 10% of the corporation's taxable income calculated without regard to several items, including net operating loss carrybacks and capital loss carrybacks. To the extent that a corporation's contributions exceed the 10% limitation, the excess may be carried over for up to five succeeding tax years. Tax benefits associated with charitable contributions made by businesses organized as pass-through entities are realized by the business owners subject to the limitations on deductions applicable to individual taxpayers. Some businesses also make gifts of goods and/or services. The practical and legal considerations of contributions made by pass-through entities and in-kind contributions, however, are beyond the scope of this article.

Corporate gifts of cash typically are made from (1) marketing or other operating budgets, (2) corporate donor advised funds administered by local community foundations, or (3) affiliate foundations.

Gifts from marketing or other operating budgets: Making charitable contributions directly from the business' marketing or other operating budgets is the least administratively burdensome option. One significant risk of this approach, however, is that contributions will not be coordinated or tracked to maximize impact across business lines. Unlike the other giving options discussed below, a key benefit of this approach is the lack of additional out-of-pocket expenses.

Gifts from donor advised funds: Some businesses prefer to make large periodic contributions to a donor advised fund administered by a local community foundation, using that fund to disperse contributions to charities. This approach has the benefit of ensuring that the business is able to easily track the amount and designations of its charitable contributions. Fees charged by a community foundation typically are quite reasonable, particularly when compared with the overhead expense of an affiliate private foundation. It should be noted, however, that the business forfeits all legal control over the assets upon contributing them to the donor advised fund. Technically, the business may only recommend distributions to specific charitable organizations, although as a practical matter any such recommendation would be followed unless the proposed organization was not a validly existing public charity listed in Internal Revenue Service ("IRS") Publication 78.

Gifts from affiliate foundations: Some businesses elect to create affiliated private foundations to manage their charitable giving programs. Such foundations, particularly those that employ professional staff, have the benefit of providing focus and discipline to the corporate giving program. The drawbacks are the expense and administrative burdens associated with creating and operating a private foundation. For example, all routine corporate formalities must be observed. In addition, the foundation must comply with a myriad of tax rules requiring payment of a 1% net excise tax and regulating, and in many instances prohibiting, certain investments and financial transactions with the parent company. The foundation must annually prepare and file a Form 990-PF (annual information return for private foundation) with the IRS. The Form 990-PF is a public document that sets forth in considerable detail information related to the foundation, including the amount contributed to the foundation by the business, the foundation's annual financials and the recipients of the foundation's charitable contributions. Businesses that are not publicly traded or otherwise accustomed to this level of transparency should consider the implications of these public disclosures before creating an affiliate foundation.

Employer Matching Gifts

Corporate matching gift programs have proven to be a popular and successful way to attract and retain employees. Key issues in developing a matching gift policy include defining employee and donee eligibility. Many programs cover full- and part-time employees, as well as retirees and members of the business' board of directors or equivalent governing body. The policy also should clearly define eligible donee organizations, which should be limited to Section 501(c)(3) public charities (excluding, by definition, political organizations and social clubs). Many policies also exclude religious organizations, including schools affiliated with places of worship that are not separately incorporated. Some policies also require that donee organizations not discriminate against any person or group on the basis of age, political affiliation, race, national origin, ethnicity, gender, disability, sexual orientation or religious belief. Such anti-discrimination policies, however well intended, are difficult to enforce and could have the unintended consequence of excluding charities that engage in noncontroversial activities, such as single-sex youth development organizations. Any program should clearly state the maximum annual gift amount that may be matched and define a clear schedule for issuing matching gift payments (typically quarterly or semiannually). Before issuing a matching gift payment, the business should confirm and document (1) the eligibility of the employee, and (2) the tax-exempt status of each donee charity using IRS Publication 78. In light of these and other complexities, many businesses engage the services of outside vendors to administer their matching gift programs.

Commercial Coventures

Commercial coventures are a powerful tool to promote brand awareness and encourage a positive view of a business among consumers. Businesses should proceed with extreme caution, however, when pursuing a national commercial coventure. Commercial coventures encompass most advertising or sales campaigns conducted by a business through which the purchase or use of goods or services offered by the business will benefit, in whole or in part, a charitable organization or charitable purpose. Commercial coventures are subject to various registration, contract, reporting and disclosure requirements in the majority of states and in many localities. Generally, the requirements imposed by the commercial coventure statutes include: (1) registration requirements; (2) either a written agreement between the charity participating in the charitable sales promotion and the commercial coventurer or written consent of the charity; (3) disclosure requirements for all advertising materials; (4) financial record keeping and reporting requirements; and (5) appointment of a state official for service of process. These requirements are burdensome and not consistent across jurisdictions, such that it is rarely cost-effective to undertake a national commercial coventure campaign that is fully compliant with all legal requirements.

Employee Volunteer Programs

Particularly in these difficult economic times, one cost-effective means to achieving a business' philanthropic goals is to encourage underutilized employees to volunteer in the name of the company. These programs have the benefit of very low additional costs to the company, provided that the activities are relatively low risk and proper insurance is procured. Any business undertaking a volunteer program, however, must consider the potential exposure to liability in connection with injuries sustained by employees and third parties.

One frequently asked question in connection with employer-sponsored volunteer programs is whether an employer will be liable for injuries sustained by a volunteering employee. If an employee is injured while taking part in an employer-sponsored volunteer program and brings suit against his or her employer, the suit will be controlled by North Carolina workers' compensation law. Whether an employer will ultimately face liability for a volunteering employee's injuries turns on the question of whether the employee was acting within the scope of employment at the time of the injury.

Another important question is whether an employer would be held liable for harm caused by its volunteering employees. There are at least two theories under which an employer might be held liable for the harm its volunteering employees cause to third parties (including the charitable organization served): (1) *respondeat superior* or vicarious liability and (2) negligent hiring. Whether a *respondeat superior* theory would be successful depends in part on whether the employee was acting within the scope of his or her employment at the time the tort was committed and whether the tort was committed in furtherance of the employer's business. An injured party may also pursue a negligent hiring claim against the employer. In connection with such a claim, an employer may be held liable even if the employee is not acting within the scope of employment. The success of a negligent hiring claim typically turns on whether (i) the employer should have reasonably foreseen the risk caused by hiring or retaining an unfit person, and (ii) a sufficient connection exists between the injured person and the employment in order for the employer to owe a duty to the person injured.

Benefits of Corporate Philanthropy

The internal and external benefits of a comprehensive corporate philanthropy program, in most instances, outweigh the expense and potential exposure to liability. External benefits include improved customer loyalty, enhanced reputation in the community,

increased positive name recognition and brand awareness, new and enhanced relationships with key community leaders, and healthier, more livable and economically stronger communities. Internal benefits also are significant, including creating a competitive advantage in attracting and retaining employees, providing leadership and professional development opportunities for employees, and improving employee morale by providing a common goal and philanthropic purpose. Now is not the time for businesses to abandon their giving programs, but rather is an opportunity to be strategic and creative in their corporate philanthropy.

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Robinson Bradshaw & Hinson, P.A. is a corporate and commercial law firm with more than 125 attorneys. The firm has offices in Charlotte, the Research Triangle and Rock Hill, South Carolina. For fifty years, the firm has consistently provided innovative solutions to its clients' business needs from both a legal and practical perspective. The firm serves as counsel to public and closely held corporations operating in domestic and foreign markets; limited liability companies; limited and general partnerships; individuals; municipal, county and state agencies; public utilities; health care institutions; financial institutions and tax-exempt organizations. For more information on Robinson Bradshaw & Hinson, please visit our Web site at www.rbh.com.