

Dear User: This form is one of the community foundation fund agreements that CMF has drafted for its members and as a service to the field. You may find this form helpful in reviewing your own forms, training new staff, or as a reminder of the applicable laws and the various factual situations that may arise in the future that are prudent to contemplate at fund inception. We hope that you find it useful! If you submit these forms to National Standards, please note that it is the CMF Form on the top of the agreement and track any changes you make to that form, in order to facilitate your review. If you have any questions or comments, please reach out to joertel@michiganfoundations.org. Thank you!

**COUNCIL OF MICHIGAN FOUNDATIONS**

**DONOR ADVISED FUND AGREEMENT GUIDESHEET**

A Donor Advised Fund (DAF), whether or not endowed, typically is established at the request of a Donor to the Community Foundation (CF) and must provide support for charitable purposes. The recommendations must be advisory only, and the CF must be free to reject any or all recommendations. It is prudent to keep track of times when the CF has said “no” to requests in case it needs to justify to the IRS that it exerts proper discretion and control over the funds.

A few things to keep in mind with DAFs (this is not an exhaustive list but deals with some of the most common questions CMF has received over the years):

* The DAF definition was enacted as part of the Pension Protection Act of 2006 and is found in Internal Revenue Code (IRC) Section 4966. Exceptions to the definition of DAF include a fund benefiting a single, identified organization (donor designated fund), or a scholarship fund where the selection committee is appointed by the CF and donor/advisors (and those related to them) don’t control (i.e., make up less than half of the votes of) that committee (important because DAFs cannot make grants to individuals). If there are many donors so that no donor “has or reasonably expects to have” advisory privileges, then that is also not a DAF.
* In most cases, giving circles will not be DAFs due to the failure to meet the above definition (there are typically several, unrelated donors who each have just 1 vote on how the funds will be distributed).
* DAFs may not:
	+ Make any grant to an individual.
	+ Make any grant to a non-charity without exercising expenditure responsibility (as set forth in IRC 4945(h)).
	+ Make a grant to a Type III non-functionally integrated supporting organization or to a Type I, Type II, and functionally integrated Type III supporting organization if the donor or any advisor directly or indirectly controls the supported organization, without exercising expenditure responsibility.
	+ Make any grant for non-charitable purposes.
	+ Grants to private non-operating foundations are discouraged and may be non-compliant if some donor/advisor benefit (or control) is involved.
* DAFs may make grants to other DAFs and to the community foundation that sponsors the DAF.
* There may be no benefits back to any donor, advisor, outside investment advisor to the Fund, any of their family members, or 35% owned (with some exceptions) entity of any of them (“Disqualified Persons”). For these purposes, family members include spouse, ancestors, children, grandchildren, great grandchildren, brothers, sisters and the spouses of any of them.
	+ Proposed DAF regulations Notice 2017-73 provide, generally, that a CF will not be held liable if a DAF is used to satisfy a binding pledge so long there is no mention of a pledge in the grant agreement. This does NOT mean that DAFs may now be used to satisfy binding pledges; rather that the CF does not have to police whether that is the case.
	+ Among other things, these proposed regulations would look through the DAF to the donor when calculating the public support test (so that donors would not be able to avoid causing a charity to “tip” into private foundation status with a large grant by passing the grant through the CF).
* Payments to DAF donors/advisors reimbursing for fundraising activities are not permitted. [It is typically not recommended that the CF reimburse the donor/advisor in exchange for a grant from the DAF to the CF in an equal amount.]
* It is unclear whether a charity that is the DAF donor may advise that grants be made back to the founding charity; while it seems an odd result, the regulations do not except charities from the “no benefits to donor” prohibitions.
* Under IRC 170, in addition to other requirements (including “no goods or services provided” language), the donor acknowledgement for DAF funds must be a “contemporaneous written acknowledgement” that states that the CF has “exclusive legal control over the assets contributed.”
* Private foundations are not prohibited from making grants to DAFs, but it is believed that if the IRS perceived it to be used to avoid the 5% minimum distributable amount (under IRC 508(e)), there may be negative consequences (the IRS may find a way to impose a penalty, such as for failure to distribute the 5%, although we do not know of this ever happening; it is merely speculation). As a general rule, private foundation grants to DAFs should be paid out by the end of the private foundation’s next fiscal year at the latest.
* Private foundations may terminate their status into a DAF. However, in order to avoid punitive termination taxes under IRC 507, private foundations must seek tax and legal advice when terminating.
* For endowed funds, it is helpful that your applicable policy or the agreement contemplates when the corpus may be invaded, but only as determined by the Community Foundation’s Board.
* QCD’s may not be made into DAFs (or supporting organizations). The donor would have to recognize income and then take a charitable deduction (as opposed to not having to recognize the income, but also not having the deduction as is the case in a QCD).
* While under Michigan’s UPMIFA statute, donors may consent to change the terms of a gift agreement, there are concerns under federal law about too much ongoing donor control over the funds, which could cause the gift to be seen as not completed (thereby denying the charitable deduction) and perhaps not a component fund of the CF. While there isn’t much official guidance, the general rule is that it is acceptable to loosen up restrictions on grants, but not to make them more restrictive. Given the disfavored position of DAFs politically, it is not advisable to agree to change a fund from another form to a DAF.
* The law does not provide for a requirement for, or prohibition against, permitting successor advisors. Common practice is to permit one successor generation, and then the funds become undesignated funds of the CF. However, that may not be palatable to some donors, and given that donors will talk, it is advisable to have an objective practice that applies to all DAFs (or equally among those of the same size).
* Beware of appointing too many advisors – it is important that the CF be certain as to whose advice it may rely upon (see sample language used in this model).
* Please consult your legal/tax advisors if the donor wants to put restrictions on the gift beyond what is typical (naming rights, charitable uses, charitable recipient, endowment).
* For any non-endowed Fund (or even regarding dipping into the corpus of endowed funds), it is good to have a policy in place in the event that donors request to distribute a large amount of assets from the Fund. CF liquidity could be an issue, and there could be penalties if investments have to be liquidated. Also, the CF should think about precedent setting as donors will very likely tell other donors that the CF permitted them to do so.
* Donors making testamentary gifts may like the certainty of having the fund established to their specifications without having to rely upon the description in their estate plan; the estate plan should simply then note that the gift is going to the CF to be placed in the Fund. See separate document “Testamentary Gifts Clauses.”
* One CMF member reported that they found that many of their donors get bored / forget they have a DAF / move out of the area within about 10 years. So, they discuss sunsetting DAFs with their donors. They say that 20 years gives them a buffer as a starting place in the conversation. If desired, you could add language to the "Recommendation for Distribution" section, where it talks about advising privileges, typically in place of a successor advisor: “Upon the earlier to occur of: (i) Donor(s) becoming unable or unwilling to serve as Advisor, or (ii) 20 years following the date of [this Agreement][receipt of the establishing gift], the Foundation will [move the Fund to unrestricted assets][grant remainder of the Fund to [insert charity], so long as it is at that time a public charity in good standing][provide for any other alternative].”
* Section 7 – Explanation of Miscellaneous (aka, “Legal boilerplate” or “what the lawyers love and foundations highly dislike”)
	+ *Governing Law; Venue*. If both the donor and the CF are residents of the same county, then governing law and venue are likely not needed as that will be a given (it doesn’t hurt to keep it in, just in case, however!)
	+ *Entire Agreement; Beneficiaries; Counsel*. This is language so that (i) no representations or assertions made orally or otherwise outside of the “4 corners” of the fund agreement can be brought into evidence; (ii) no one other than donor and the CF have any right to claim that they are entitled to benefits under the agreement; and (iii) donor is only relying on donor’s own advisors for advice. This is particularly key because donors always ask CF’s for tax advice, and we usually give it to them, hopefully with a disclaimer, but let’s be safe in the fund agreement.
	+ *Due Authorization; Electronic Signatures;Counterparts*. This seems like unnecessary legal mumbo jumbo, but it’s good to have in any agreement.
* Investment of non-endowed funds - by nature, non-endowed funds have a much shorter time period and thus less time for the value to recover in the event of a market crash. Foundations should consider establishing a formal policy that makes it clear whether these funds will be invested in the endowment investment pool or placed in a more secure investment pool. It should be noted in either case the donor does not control the investment of their gift. For foundations placing these types of funds in their endowment investment pool, they should make the donors aware of potential losses of principal by including an attachment with the donor’s acknowledgement of the investment risk.

*Thank you to Indiana Philanthropy Alliance and to the CMF members who assisted in this project: Johanna Allen (Community Foundation of Greater Rochester); Nancy Boxey (Lapeer County Community Foundation); Kathy Dickens (Four County Community Foundation); Dennis Fliehman (Capital Region Community Foundation), Laura Heintzelman (Manistee County Community Foundation), Brett Hunkins (Community Foundation of Greater Flint), Jamie Hunter (Ann Arbor Area Community Foundation).*

*This sample agreement is for illustrative purposes only. The document should be reviewed by your legal counsel to be certain that it is appropriate for your charitable goals and will accomplish the purposes you intend.*

**FORM OF**

**DONOR ADVISED FUND AGREEMENT
BETWEEN**
[Insert Name of community foundation]
**AND**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“*DONOR*”)

**[ENDOWED][UN-ENDOWED]**

 **THIS AGREEMENT** (the “***Agreement***”) is made and entered into as of \_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_, by and between [insert name of community foundation], a Michigan nonprofit corporation with tax exempt status as a public charity (the “***Community Foundation***”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (together, “***Donor***”).

1**. Irrevocable Gift; Fund Assets; Name.** Donor hereby transfers irrevocably to the Community Foundation the property described in the attached Exhibit A to establish a Donor Advised Fund to be known as the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Fund (the “***Fund***”). Subject to the right of the Community Foundation to reject any particular gift, from time to time the Community Foundation may accept additional gifts of property to be added to the Fund. All gifts, bequests, and devises to the Fund shall be irrevocable once accepted by the Community Foundation and shall become assets of the Community Foundation, which has exclusive legal ownership of, and control over, them and any income thereon.

2. **Donor Recommendations as to Fund Distributions; Successor Advisors.**  Subject to Section 3 hereof, Donor and/or one or more advisors named in the attached Exhibit A may from time to time make recommendations to the Community Foundation for one or more distributions to qualified recipients for charitable purposes that are consistent with the Community Foundation’s mission. If there are more than one Donor/Advisor listed, then the Community Foundation may rely upon the recommendation of any one of them regarding distributions. [*Optional*: The Donor may designate a Lead Advisor to communicate recommended distributions from the Fund; if no Lead Advisor is designated, then one or both Donor(s) shall be deemed a Lead Advisor.][Note to also designate Lead Advisor from Successors, if so desired.] As required by law, all recommendations from Donor or the designated advisor(s) shall be solely advisory, and the Community Foundation may accept or reject them.

Upon the death or incapacity of Donor, then the Successor Advisor(s) noted on Exhibit A shall have the ability to recommend distributions from the Fund. Upon the death, incapacity, or failure to communicate (after 12 months of attempts by Community Foundation, to the contact information supplied by Successor Advisor(s)), then the Fund shall [*Optional*: be added to the unrestricted assets of the Community Foundation][be distributed in the following percentages to the following charities [insert], in which case if any of those organizations is not a qualified recipient in the sole discretion of the Community Foundation, those assets will be distributed to the other organizations noted on a *pro rata* basis].

[*Optional*: In accordance with Community Foundation policy, the Fund will become a general unrestricted asset of the Community Foundation if it ever reaches the Minimum Fund Size established by our Board of Directors, which is currently set at $\_\_\_\_\_\_\_. ]

3. **Limitations on Distributions.** [*Alternatively, these could be in a DAF policy given to donors or attached to the Agreement.*] Subject to the other terms and conditions of this Agreement and applicable law, distributions from the Fund:

1. may be made only for charitable purposes within Sections 170(c) of the Code, as determined in the sole discretion of the Community Foundation;
2. may not be made to non-qualified recipients. [If a desired gift involves the exercise of expenditure responsibility, the Community Foundation may charge an additional fee, which will be disclosed to Donor/Advisor(s)];
3. may not provide any benefit back to Donor, any Advisor (including any outside investment advisor to the Fund), or related entity or individual (other than recognition as a donor);
4. [if endowed] The Fund is endowed, meaning that Donor intends that it exist into perpetuity. The amount of the Fund that will be appropriated for expenditure or accumulated is subject to the Community Foundation’s [Endowment Policy][Spending Policy], which is subject to change by the Community Foundation from time to time, and to the Community Foundation’s variance power (as discussed in Section 4 below)

4. **Applicable Policies; Component Fund; Variance Power.** The Fund shall be subject to the Community Foundation’s Articles of Incorporation, Bylaws, Inactive Funds Policy, and other Community Foundation policies that are subject to change from time to time. It is intended that the Fund will be a component fund of the Community Foundation which shall have all powers of modification and removal specified in United States Treasury Regulation section 1.170A-9(f)(11)(v)(B) (or corresponding provisions of any subsequent federal tax laws), including the authority to vary the terms of any gift if continued adherence to any condition or restriction is in the judgment of the Community Foundation’s Board of Directors unnecessary, incapable of fulfillment, or inconsistent with the charitable or other exempt purposes of the Community Foundation or the needs of the community it serves. Although the Fund assets will be accounted for separately for purposes of reporting to Donor(s), such assets shall not be deemed trust property of a separate trust. This Agreement will be interpreted in a manner consistent with the foregoing intention and so as to conform to any applicable tax laws and regulations.

5. **Investment of Fund Assets**. The Community Foundation shall have all powers necessary, or in its judgment desirable, to carry out the purposes of the Fund including, but not limited to, the power to retain, invest, and reinvest the assets of the Fund and the power to commingle the assets of the Fund for investment purposes with those of other funds or the Community Foundation’s other assets. [Optional: You may make recommendations to the Community Foundation for investment of your Fund as described in [insert]; as with grant recommendations, investment recommendations are advisory in nature only.]

6. **Costs of the Fund**. It is understood and agreed that the Fund shall share a fair portion of the total investment and administrative costs and expenses of the Community Foundation. Those costs and expenses charged against the Fund shall be determined in accordance with the then- current administrative fee policy identified by the Community Foundation, as such policy may be amended by the Community Foundation from time to time. Any costs and expenses incurred by the Community Foundation in accepting, transferring, or managing property donated to the Community Foundation for the Fund, including without limitation the Community Foundation’s costs and expenses (including reasonable attorneys fees) of any claim or proceeding with respect to the Fund, also shall be paid from the Fund.

7. **Miscellaneous.**

a. Governing Law; Venue. This Agreement shall be governed by the laws of the State of Michigan (exclusive of its choice of law rules), and the federal laws of the U.S.  The parties agree that any litigation arising between the parties in relation to this Agreement shall be initiated and maintained in the Circuit Court of the County of \_\_\_\_\_\_\_\_\_\_\_, Michigan, or the U.S. District Court for the \_\_\_\_\_\_\_\_\_\_\_\_ District of Michigan, and the parties hereby irrevocably submit to the exclusive jurisdiction and venue of such courts.

b. Entire Agreement; Beneficiaries; Counsel*.* This Agreement contains the entire understanding of the parties, and there are no other agreements or understandings, written or oral, in effect between the parties relating to the Fund. Nothing in this Agreement will be construed as giving any person, other than the parties hereto, and their respective successors and permitted assigns, any right, remedy or claim under or in respect of this Agreement or any provision hereof. The parties may have discussed tax and legal consequences of this Agreement, but each may rely only upon the advice of its own advisors.

c. Due Authorization; Electronic Signatures/Counterparts. The undersigned are duly authorized and competent to enter into this Agreement, which may be executed and delivered in two or more counterparts, including by electronic transmission, each of which shall be deemed an original and all of which together shall be deemed to constitute one and the same Agreement. This Agreement may be executed by a handwritten signature or by an electronic signature. Where the Donor has delivered this Agreement by electronic transmission, it shall forthwith deliver an originally executed copy of this Agreement to the Community Foundation, but the failure to do so shall not affect the validity or enforceability of this Agreement.

d. Publicity. [If the Community Foundation does not use an intake form, then discuss here anonymity versus publicity; you can also make this a check-the-box, per the below.]

The Community Foundation honors and recognizes our donors’ names in publicity about the Community Foundation unless they wish to remain anonymous. Please check the box below that best describes your wish regarding publicity.

 □ You may include my name and gift in Community Foundation publicity

 □ Please do not list my name in Community Foundation publicity.

**[signature page follows]**

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

**DONOR:**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name

**COMMUNITY FOUNDATION**

[INSERT NAME]

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**EXHIBIT A**

**LIST OF INITIAL DONATIONS TO FUND**

**ADVISORS AND SUCCESSOR ADVISORS**

Cash: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Publicly Traded Securities:

Other:

**ADVISORS**

Initial Advisor(s):

[Be sure to collect names, address, email, phone]

Successor Advisor(s):

[Distribution after last advisor: ]