

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**

**DISCRETIONARY FUND AGREEMENT GUIDESHEET**

A Discretionary (or “Undesignated”) Fund typically is established when the Donor wants to rely upon the expertise of the CF in determining how to distribute the funds. A few things to keep in mind with Discretionary Funds (this is not an exhaustive list but deals with some of the most common questions CMF has received over the years):

* Query whether a fund agreement is actually needed. If the Fund is not endowed, then with any other type of charity, it would simply be a donation to the charity (without fund accounting and with no fund reporting beyond the year of the donation, although donors typically continue to receive the recipient’s annual report in hopes of encouraging future donations).
	+ However, many donors want the fund reporting and their names to show up in the CF’s annual report, year after year, as holding funds at the CF.
	+ This is very useful for testamentary gifts, as noted in the next bullet.
* Dennis Fliehman, CEO of Capital Region Community Foundation, has developed language to use in establishing testamentary gifts. Donors often like the certainty of having the fund established to their specifications without having to rely upon the description in their estate plan. See separate document “Testamentary Gifts Clauses.”
* 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. Therefore, it is prudent to ensure that donors truly want a discretionary fund and are aware that it cannot be changed to a DAF at a later time.
* If donors intend to help fundraise for the Fund, the CF should have them abide by its Donor Initiated Fundraising Policy.
* For endowed funds, it is helpful that your applicable policy or the agreement contemplates when the corpus may be invaded – such as acquisition or renovation of a capital asset or to assist with unexpected financial needs, but only as determined by the Community Foundation’s Board.
* 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.
* 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 Area 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**

**DISCRETIONARY FUND AGREEMENT
BETWEEN**
[Insert Name of community foundation]
**AND**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ [insert donor name]

**[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 \_\_\_\_\_ (“***Donor(s)***”).

1**. Irrevocable Gift; Fund Assets; Purpose; Name.** Donor hereby transfers irrevocably to the Community Foundation the property described in the attached Exhibit A to establish a Discretionary 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 the earnings thereon.

Donor intends to rely upon the expertise and discretion of the Community Foundation in making distributions from the Fund for the Community Foundation’s charitable purposes in accordance with Section 170(c) of the Internal Revenue Code of 1986, as amended (the “***Code***”) (“***Charitable Purposes***”).

2. **Fund Distributions.**  [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).][*Optional for endowed*: Assets in the Fund will accumulate until the Fund balance reaches $\_\_\_\_\_; *provided, however*, that if the Fund balance does not reach that amount by [insert date], then annual distributions will begin at that time.]

Distributions from the Fund will be made from time to time for the Charitable Purposes at the discretion of the Community Foundation.

3. **Applicable Policies; Component Fund; Variance Power.** The Fund shall be subject to the Community Foundation’s Articles of Incorporation, Bylaws, and other Community Foundation policies that are subject to change from time to time and [available on the Community Foundation’s website][available upon request]. 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.

4. **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.]

5. **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.

6. **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 (including Designee), 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, engaged advisors and neither shall have liability to the other for any such discussion, opinions or advice.

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. [Optional: 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.

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

**DONOR(s):**

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

Name

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

Name

**COMMUNITY FOUNDATION**

[INSERT NAME]

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

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

**EXHIBIT A**

**INITIAL FUND ASSETS**

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

Publicly Traded Securities:

Other: