



# NACUA NOTES

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## TOPIC:

### SCHOLARSHIP RESTRICTIONS

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## INTRODUCTION:

Private donors often desire to attach restrictions to scholarships when they make their gifts to colleges and universities. For public and private institutions receiving federal funds, various federal statutes, including Title VI of the Civil Rights Act of 1964<sup>[2]</sup> and Title IX of the Education Amendments of 1972<sup>[3]</sup>, determine whether and how some of those restrictions may be accepted.<sup>[4]</sup> For public institutions, the Equal Protection Clause of the U.S. Constitution<sup>[5]</sup> also limits the permissibility of certain restrictions. Finally, state laws or institutional policies may restrict an institution's ability to accept funds for scholarships that are limited to certain protected classes of individuals. Even when there is no state involvement or federally regulated activity (i.e., a private institution receives no federal funds), where a private institution is free to accept any type of restricted gift under that institution's own policies,<sup>[6]</sup> accepting a gift with a restriction that is against public policy could place the institution's tax exemption at risk.<sup>[7]</sup>

This Note will discuss how various restrictions on private donations may be accepted by public and private institutions of higher education that receive public funds directly or indirectly, as well as how to remedy situations in which an institution accepted a gift restriction with which it cannot (or can no longer) legally comply.<sup>[8]</sup>

# DISCUSSION:

## I. Governing Laws and Policies

### A. Federal Laws

Whether a college or a university can lawfully accept and administer a restricted scholarship depends on the terms of the restriction, the governing laws, and the level of scrutiny that applies based on the nature of the institution and the type of restriction at issue. The U.S. Supreme Court has devised three levels of scrutiny for potential discrimination that correspond to certain types of classifications: strict scrutiny, intermediate scrutiny, and the rational basis test. These classifications were developed in the context of the Equal Protection Clause and, in that context, would only be applicable to public universities. However, Title VI has been held to be coextensive with that Clause, thus rendering an equal protection analysis applicable to private universities, at least with respect to scholarship restrictions based on race, color, and national origin.<sup>[9]</sup> Moreover, although Title IX has not expressly been held to be coextensive with the Equal Protection Clause, the Supreme Court has recognized that Title IX is modeled after Title VI.<sup>[10]</sup> There is some disagreement among the courts whether this means that Title IX claims should be viewed as subject to strict scrutiny, the standard applicable to Title VI claims, or to intermediate scrutiny, the standard applicable to sex discrimination claims under the Equal Protection Clause.<sup>[11]</sup> Notwithstanding this ambiguity, public and private institutions alike should generally analyze scholarship restrictions pursuant to the framework adopted by the U.S. Supreme Court in analyzing Equal Protection claims, that is: the framework of strict scrutiny, intermediate scrutiny, and rational basis scrutiny.

Strict scrutiny applies when a classification is based on race/ethnicity or national origin.<sup>[12]</sup> Strict scrutiny requires that the classification be narrowly tailored to promote a compelling governmental interest, such as remedying past discrimination or promoting the educational benefits of diversity.<sup>[13]</sup> This is true even if the classification is intended to assist, rather than impede, an individual or group. The Supreme Court has held that there is no legal difference between these purposes.<sup>[14]</sup>

Intermediate scrutiny is generally viewed as applicable to classifications based on sex<sup>[15]</sup> and marital status. The name “intermediate scrutiny” aptly describes what it is: a test between strict scrutiny and the rational basis test. The U.S. Supreme Court says that a classification “must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives.”<sup>[16]</sup> Important governmental objectives can include rectifying a disadvantage.

Under the third test, rational basis, the classification must only be “rationally related to a legitimate governmental purpose.”<sup>[17]</sup> In such cases, in which a statutory (rather than a constitutional) provision is at issue, the “general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>[18]</sup> Accordingly, statutory classifications must be upheld if there is “any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>[19]</sup> Classifications such as those based on age, for example, are subject to rational basis review.<sup>[20]</sup>

## **B. Other Considerations**

When considering whether to accept private donors' proposed scholarship restrictions, institutions must also take into account other considerations, such as state laws, institutional policies, and issues related to foundations.

### **1. State Law**

In general, states have adopted antidiscrimination statutes that prohibit discrimination on the basis of the statuses protected under federal law, and sometimes also on other grounds.<sup>[21]</sup> In addition, several states have now adopted, typically by ballot initiative, state constitutional amendments or statutes that prohibit discrimination or preferential treatment based on certain classifications in public universities.<sup>[22]</sup> The categories of classifications prohibited in these state constitutional amendments or statutory provisions include, but are not necessarily limited to, race, ethnicity, national origin, sex, and color. This Note will focus on federal legal issues, but institutions should consider whether there are any state laws that would impose additional restrictions.

### **2. Institutional Policies**

An institution's own policies can also create additional requirements or protections that must be considered. For example, the University of Michigan Board of Regents' Bylaw on nondiscrimination protects individuals based on gender identity or gender expression, as well as "height, weight, or veteran status."<sup>[23]</sup> Therefore, institutions should thoroughly review their nondiscrimination policies to ensure that scholarship administration does not conflict with any protections in institutional nondiscrimination policies.

### **3. Foundations**

Some institutions have foundations that accept gifts on behalf of the supported institution. In some cases, the foundations are considered to be subject to the same laws as the supported institution, particularly if the relationship with the supported institution is quite entangled. Counsel, then, must consider what laws and cases apply to their particular foundations.

## **II. Analyzing Scholarship Restrictions**

### **A. Strict Scrutiny Classifications**

#### **1. Race/Ethnicity**

Donors sometimes propose scholarships that are restricted by race, for example, by endowing a scholarship for "meritorious African American students with financial need." Proposed restrictions based on race raise serious constitutional and statutory issues.

Under *Grutter v. Bollinger*,<sup>[24]</sup> which addressed university admissions, race can be considered as one of many factors in an individualized, holistic admissions process that is designed to promote the educational benefits of diversity. The U.S. Supreme Court confirmed in *Fisher* <sup>[25]</sup> that the educational benefits of diversity remain sufficiently compelling to justify the narrowly tailored consideration of race in university admissions. Following a remand to the Fifth Circuit, *Fisher* returned to the Supreme Court,<sup>[26]</sup> which again confirmed that "a university may institute

a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity.”[\[27\]](#)

As noted above, the *Grutter* and *Fisher* cases both pertained to university admissions, and in *Grutter*, the Court expressly noted that “context matters” when assessing whether the use of race is constitutionally permissible.[\[28\]](#) The Supreme Court has yet to hear a case involving university consideration of race in the context of financial aid, however, and there is a dearth of lower court consideration of this issue as well. One notable exception is the case of *Podberesky v. Kirwan*,[\[29\]](#) in which the Fourth Circuit concluded that the University of Maryland had provided insufficient justification to demonstrate that its Benjamin Banneker Scholarship, which was limited to African American students, was needed to remedy the present effects of past discrimination (and thereby satisfy strict scrutiny).[\[30\]](#)

The U.S. Department of Education Office for Civil Rights (OCR) has issued guidance on race-based scholarships and scholarships restricted by national origin.[\[31\]](#) This guidance, now over 20 years old, permits colleges and universities to award financial aid based on race or national origin to remedy the effects of past discrimination or to increase student body diversity, provided that the award is narrowly tailored to achieve either of these objectives.[\[32\]](#) *Podberesky* (which was decided just after the guidance was issued) is not inconsistent with the OCR Guidance, but nonetheless demonstrates that, for the Fourth Circuit at least, the underlying justifications for the race-based restrictions will be viewed with exacting scrutiny.

Colleges and universities should therefore be aware that such restrictions, no matter how well-intentioned, may be constitutionally impermissible or otherwise impermissible under federal or state law. The most prudent course of action is to structure the gift in a race-neutral manner that still honors the donor’s intention.

### **Drafting**

It is safest from a legal risk perspective to target experience and goals, including areas of study, not race in and of itself. For example, the instrument might say:

“The Donor desires that when awarding this scholarship special consideration be given for students who have demonstrated experience in or commitment to working with historically underserved or underprivileged populations.” Or the agreement might focus on “experience living or working in diverse environments.”

Another method of drafting, using *Grutter* and *Fisher* as guidance, is to consider race in an individualized, holistic scholarship process, as one of many factors in their efforts to promote the educational benefits of diversity.[\[33\]](#) Depending on the mission of the program involved and the circumstances, the institution might want to consider, in addition to (or instead of) race, factors such as the following:

- First generation in one’s family to attend college or graduate school
- Socioeconomically disadvantaged students (includes a variety of criteria)
- Individuals who have overcome substantial educational or economic obstacles
- Attendance at minority-serving institutions or at other universities with which the institution has established a pipeline or feeder program

- Membership in organizations open to all but whose missions seek to advance the needs of populations historically underrepresented in higher education.

Finally, the pool and match method, discussed in detail below, may be considered to permit the award of scholarships that would otherwise be viewed as race-conscious, particularly for public educational institutions in states with statutes prohibiting discrimination or preferential treatment based on race, though institutions should be aware that the pool and match method has not been tested by the courts.

## 2. National Origin

Donors sometimes desire to restrict scholarships based on national origin, for example, by donating funds to “cover the educational expenses of promising students of Colombian descent.” Again, such restrictions will be subject to strict scrutiny.

According to the Equal Employment Opportunity Commission, national origin discrimination means treating someone differently because that individual (or his or her ancestors) is from a certain place or belongs to a particular national origin group.<sup>[34]</sup> The place is usually a country or a former country. In some cases, though, the place has never been a country *per se*, but is closely associated with a group of people who share a common language, culture, ancestry, and/or other similar social characteristics; Kurdistan is an example of such a place. Such a “national origin group” can include larger ethnic groups, such as Hispanics or Arabs, and smaller ethnic groups, such as Kurds or Roma (previously referred to as “Gypsies”).

As stated above, the OCR Guidance on Non-Discrimination in Federally Assisted Programs applies to restrictions based on national origin, although even when implemented pursuant to one of the permissible justifications set forth in the guidance, such restrictions will still be examined critically.<sup>[35]</sup> In the years since the civil rights statutes were enacted, only a couple of U.S. Supreme Court decisions have expressly scrutinized distinctions based on national origin. In *Espinoza v. Farah Manufacturing Company, Inc.*, the Court concluded that national origin is in fact a suspect class and that the term refers “to the country where a person was born or, more broadly, the country from which his or her ancestors came.”<sup>[36]</sup>

Because national origin is a suspect classification subject to strict scrutiny, institutions should again be cautious about accepting any scholarship restricted on such a basis and should instead endeavor to structure the scholarship in a more neutral manner if at all possible.

### **Drafting**

Strict scrutiny makes it difficult to defend awarding scholarships to students because they or their ancestors are from a particular country. A neutral method is to instead require certain studies or knowledge, both of which can be acquired, rather than being born into a particular national origin group, which is an immutable characteristic. For example, recipients might be required to have knowledge of the culture and language of a particular ethnic group. Another option might be to broaden the geographic scope of the focus to encompass a greater area, as discussed in the section below titled “Exception to Strict Scrutiny – International Students.”

### 3. Alienage (Citizenship)

Unlike national origin restrictions, where people are classified based on a country of origin or affiliation with a particular ethnic group, alienage refers to citizenship. For example, a donor may wish to restrict a scholarship to “U.S. citizens” only.

The U.S. Supreme Court has recognized alienage as a suspect classification under the Equal Protection Clause of the Fourteenth Amendment. “It has long been settled . . . that the term ‘person’ [in the Equal Protection Clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.”<sup>[37]</sup>

Alienage in scholarships was considered in a U.S. Supreme Court case involving a New York state statute that barred resident aliens from eligibility for state financial assistance. The Court in *Nyquist v. Mauclet*<sup>[38]</sup> held that the statute violated the Equal Protection Clause. In reaching its conclusion, the Court provided a method for drafting when donors want to restrict their gifts to U.S. citizens – specifically, scholarships may instead be restricted to “U.S. citizens or resident aliens” (“permanent residents” can be substituted for “resident aliens”). This excludes people who are in the U.S. without documentation to support their immigration status.

#### **Drafting**

As set forth in *Mauclet*, draft the eligibility criteria such that “U.S. citizens or resident aliens” or “U.S. citizens or permanent residents” qualify.

### 4. Exception to Strict Scrutiny: International Students

“International students” is not a group that has been expressly found to be entitled to heightened constitutional protection. Moreover, it is certainly the case that institutions regularly distinguish between international and domestic students—for example, in the assessment of tuition—as do federal financial aid regulations, which generally do not permit international students to receive federal student aid.<sup>[39]</sup> One might view creating a general category of “international students” as comparable to the approach, discussed above, of broadening the geographic scope of the focus to avoid a national origin issue. Consequently, it appears likely that donors can designate the broad, general category of “international students” without issue.

#### **Drafting**

Scholarships may be designated for “international students”. For donors who want a restriction for a particular country, preferences based on experience and goals are best to avoid running afoul of the national origin concerns discussed above. For example, one or more of the following (using Poland as the example) would work:

- Students who have had coursework in Polish studies, and/or
- Students who have a demonstrated knowledge of Polish history or culture, and/or
- Students who have made a commitment to enhance Polish culture.

In limited situations, it may be acceptable to allow a requirement that students have graduated from high school, or college in the case of graduate students, in a particular country. The country should be a relatively open one so that people not born there can attend high school or college, and the students would not all be of the same race, ethnicity, or national origin. Hong Kong is one example of where this approach would currently work. In such cases, it is critical that the drafting instrument distinguish the eligible class in such a manner that it cannot be confused with national origin. If the designation narrows to a region of the world, or a list of particular countries, that restricts enrollment of foreign students, national origin may become an issue and strict scrutiny would apply.

## **B. Intermediate Scrutiny Classifications**

### **1. Sex**

Sex-based scholarship restrictions are one of the most common restrictions affixed to donations. For example, a donor may wish to endow a scholarship for “female students pursuing STEM degrees.”

Title IX’s regulations prohibit scholarships that are restricted on the basis of sex, with several exceptions. The most significant exception is that an institution may administer financial aid “established pursuant to domestic or foreign wills, trusts, bequests or similar legal instruments . . . which require[s] that awards be made to members of a particular sex specified therein; Provided, [t]hat the overall effect of the award . . . does not discriminate on the basis of sex.”[\[40\]](#) The Title IX regulation also includes procedures to follow to ensure that the financial awards are not discriminatory.[\[41\]](#) The Department of Education has apparently informally agreed that this regulation also applies to lifetime gifts as well.

#### **Drafting**

The procedures set forth in the Title IX regulation referenced above seem to sanction the “pool and match” method of awarding financial aid that is described further below. Provided that these procedures are followed, gift documents can specify that the gift is to be limited to female students or, in some cases, male students. Both scenarios are acceptable for athletic teams within the limits of the Office for Civil Rights’ athletic financial assistance requirements,[\[42\]](#) where membership on the team (vs. sex itself) is the primary criterion. For example, a donor might create a scholarship for members of the institution’s women’s swimming team.

If, however, a donor wants the scholarship to be used for recruiting or is unwilling to have the scholarship simply replace the funding that the institution would already be awarding to a given student, the intermediate scrutiny standard must be met before any sex-specific factors may be used. For institutions that cannot specify sex as one of the factors it uses in making financial aid awards, favoring students of a particular sex in the governing document would create legal risk. In certain situations, the document might specify or give preference to students who are members of organizations (usually at the institution) whose membership tends to be predominantly female or male. However, membership in those organizations must not be strictly limited on the basis of sex.

## 2. Marital and Parental Status

On occasion, a donor may propose a scholarship with eligibility criteria that implicates restrictions based on marital status or parental status. For example, a donor may want to endow a scholarship “for single mothers.”

Discrimination based on marital or parental status is prohibited in the context of employment<sup>[43]</sup> and discrimination based on parental status is prohibited by Title IX’s regulations.<sup>[44]</sup> Marital status has often been termed an example of a “sex-plus” classification because it is based on sex plus an additional factor (that is, whether an individual of the given sex is married or not)—for example, where an employer’s policy requires that all female employees who marry resign but does not require the same of male employees who marry. As marriage becomes less defined by the sexes of the participants, this “sex-plus” analysis will become less useful. Regarding parental status, Title IX prohibits colleges and universities that receive federal funds from conditioning financial assistance “on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom”<sup>[45]</sup> or otherwise adopting rules or regulations that treat students differently based on actual or potential parental status.<sup>[46]</sup>

### **Drafting**

For various reasons, including the changing legal landscape in this area, institutions should be cautious when accepting gifts with restrictions based on marital or parental status for scholarships. Absent state law or other prohibitions, using the “reasonably necessary” standard of Title VII likely has the least risk for determining if a marital status restriction is acceptable. “Caregiver” is a term that may be acceptable under this standard, as it can apply to individuals of any sex.

## C. Rational Basis Classifications

### 1. Age

Periodically, donors structure proposed scholarships with age restrictions. For example, a donor may wish to endow a scholarship for “promising students who have not yet reached the age of majority” or “for senior citizens over 65-years-old who are returning to college to obtain a degree.”

The Age Discrimination Act of 1975<sup>[47]</sup> is designed to prohibit discrimination on the basis of age in any program or activity receiving federal financial assistance. The statute says that no person shall “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under” such programs.<sup>[48]</sup> The Act incorporates the rational basis test. Therefore, it is not a violation when “such action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity; or the differentiation made by such action is based upon reasonable factors other than age.”<sup>[49]</sup>

### **Drafting**

To avoid using express age-based restrictions or age references such as “older,” scholarships that target such students might refer to them as “returning” students or require a minimum number of years since they last attended high school or college.

## **2. Disability**

The Rehabilitation Act of 1973<sup>[50]</sup> and the Americans with Disabilities Act of 1990<sup>[51]</sup> each prohibit discrimination on the basis of disability. According to the U.S. Department of Education’s Office for Civil Rights, “[p]ractically every . . . postsecondary school in the United States is subject to one or both of these laws, which have similar requirements.”<sup>[52]</sup>

Disfavoring students on the basis of disability, or favoring students on the basis of an absence of disability, is clearly not acceptable because of the Acts’ protections. However, because the Acts protect qualified individuals “with a disability,”<sup>[53]</sup> someone who does not have a disability (and has neither been perceived or recorded as having one) may not have standing to challenge a scholarship awarded to a disabled person.<sup>[54]</sup>

### **Drafting**

It may be possible to accept a donor-funded scholarship for which eligibility is limited to “students with disabilities”; however, an institution would need to be careful that the scholarship is not administered in such a way that it appears that the institution is giving preference to one type of disability over another. Although, as noted above, someone without a disability likely would not have standing to challenge the scholarship under the Acts, someone with, for instance, a learning disability, could well challenge a scholarship for “students with disabilities” that is consistently awarded only to those with physical disabilities.

## **D. Other Classifications**

### **1. Veterans**

There are laws giving preference to veterans in federal employment,<sup>[55]</sup> as well as prohibiting discrimination on the basis of veteran status. As with giving preference to those with disabilities, discussed above, restricting scholarships to veterans does not appear to raise legal issues.<sup>[56]</sup> There may be issues as a practical matter, however, if the institution does not have many veterans applying for admission and thus would not have many opportunities to actually award a scholarship restricted in that manner.

### **Drafting**

From a legal perspective, it should be possible to accept a scholarship limiting eligibility to “veterans” or to those receiving assistance under various federal laws providing education benefits to veterans and their families.

## 2. Native Americans

“Native American,” although sometimes considered as a racial category,<sup>[57]</sup> can also be considered a political status in that it is dependent upon the recognition, by a sovereign tribal nation, of an individual’s membership in that sovereign tribe. The U.S. Supreme Court has recognized the unique/dual nature of the “Native American” designation and has, on that basis, rejected the argument that extending preferences to Native Americans constituted “invidious racial discrimination”; rather, the Court concluded, it was “not even a ‘racial’ preference” at all.<sup>[58]</sup> According to the Court, the “unique legal status” of Native Americans “is of long standing and its sources are diverse,” and so “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”<sup>[59]</sup> Consequently, institutions should be able to reference Native Americans specifically in scholarships and determine scholarship recipients’ eligibility based on their membership or affiliation with federally or state recognized Native American Indian tribes.

Note that the term “Native American” may not include certain groups. The U.S. Constitution refers to “Indians”, not Native Americans, for example. In addition, protections are typically extended on the basis of governmental recognition, which limits the political status argument for those tribes that are not officially recognized. Consider, too, that giving preference for a particular Native American tribe over others could be considered akin to raising a national origin concern; refer to the national origin and international students sections above for drafting alternatives to avoid that concern.<sup>[60]</sup>

### **Drafting**

To reinforce the idea that the scholarship eligibility is based on the individual’s political status, rather than his or her race, it would be best for scholarship eligibility to be based on “membership in a federally- (or state-) recognized Native American tribe,” rather than to require (in addition or instead) some degree of Native American ancestry. The latter (often referenced as a blood quantum) could support the argument that the institution is basing its determination on the individual’s race—number of Native American ancestors—instead of simply accepting the sovereign tribe’s political determination that an individual is or is not a member of that tribe.<sup>[61]</sup>

## 3. Religion

Assessment of a restriction at a public institution for scholarships based on students’ religion is likely to be made under the First Amendment’s Establishment Clause or Free Exercise Clause: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>[62]</sup> The case law, however, has not provided a particular test or much guidance in the financial aid context.<sup>[63]</sup> Increasing religious diversity on campus may be an acceptable argument supporting the allowance of scholarships targeting recipients by religion. For public institutions, however, religious diversity may not be a priority and may have implications, both legal and otherwise.

### **Drafting**

In order to avoid naming specific religions, one drafting suggestion is to list some of the core values of the religion. For example, instead of targeting students by specifying that they practice Jainism, list some of Jainism's core values: non-violence and non-violent conflict resolution, vegetarianism, animal rights, and the like.

## **4. Sexual Orientation (LGBT)**

The legal rights of people who identify as lesbian, gay, bisexual, and transgender (LGBT) are currently evolving. For example, even after the U.S. Supreme Court's decision holding that the Fourteenth Amendment guarantees same-sex couples the fundamental right to marry,<sup>[64]</sup> some states have passed laws allowing various forms of discrimination against LGBT people. As another example of changing approaches in this area, although joint guidance was issued by the U.S. Departments of Education and Justice on May 13, 2016 indicating that these agencies would treat a student's sexual orientation and gender identity as the student's sex for purposes of enforcing Title IX,<sup>[65]</sup> that guidance was subsequently withdrawn on February 22, 2017.<sup>[66]</sup> The state limitations and changing federal guidance notwithstanding, aggrieved parties *can* make claims for redress under various federal laws.<sup>[67]</sup>

### **Drafting**

The safest course appears to be to avoid specifying this classification. Instead, instruments can specify that scholarship recipients be members of an LGBT organization that is open to anyone, or have demonstrated experience in or commitment to working with LGBT organizations or to promoting the needs of LGBT individuals.

## **5. Employees**

The Internal Revenue Service provided basic guidance in I.R.S. Revenue Procedure 76-47<sup>[68]</sup> for allowing companies to establish scholarships that are limited to their employees. Generally, the funds must be administered in an objective and non-discriminatory manner.

## **6. Survivors of Disaster**

The IRS has also confirmed that public charities and private foundations can provide disaster relief to individuals, including employees, and to businesses so long as the grant decisions are made objectively and the class of eligible individuals is broad enough to be considered a charitable class, i.e., the IRS would allow a deduction for donations to it. This disaster relief could, in some cases, take the form of scholarships to affected students.<sup>[69]</sup>

## **7. Geography**

It is legally acceptable for donors to require that their scholarship gifts be used to support students from a particular geographic area of the United States. The U.S. Department of Education's policy guidance on Title VI of the Civil Rights Act of 1964, in its discussion on student financial aid awarded on the basis of race or national origin, states that when a college

or university promotes diversity by using its financial aid program, it can consider factors such as “geographic origin.”<sup>[70]</sup>

The drawback of restricting the gift or giving preference based on a geographic area, such as urban areas, to try to target a scholarship toward, for example, a particular racial or ethnic group without considering race directly, is that demographics may change in the future. For endowment funds, in particular, this restriction or preference may get away from the donor’s original intent.

For practical reasons, is best to avoid limiting the geographic area too much. If the area would produce few if any candidates for the scholarship, the scholarship would be difficult to actually award, or it might produce candidates that would be considered “earmarked,” i.e., designated for particular individuals or private groups, making the donor’s contribution ineligible for a charitable deduction.<sup>[71]</sup>

### **Drafting**

In addition to allowing donor restrictions based on U.S. geography, international geography may be acceptable. But be careful that the restrictions are not based on national origin, which would necessitate application of the strict scrutiny test. Additionally, as with many classifications, there should be a reason articulated by the institution for desiring such students. A restriction for students from Europe, for instance, would be considered a geographical restriction, and the institution must determine whether it desires students from Europe and why.

## **III. Alternative Solutions**

### **A. Preferences vs. Restrictions**

It is usually better to state classifications as non-exclusive preferences rather than absolute restrictions in scholarships. Although preferences are still subject to the same level of scrutiny that absolute restrictions would be, they are *not* absolute and thus permit greater flexibility in interpretation and application. Thus, preferences should be more likely to pass muster because they would create less of a burden on the non-preferred group. However, institutions must then take care to administer preferences as just that—they cannot be administered as absolute requirements.

Even with proper administration, preferences may not be permissible for some desired restrictions including, for example, in states that have adopted prohibitions on preferential treatment, as described above.

### **B. Pool and Match Method**

In some circumstances, particularly for educational institutions in states with statutes or constitutional provisions prohibiting discrimination or preferential treatment based on certain classifications, institutions might consider using a “pool and match” approach to aid instead of a preference or restriction. Under this method, which has not been tested in the courts, the institution first “pools” the total money from all sources, including donors’ gifts, that it has to award and determines the financial package for the potential scholarship recipients based on neutral factors, such as need or merit. Then the institution “matches” specific scholarships to

students based on the donors' expressed desires. The key is that recipients must receive no more than the scholarship portion of the financial package that was determined initially. For example, donor funds may not reduce loans or work study portions of the financial packages, nor may the application of donor funds result in higher grant aid than would have been distributed under the institution's neutral allocation method. Basically, all recipients receive the scholarship amounts they would have received without consideration of the source of funds. Consequently, the donors' desires, though accommodated, do not actually result in any preferences among the students receiving aid. Whether students accept admission to the institution, then, is not affected by donor scholarships any more than by any other source of financial aid.

The pool and match method is most commonly used with classifications based on race or sex,<sup>[72]</sup> which obviates the need for justification based on strict scrutiny (race) or intermediate scrutiny (sex). The method may be used for other classifications. However, consider whether using it for other classifications might have consequences in other operations of the institution. Also, because there are different legal precedents for other classifications, using pool and match for those classifications may cause higher, or different, legal risk. The institution will have to determine if it wants to accept those risks and adjust its other operations accordingly.

In addition to considering the law, the drafter must consider the process for awarding scholarships that the financial offices use, as not all offices use or are able to use, the pool and match method. Processes for awarding scholarships may vary even among financial aid offices within institutions, and what might work for one unit within the institution may not work for another. In general, pool and match is usually used for larger financial aid operations.

If the donor does not want to be limited to the amount that the institution has determined to award using neutral means or wants the scholarship to be used for recruiting, which is typically done before any pool is formed, that donor's scholarship cannot be in the pool. In those cases, the institution would be able to accept the donor's restrictions only if they are otherwise legally permissible.

### **Drafting**

Sample pool and match language: "The Donor desires that in awarding the scholarship, the University matches it to African American students to fund the financial aid packages that those students would otherwise be awarded."

### **C. Sunset Clause**

"Sunset clauses" are a drafting alternative that allows institutions to observe restrictions but not be bound in perpetuity. They cause restrictions to lapse after a period of time or permit the institution to lift the restriction after a period of time. These can be very effective when laws are changing such that the institution can fairly reliably predict that the current restrictions or preferences will become difficult or impossible to administer, but the institution does not know what the new laws will be.

### **D. Gift Over**

Donors may be adamant about wanting restrictions that are narrow and that the institution is fairly certain will not be useful after a period of time, especially if the gift is for endowment. In

those cases, institutions should discuss with donors including within the instrument a broader alternative use, preferably within the institution; this alternative use is called a “gift over.” The goal is to ensure the institution can carry out the donor’s general charitable intent in accordance with the institution’s proper administration.

## **E. External Administration**

If the donor insists on a restriction, without alternatives, that the institution cannot or does not want to agree to, the donor might make the gift to an external entity that can hold and administer it, potentially for the ultimate benefit of students who attend the institution.<sup>[73]</sup> For example, a community foundation might hold and administer the gift and might determine that the institution’s students receive scholarships from the gift. In such a case, the institution may advertise the scholarships but may not be involved in the administration of, or provide significant assistance to, the external scholarship program.

## **IV. Fixing Restrictions After Accepting Gifts**

### **A. Uniform Prudent Management of Institutional Funds Act**

The Uniform Prudent Management of Institutional Funds Act (“UPMIFA”), which has now been adopted in nearly all states,<sup>[74]</sup> establishes the basic rules for administering funds with charitable purposes. UPMIFA allows institutions to modify restrictions by several methods and institutions should consider using one or more of them. The methods, which are described more fully below, can be used before donors and institutions agree on the initial gift, as well as up to and including long after the gift has been at the institution. Unquestionably, before institutions modify restrictions, they should have tried as much as reasonably possible to use the gift in accordance with the donor’s purposes.

#### **1. Donor Consent**

Included in UPMIFA is a provision for institutions to release or modify gift restrictions with the donor’s consent as long as the funds are used for the charitable purposes of the institution.<sup>[75]</sup> An excellent method of handling restrictions that become problematic is to ask donors to release or modify them in the manner described under UPMIFA. This method may involve some negotiation but working with donors like this should provide the most satisfactory result for both the donors and the institution.

#### **2. Institutional Determination**

UPMIFA also allows donors to give prior consent to release or modify a restriction. Institutions should consider including a statement in the gift instrument that allows them to modify the restrictions on their own if those restrictions cannot be followed for some reason. It is helpful if the institution’s board has a policy that allows this.<sup>[76]</sup>

#### **3. Equitable Deviation**

UPMIFA includes a provision focusing on the administration of gifts, called equitable deviation. Courts may modify a restriction on the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a

restriction will further the purposes of the fund. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

#### **4. Modification**

UPMIFA also allows institutions to modify restrictions without court approval on old (e.g., 20 years), small (e.g., \$25,000) funds as long as they provide 60 days' prior notice to the state attorney general. As with trust law for cy pres and deviation, UPMIFA does not require notification of donors and maintains the attorney general's traditional role in protecting donor intent and the public interest in charitable assets.

#### **5. Cy Pres**

A traditional court remedy that UPMIFA has adopted is cy pres. Cy pres is an equitable remedy developed in England centuries ago to prevent the charitable intention of the creator of a charitable trust from being thwarted when it is impossible to carry out the particular terms of the trust. Because charitable trusts are perpetual, courts developed the doctrine to save the trust when the particular purpose failed but there was evidence of a broader charitable intent. Cy pres is typically used when donors are deceased and there are no other methods available to modify restrictions.

UPMIFA makes cy pres applicable to institutional funds in addition to charitable trusts, which state law more commonly covers. If restrictions become unlawful, impracticable, impossible to achieve, or wasteful, courts may modify the restrictions in a manner consistent with the charitable purposes expressed in the gift instrument.

An institution may petition a court of equity and demonstrate: (1) the charitable purpose for which property is given in trust becomes impossible, impracticable or illegal to carry out, and (2) the donor manifested a more general intention to devote the property to charitable purposes. If so proven, the trust will not fail, but the court will instead direct the application of the property to some charitable purpose which falls within the general charitable intention of the donor.[\[77\]](#)

#### **B. Transfer**

Usually the last resort is to transfer the gift to another institution—for example, as described under External Administration above—or possibly back to the donor. Transferring must be considered carefully, not just because there may be tax consequences to the donor, but also because of the consequences to the institution. The institution must consider administrative and possible tax issues if asked to transfer endowment appreciation.

## **CONCLUSION:**

Although institutions need to keep their legal obligations in mind when being asked to accept donor funds that contain restrictions based on protected classifications, it is often possible to draft the gift instruments to accommodate both those legal obligations and the donor's intent. Moreover, institutions can also seek to protect themselves in the event of changes in the law after their acceptance of a gift, either by proactively accounting for such possibilities through sunset clauses, gift overs, or the like, or by seeking subsequent modifications to the gift instrument under UPMIFA or otherwise.

## ENDNOTES:

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[2] “[N]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving financial assistance.” 42 U.S.C. § 2000d; *id.* § 2000d-4a(2)(A) (defining “program or activity” as including the operations of “a college, university, or other postsecondary institution, or a public system of higher education”). Title VI is co-extensive with the Equal Protection Clause (See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 285 n.23 (2003)). Department of Education guidelines state that Title VI of the U.S. Constitution applies to private gifts to colleges that are awarded or administered by the college as financial aid. 34 C.F.R. 100.3(b); 59 Fed. Reg. 8756 (Feb. 23, 1994).

[3] Title IX of the Education Amendments of 1972 applies to discrimination based on gender, prohibiting such discrimination in any education program or activity that receives federal financial assistance. 20 U.S.C. § 1681 et seq. The statute was modeled after Title VI.

[4] Once Title VI and Title IX apply to a college or university, it covers all programs in all subdivisions of a college or university, not only programs that themselves involve education or that directly receive federal financial assistance. *Id.* § 1687.

[5] The Equal Protection Clause of the Fourteenth Amendment to the Constitution guarantees that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. The Fifth Amendment to the Constitution provides the same guarantees against similar actions by the federal government. U.S. CONST. amend. V.

[6] E.g., *Lockwood v. Killiam*, 375 A.2d 998 (1977) (involving scholarships for needy boys who are Caucasian and of the Protestant Congregational Faith).

[7] *Bob Jones Univ. v. United States*, 461 U.S. 574 (1993).

[8] For an in-depth review and analysis of these issues, see Lorraine A. Sciarra & Donna J. Snyder, [“Gift Restrictions and Protected Classes.”](#) (NACUA March Workshop 2009).

[9] See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003).

[10] See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) (referring to “Title IX, [and] its model Title VI”).

[11] David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 222-26 (2005).

[12] “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” *Korematsu v. United States*, 323 U.S. 214, 216 (1944). “Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978).

[13] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Racial classifications “are constitutional only if they are narrowly tailored to further compelling governmental interests.” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

[14] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

[15] *United States v. Virginia*, 518 U.S. 515 (1996). Note, however, that in determining that the remedy Virginia Military Institute offered to avoid admitting female students violated the Equal Protection Clause, the court's opinion analyzed whether the remedy was "exceedingly persuasive." Some scholars have likened this analysis more to strict scrutiny than to intermediate scrutiny.

[16] *Wengler v. Druggists Mutual Ins. Co.* 446 U.S. 142, 150 (1980).

[17] *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

[18] *City of Cleburne, v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

[19] *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

[20] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83-84 (2000) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)) (age); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (disability).

[21] For example, in Michigan, the Elliott-Larsen Civil Rights Act not only generally prohibits educational institutions from discriminating on the basis of religion, race, color, national origin, age, sex, or marital status, but also declares "the full and equal utilization of . . . educational facilities without discrimination because of religion, race, color, national origin, age, sex, *height, weight, familial status*, or marital status as . . . a civil right." MICH. COMP. LAWS § 37.2102(1) (emphasis added).

[22] Affected states include California (constitutional amendment via ballot initiative), Washington (state law via ballot initiative), Michigan (constitutional amendment via ballot initiative), Nebraska (constitutional amendment via ballot initiative), Arizona (constitutional amendment via ballot initiative), New Hampshire (state law passed by legislature), and Oklahoma (constitutional amendment via ballot initiative). In addition, Florida has an Executive Order from then-Governor Jeb Bush prohibiting affirmative action in state schools' admissions policies.

[23] BD. OF REGENTS, UNIV. OF MICH., [Miscellaneous Rules and Regulations § 14.06](#) (updated Oct. 2016).

[24] 539 U.S. 306 (2003).

[25] *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

[26] See U.S., GRANTED & NOTED LIST: CASES FOR ARGUMENT IN OCTOBER TERM 2015 (June 2016), <http://www.supremecourt.gov/orders/15grantednotedlist.pdf> (noting grant of certiorari on June 29, 2015).

[27] *Fisher v. Univ. of Tex.*, No. 14-981, slip op. at 11-12 (U.S. June 23, 2016) (internal quotation marks omitted), [https://www.supremecourt.gov/opinions/15pdf/14-981\\_4g15.pdf](https://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf).

[28] *Grutter*, 539 U.S. at 327.

[29] 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

[30] See *id.* Interestingly, the Fourth Circuit's opinion in this case post-dated guidance from the U.S. Department of Education's Office for Civil Rights (OCR), see 59 Fed. Reg. 8756 (Feb. 23, 1994), <http://www2.ed.gov/about/offices/list/ocr/docs/racefa.html>, in which OCR advised that "evidence of a statistically significant disparity between the percentage of minority students in a college's student body and the percentage of qualified minorities in the relevant pool of college-bound high school graduates may be sufficient," *id.*, and yet the court rejected similar statistical evidence proffered by the University of Maryland, and did so without even acknowledging the OCR guidance.

[31] *Id.*

[32] *Id.*

[33] See also *id.* (also discussed *supra*, note 28).

[34] EEOC Directive No. 915.003 (December 2, 2002).

[35] *Id.*

[36] *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) (decided under Title VII, 42 U.S.C. § 2000e). Also, in *Lau v. Nichols*, 414 U.S. 563 (1974), *abrogated on other grounds by Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the court determined that under Title VI and its regulations, Chinese-speaking children were denied “a meaningful opportunity to participate in the educational program – all earmarks of the [national origin] discrimination banned by the regulations.” *Id.* at 568. Most recently, a district court recognized that “. . . longstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI.” *United States v. Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012).

[37] *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

[38] 432 U.S. 1 (1977).

[39] See, e.g., Office of Fed. Student Aid, U.S. Dep’t of Educ., Information for International Students Wishing to Attend College in the United States, <https://studentaid.ed.gov/sa/sites/default/files/international-students.pdf> (last visited Mar. 16, 2017).

[40] 34 C.F.R. § 106.37.

[41] See *id.* § 106.37(b)(2) (requiring institutions to “develop and use procedures under which: (i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex; (ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected . . . ; and (iii) No student is denied the award for which he or she was selected . . . because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student’s sex”).

[42] OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., REQUIREMENTS UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last visited Apr. 6, 2017).

[43] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, makes it an unlawful employment practice for an employer to discriminate against individuals on the basis of sex, unless sex is a bona fide occupational qualification that is reasonably necessary to the operation of the particular business or enterprise. Although Title VII does not specifically prohibit employment distinctions based on marital status, federal court and Equal Employment Opportunity Commission decisions indicate that such distinctions may constitute sex discrimination under Title VII. The Equal Employment Opportunity Commission’s regulations at 29 C.F.R. § 1604.4 state: “It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.”

[44] 34 C.F.R. § 106.40(a) (“Status generally. A recipient shall not apply any rule concerning a student’s actual or potential parental, family, or marital status which treats students differently on the basis of sex.”).

[45] 34 U.S.C. § 106.57.

[46] 34 C.F.R. § 106.40. See also U. S. Dep't of Educ., Office for Civil Rights, "[Dear Colleague](#)" Letter on [Pregnant and Parenting Students](#) (June 25, 2013). State law can also impose restrictions. See, e.g., Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2102(1).

[47] 42 U.S.C. § 6101 et seq.

[48] *Id.* § 6102.

[49] *Id.* § 6103.

[50] 29 U.S.C. § 794 et seq.

[51] 42 U.S.C. § 12101 et seq.

[52] Office for Civil Rights, U.S. Dep't of Educ., *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities* (revised Sept. 2011), <http://www2.ed.gov/about/offices/list/ocr/transition.html> .

[53] E.g., 29 U.S.C. § 504.

[54] State laws may take a similar approach. For example, Michigan's Persons with Disabilities Act, MICH. COMP. LAWS § 37.1101 et seq., protects only those with disabilities and, in pertinent part, prohibits discrimination based upon disability by educational institutions in the admissions process. *Id.* § 37.1402(b).

[55] Veteran's Preference Act of 1944, as amended, 5 U.S.C. § 2108; Vietnam Era Veterans' Readjustment Assistance Acts of 1972 and 1974, 38 U.S.C.A. §§ 3680 to 3691, 3696 to 3699, 4106, 4107, 4211 to 4214.

[56] See, e.g., *Massachusetts v. Feeney*, 442 U.S. 256 (1979).

[57] See, e.g., U.S. CENSUS, RACE (revised Jan. 2017), <https://www.census.gov/topics/population/race/about.html> (referencing "American Indian or Alaska Native" as one of several racial categories on the U.S. Census).

[58] *Morton v. Mancari*, 417 U.S. 535, 554 (1974) ("Contrary to the characterization made by appellees, this preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference.").

[59] *Id.* (internal citations omitted).

[60] See *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117 (9th Cir. 1998) (discrimination on the basis of tribal membership constitutes national origin discrimination under Title VII).

[61] This is not to suggest that tribes may not themselves impose a blood quantum requirement for an individual to be enrolled in the tribe. The concern here is avoiding a situation in which a tribe has determined that an individual is an enrolled member (i.e., a citizen of the tribal nation), and the institution is seeking to impose additional blood quantum requirements (i.e., going beyond the political determination of tribal membership to impose a racial component).

[62] U.S. CONST. amend. I. Title VI may also be helpful in some instances. See Dep't of Educ., Office of Civil Rights, 2010 "Dear Colleague" Letter: Harassment and Bullying, at 5 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>. The anti-Semitic harassment example includes a discussion of harassment against students of one religious group may be "based on

the group's actual or perceived shared ancestry or ethnic characteristics, rather than solely on its members' religious practices." *Id.*

[63] Cases have generally involved state scholarship programs and religious schools. For example, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court decided that Ohio's scholarship program, in which students receiving tuition aid could choose to attend religious schools, was neutral and did not offend the Establishment Clause; and in *Locke v. Davey*, 540 U.S. 712 (2004), the Court determined that Washington's Promise Scholarship Program, which assisted students as long as they did not pursue a degree in theology (i.e., a degree that was devotional in nature), did not violate the Free Exercise Clause.

[64] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[65] U.S. Dep't of Educ. & U.S. Dep't of Justice, "[Dear Colleague](#)" [Letter on Transgender Students](#) (May 13, 2016), (relied upon in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016)); see also [Press Release](#), U.S. Dep't of Educ., U.S. Departments of Education and Justice Release Joint Guidance to Help Schools Ensure the Civil Rights of Transgender Students (May 13, 2016).

[66] U.S. Dep't of Educ. & U.S. Dep't of Justice, "[Dear Colleague](#)" [Letter Withdrawing Transgender Guidance](#) (Feb. 22, 2017); see also [Press Release](#), U.S. Dep't of Educ., U.S. Secretary of Education Betsy DeVos Issues Statement on New Title IX Guidance (Feb. 22, 2017).

[67] For example: a First Amendment claim; an equal protection claim; a due process claim; a claim under Title VII (42 U.S.C. § 2000e et seq.) for sexual harassment (since same-sex sexual harassment is actionable as sex discrimination under Title VII if the harassment is "because of sex"); a claim for same-sex sexual harassment under Title IX; or a claim under the Americans with Disabilities Act where the discrimination occurred because of a person's relationship with an individual who was HIV-positive or had AIDS. Moreover, although sexual orientation discrimination in and of itself was previously found not to be prohibited by Title VII, see, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999), other, more recent cases have extended the prohibition against sex discrimination under Title VII and Title IX to discrimination based on sexual orientation, see, e.g., *Videckis v. Pepperdine University* (C.D. Cal. 2015) (relying on federal sector EEOC decisions).

[68] I.R.S. Rev. Proc. 76-47, 1976-2 C.B. 670 (clarified by I.R.S. Rev. Proc. 85-51, 1985-2 C.B. 717 and I.R.S. Rev. Proc. 81-65, 1981-2 C.B. 690). The IRS has also provided guidance on its website on company-created private foundations awarding scholarships to employees or their children, etc. INTERNAL REV. SERV., COMPANY SCHOLARSHIP PROGRAMS (updated Oct. 19, 2016) <https://www.irs.gov/Charities-&-Non-Profits/Private-Foundations/Company-Scholarship-Programs>.

[69] The IRS ruled on matter involving a private foundation in I.R.S. Revenue Ruling 2003-32, 2003-1 C.B. 689, which allowed a private foundation to provide scholarships to a corporation's employees or their children if an employee is seriously injured or killed as a result of a "qualified disaster," such as Hurricane Katrina. The foundation's scholarship program satisfied almost all of the requirements of I.R.S. Revenue Proceeding 76-47, 1976-2 C.B. 670. The IRS determined that the charitable amounts provided to recipients were scholarships in accordance with I.R.C. § 117.

[70] 59 Fed. Reg. 8756, 8762 (Feb. 23, 1994).

[71] In Private Letter Ruling 8927050, the donor planned to give a gift to a college for an endowment to be used for scholarships with a preference given to students with ancestors born in the donor's hometown, excepting the donor's relatives and their descendants. If there were no preferred students enrolled, the college would choose students based on its usual method of determining need and merit. The IRS calculated from census figures the number of possible people that might be eligible in order to determine whether the preferred class was so small as to render the gift private instead of charitable. The calculation showed thousands of potential beneficiaries, with only a few related to the donor. Thus, the

class of beneficiaries was broad enough to ensure that the gift was being made for public purposes and the charitable deduction was allowed.

[72] See, e.g., UNIV. OF CALIF., [University of California Financial Aid Guidelines for Compliance with Proposition 209](#) (Nov. 1, 2001); Univ. of Wash., [Revised policy for financial aid meets I-200 and still makes room for diversity](#) (Apr. 4, 1999).

[73] See 59 Fed. Reg. 8756 (Feb. 23, 1994) (“Title VI does not prohibit an individual or an organization that is not a recipient of Federal financial assistance from directly giving scholarships or other forms of financial aid to students based on their race or national origin. Title VI simply does not apply.”)

[74] As of this writing, UPMIFA has been enacted in all states except Pennsylvania. The District of Columbia and the U.S. Virgin Islands have also enacted it.

[75] For example, see “Release or modification of restriction” in Michigan’s UPMIFA, MICH. COMP. LAWS § 451.926.

[76] The University of Michigan includes modification language in nearly all gift instruments. Here is the standard version:

“This Gift Agreement will be administered in accordance with then existing Bylaws of the University. Bylaw 3.05 indicates that the wishes of donors shall be loyally observed, so long as in the opinion of the Regents such wishes do not conflict with the proper administration of the University under changes that may develop in the course of time. If such changes occur, the University will consult with the Donor about alternative uses for the gift within the University. If the Donor cannot be consulted, the University will use the gift in a manner that most closely satisfies the Donor’s intentions as described above.”

[77] RESTATEMENT (SECOND) OF TRUSTS § 399 (1958).

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