



The Brave New World of Fundraising: *A General Counsel's Guide to Compliance Concerns*

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Looking back:
Surviving the
challenges,
accelerating change,
and benefiting missions
and meeting needs at a
critical time.



Looking forward:
Staying current, going
forward and in reverse
at the same time and
doing the best we can
in the unknown.



With COVID and the need to reach new audiences, fundraising techniques are constantly evolving.

The World Around Us:

- *“The challenge is the compounding effect of change. Organizations have change bearing down on them from all directions that is continuous, dynamic and disruptive.*
- *Change is an intricate machine of chaotic gears and movements. Keeping current and aligned with change is now one of the greatest challenges to compliance management strategies within companies.*
- *Internal processes, people and technology change continuously and regulatory requirements need to be understood in the context of business change.”*



▪ GRC 20/20 Research LLC, July 2020 publication on risk.



Fundraising Landscape Changes



Collaboration between artist Sierato and NBA player James Wiseman for custom-designed shoes and NFT auctioned to benefit charity



The first minted music NFT played in space.
Performance by Kings of Leon of the song *Time in Disguise*



Cryptocurrency



Cryptocurrency—How does it work?

- Form of digital payment
- Relies on a decentralized system of verification known as the blockchain
- The blockchain is essentially a ledger that records transactions in code
- Crypto wallets are software programs that interact with the blockchain and allow users to send and receive cryptocurrency

Not just for Tech Enthusiasts...

- There is a global, multicultural market for crypto
- 70M people worldwide own blockchain wallets
- The market for crypto is expected to expand to \$5T in next 2 years
- 14% of US adults own crypto, expected to double in next 12 months
- 63% of US adults are interested in crypto
- Embraced by merchants and financial institutions

Unique Opportunities for Philanthropy

- Fidelity Charitable raised \$150M through July 2021, up from \$28M in 2020
- Many nonprofits are accepting crypto
- ALSAC has seen a significant uptick in donor interest in cryptocurrency, and currently accepts crypto primarily through Bitpay and The Giving Block



What a law firm
should be.SM



Cryptocurrency – What does a transaction look like?



Cryptocurrency – Legal considerations

- Valuation fluctuation risk – high volatility
- Access to and securing the wallets
- Wallets used for both cryptocurrency and NFTs
- Anti-money laundering
- Donation acknowledgments with unknown donors
- Consider state charitable solicitation regulations



Cryptocurrencies – Tax considerations

- IRS defines crypto as property - subject to same rules as non-cash gifts
 - Notice 2014-21 and subsequent guidance, including FAQs on virtual currency transactions
- Donations of more than \$500 of crypto, Form 8283, Noncash Charitable Contributions
- Donations of more than \$5,000 of crypto, Form 8283 requires a qualified appraisal – what is qualified appraisal for crypto?
- Form 8283 – donee acknowledgement (acceptance of item, not acceptance of value)
- Form 8282 if sale of donated crypto within 3 years
- Sales Exempt from UBI, unless debt financed
- Form 990 Reporting
 - Part VIII, Statement of Revenue, Line 1g noncash contributions
 - Part X, Balance Sheet, Line 14, Intangible Assets
 - Schedule M, Noncash contributions and the number of Forms 8283 received



Cryptocurrency – Other issues

- How does crypto fit with Nonprofit's exempt purposes? (i.e., environmental impacts, social movement challenging current financial system, etc.)
- Crypto as payment for services (like school tuition, etc.)?
- Should the crypto be liquidated immediately or held (volatility policies in gift acceptance and/or investment policies)
- Will Nonprofit consider Donor requests re: liquidation?



Cryptocurrency – Risk Mitigation Strategies



Clear Policies and Controls

- Establish gift acceptance policies and safeguards for acceptance and account access, consistent with organizational finance and audit procedures
- Custodian agreements for individuals with account access where appropriate

Vendor Vigilance

- Partner with vendors/exchanges who are regulated by FinCEN or NYDFS



Cryptocurrency - Outside Options to Assist Acceptance

- Intermediary 501(c)(3)
 - Donor's DAF
 - Specialized organizations (i.e., Dechomai Foundation, Crypto for Charity, etc.)
- Specialized Companies with Giving Platforms
 - The Giving Block (crypto), etc.

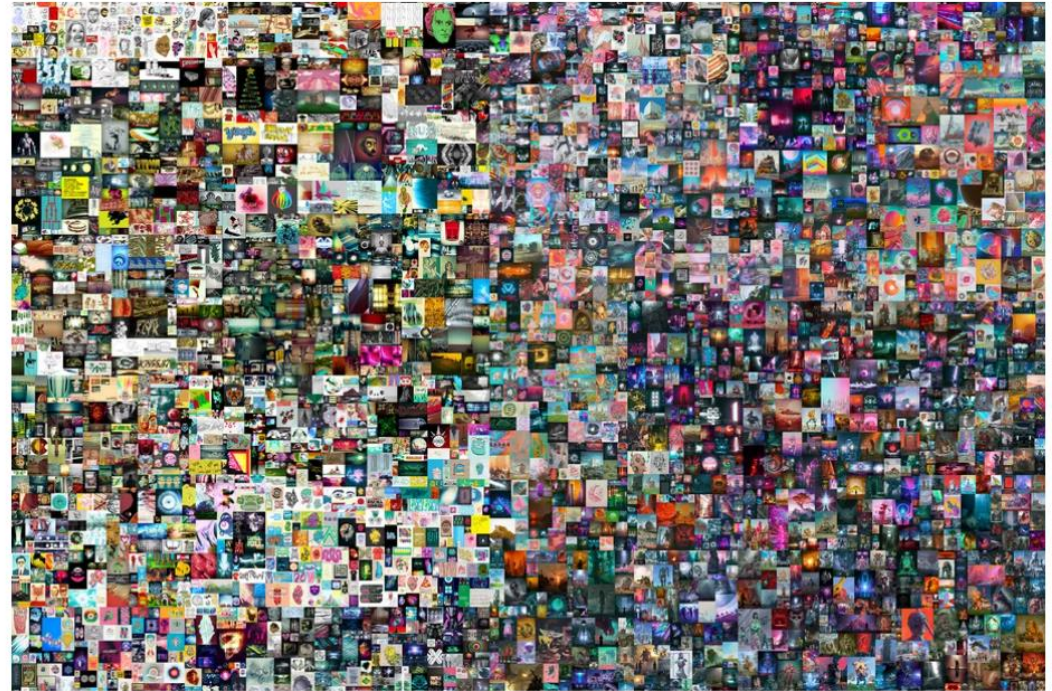


Difficult to predict in the digital world . . . NFTs and beyond

\$ 11.3MM



\$69MM



NFT



What is an NFT?

- Non-Fungible Tokens (NFTs) are unique, digital items with blockchain-managed ownership. Examples of NFTs include digital art, collectibles, virtual reality items, ownership records for physical assets, and more.
- Further explained: “Non-fungible” means that it’s unique and can’t be replaced with something else. For example, a dollar bill is fungible – if you trade one dollar bill for another dollar bill – you have essentially the same thing (fungible). However, NFTs are more akin to a one-of-a-kind playing card or numbered pieces of art (non-fungible).
- A NFT can be created and sold as a one of a kind, like an original painting that is not reprinted, or a series, like numbered reprints of a painting, but the blockchain keeps track of who has ownership of the file.
- The digital asset often includes access to a physical item or in-person experience. For example, if you bought a NFT of a song, to improve the monetization the sale, the artist may provide tickets to a show.



Minting on the blockchain

Minting Explained

- To create a NFT, the assets must be minted. Minting refers to the process of validating information or creating a new block on the blockchain. Every time an individual mints a NFT, it is permanently timestamped and is put into an immutable ledger. This ensures verifiable ownership.

Where do you create NFTs?

- Many NFTs are part of the Ethereum blockchain. Ether is the native cryptocurrency for this blockchain, like bitcoin, but the blockchain also supports the creation of NFTs, which stores extra information that makes them work differently from, say, an ETH coin. Other blockchains can implement their own versions of NFTs.
- The platform/blockchain that is used to create the NFT impacts what crypto can be used to purchase the NFT and where the NFT can trade in the secondary market.



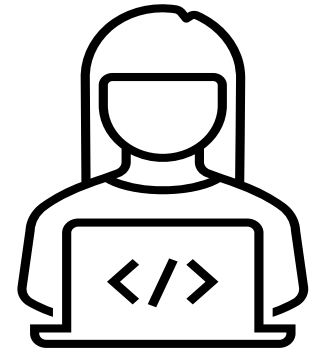
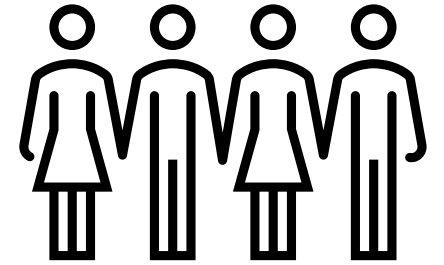
NFTs - Legal Considerations and Questions

- IP rights to underlying collateral
 - IP in advertisements
 - If the NFT is a single version asset, the artist must agree to not create any future NFT with the underlying asset
- Description of asset - One of a kind or a series?
- Which blockchain to use?
- What platform to mint and auction/sell?
- Contract with platform to mint asset
- Fees/fee structure for platform use to mint and sell
- Structure of transaction:
 - Who will mint the asset?
 - Who will sell the asset?
 - Will assets be auctioned; sold; or auctioned with buy now; etc.?
 - Royalty structure for resale?
 - Fair Market Value / Tax Receipt
 - Acceptable Form of Payment (crypto and/or dollars)
 - The platform chosen will impact the currency options
 - For a third party NFT transaction, specify in the contract how the proceeds will be transferred (in kind / converted) to the charity
 - Gift Acceptance Policy



Hybrid Events

- Can be more difficult than in-person and virtual
 - Hosting 2 events simultaneously that must seamlessly interact.
- Engaging 2 different audiences with the same content.
 - In Person
 - COVID requirements
 - Testing / Vaccination requirements and regulations
 - Screening questions/apps
 - Social Distancing
 - Virtual
 - All standard requirements of in-person event: food, venue, etc.
 - Third Party Platform Integration / Streaming technology
 - Donation options/capabilities
 - Interacting with the virtual audience
- ROI – Hybrid can be more expensive
 - Higher expenses for often smaller audiences
 - Balance differentiating ticket costs / benefits provided



Event Planning and Contracting

- Force Majeure is less reliable
 - We know going into a contract that COVID is ongoing
 - Vendors are more sophisticated: specifically excluding COVID from force majeure and from permitted cancellation
 - Fewer mandates requiring cancellation > Vendors view cancellations as “optional” and argue that cancellations no longer fall within excused non-performance.
- Future Bookings Clause
 - Use portion of cancellation penalties as credit for future bookings
 - Negotiate at time of contracting



ERM and Survival Techniques

Legal is the risk advisor, counselor, problem-solver, crisis call, the rabbit out of the hat, and the here you fix it department.

The stress of the pandemic on nonprofits and all the changes to our operations and the increasing and changing regulations is acutely felt by the lawyers and the Legal team.

The cumulative burden of change is a real challenge for organizations, non-profits and individuals trying to do their best jobs, which particularly includes type-A perfectionistic attorneys.

Figure out what you can stop doing, doing less of, etc. so you can focus on what is most critical. Its ok to say no and we have a lot more organizational power than most of us every exercise first.

Put on your own oxygen mask first, know when to take a break during the day, during the week or a real vacation.



“Complex Assets”



Nonprofits often describe any asset that may be donated that is *not* in the form of cash or a marketable security as a “Complex Asset”



Complex Assets = greater time, cost and expertise to accept



In recent years, more sophisticated charities have seen the most significant growth in donations coming through complex assets

“Complex Asset” Examples

Privately Held Business Interests

C-Corp or S-Corp Stock

Limited Liability Company (LLC) Interests

Limited Partnership Interests

Real Estate

Personal Residence

Commercial Property

Farmland or Undeveloped Property

“Complex Asset” Examples, *continued*

Other Alternative Assets

Retirement Plans

Life Insurance
Policies

Negotiable
Instruments

Oil and Gas
Interests

Private Equity (LP
or LLC interests in
investment funds)

Cryptocurrency

Tangible Personal
Property (best if
for a related use)

Should We Accept the Complex Gift?

- Clear internal process for reviewing and deciding

- YES

- Can we accept this directly ourselves?
 - Can we partner with outside options to accept?

- NO

- Document reasoning from appropriate decisionmakers

Range of Considerations



Fiduciary Duty of Care



Gift Acceptance Policies



Investment Policy Statement

Fiduciary Duties

Duty of Care

Duty of Loyalty

Duty of Supervision

Duty of Obedience

Fiduciary Duty of Care

Restatement of the Law, Charitable Nonprofit Orgs. § 2.03 (2021)

§ 2.03 Duty of Care and the Business Judgment Rule



(a) A fiduciary of a charity has a duty to act in good faith with the care a person of ordinary prudence in a like position would exercise under similar circumstances.

Fiduciary Duty of Care

(b) A fiduciary of a charity who makes a decision in good faith should not be subject to further review for breach of the duty of care under subsection (a) for that decision if, at the time the decision is made, the fiduciary:



(1) has no interest, direct or indirect, in the subject of the decision and is otherwise able to exercise independent judgment;



(2) is reasonably informed with respect to the subject of the decision using material information reasonably available under the circumstances; and



(3) reasonably believes that the decision is in the best interests of the charity in light of its purposes.

Gift Acceptance Policies

Guidance for Solicitation, Acceptance, and Disposition

Protect Nonprofit's Interests

Ensure Gifts are Used to Further Exempt Purposes

Clear and Transparent Process

Gift Acceptance Policy - Who Makes the Acceptance Decision?

- Board, Committee, Task Force?
- Legal Counsel's Role
 - Encourage Donor's to have independent tax/legal counsel and confirm Nonprofit's lawyers cannot serve as both
 - Confirm Intention to Gift
- Key Gift Elements
 - Charitable Intent
 - Irrevocable Transfer
 - Not subject to Quid Pro Quo (except some split-interest gifts)
 - Donor Loss of Control
 - Specifics of Reporting to Donor, if Any
 - Not Completed Until Accepted
 - Restricted, Unrestricted, and Change of Circumstances

Gift Acceptance Policy - Complex Asset Due Diligence and Who Pays?

- Professional Fees

- Reasonable costs (i.e., transaction costs and professional fees) typically borne by Donor
- Guidelines and process for when Nonprofit will pay

- Due Diligence

- Organizational or other ownership documents
- Description of asset
- List of current owners
- History (financial statements, provenance, etc.)
- Agreements that reference asset
- Environmental, hazardous/toxic issues
- Pending litigation

Gift Acceptance Policy – Gift Acknowledgement and Credit

- Acknowledgements for Tax Purposes

- Internal Revenue Code and Regulations – substantiation requirements

- IRS Forms

- 8283 – Donor reports noncash contributions worth more than \$500
- 8282 – Nonprofit files if dispose of donated property within 3 years

- Crediting

- Pledges – when payment is made
- Liquid Gifts – amount of gift received after expenses in U.S. dollars
- Liquidated Complex Assets – amount of gift proceeds minus expenses and costs
- Retained Complex Assets – fair market value as determined by Nonprofit

- Naming Rights

- Anonymous Gifts

Acknowledgement Requirements



IRC § 170(f)(8)



Applies to donations of \$250 or more



“The amount of cash and a description (but not value) of any property other than cash contributed.” IRC § 170(f)(8)(B)(ii)

Acknowledgement Requirements



IRC § 170(f)(11)



26 CFR § 1.170A-17 - Qualified appraisal and qualified appraiser.



Obligation of the Donor (not the charity)



A qualified appraisal is required for certain donations valued more than \$5,000

IRS Forms 8283 and 8282

▪ Form 8283

- Donated property valued at more than \$500 – Donor completes and attaches to tax return
- Nonprofit signs to acknowledge receipt, not claimed value
- Qualified Appraisals required for certain property
 - Specific IRS standards
 - Must comply with specific procedures/requirements
- Does not include out-of-pocket expenses from volunteer or charitable work or cash/credit card payments or expenses

▪ Form 8282

- Nonprofit reports sale or disposition of charitable deduction property to IRS and to Donors
- Both original recipient organizations and successor organizations file
- Nonprofits file when dispose of assets within 3 years of donation
- Must file within 125 days of disposition or subject to \$50 penalty
- Fraudulent characterization as exempt use asset - \$10,000 fine

Naming Considerations



Perpetuity vs Term of Years



Lincoln Center for the Performing Arts and Avery Fisher Hall



Practical Issues

- Ongoing maintenance costs
- Future costs to renovate
- Ability to raise funds in the future



Common Terms

- 20 or 25 year term
- Right to extend
- Right of first refusal

Morals Clause

Examples:

- Seton Hall University – Kozlowski Hall
- University of Missouri – Paige Sports Arena
- Metropolitan Museum of Art – Sacker Family

Provision requiring removal for:

- conviction/no contest
- anything that might impair the name of the organization; guilt by association
- moral turpitude

Investment Policy Statement

Investment/Impact Strategy

Liquidity Needs

Restricted Gift Management

Clear Timelines/Practices

Top Ten Takeaways

- For novel areas, proceed, but with caution
- Start from best practices and extrapolate
- Update existing policies for novel areas
- Stay abreast of regulatory guidance
- Map out in advance decision-making process regarding complex assets (be prepared!)
- Ensure entire organization is on the same page re: accepting complex assets (development, finance, legal, etc.)
- Confirm donor truly understands what they are giving away and what flows from that decision
- Consider utilizing outside partners to accept complex gifts
- Avoid headaches - don't skip over 8283/qualified appraisals
- Your organization's reputation is its most valuable asset



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