

► **Being Charitable With Stock  
Issues for the Donor and the Charity**  
Presentation to Northern California Planned Giving Council  
Jill S. Dodd  
Craig D. Miller

## Securities Basics

1

- a. Securities Act of 1933
- b. State securities laws
- c. Securities Exchange Act of 1934

## Securities Act of 1933 and State Securities Laws

2

- Offer and sale of securities
- Gifts are not sales but transactions in gifted securities by Donor and Donee are potentially of concern under the securities laws
- Need to ask Key Questions:
  - Who is Donor?
  - Who is Donee?
  - What is nature of equity you are receiving?
  - What is the status of the underlying company? (i.e. public/pre-ipo)

## Who Is Donor?

3

- Issuer
- Affiliate of Issuer
  - (Director/Officers)
  - 10% shareholder of Issuer
- Non-affiliate of Issuer
- Ask, "Where did you get the security you are so graciously donating to us?"

## What Type of Security Is Being Given?

4

- Stock
- Option (or other contingent right) to acquire stock where Donee may be required to pay some consideration (even nominally) to acquire the underlying stock.

## What Are Applicable Rules for Stock: Rule 144 Components

5

- Rule 144 is a safe harbor from the registration provisions of the Securities Act.
- Rule 144 is not exclusive, but generally may be the only "safe" way to meet securities obligations.
- Donees need not be aggressive in handling stock or other equity instruments (i.e., don't rush to market unless you are comfortable with obligations and you do not jeopardize potential future gifts from donor).

## The Five Requirements

6

- Current public Information
- Holding Period
- Volume Limitations
- Manner of Sale
- Notice
- Donees must remember that, in some cases, your Donor may have a “tail” and need to keep track of donee sales of securities. Be cooperative...you want more stock!

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

## Donor of Company Stock for Which They Are an Affiliate vs Donor of Stock for Which They Are Not an Affiliate

7

- Key Differences
- Importance of Certification Letters
- Remember importance of broker and transfer agent in the context of any sale.

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

## How to Mitigate Risk or Concern

8

- Unclear Source of Gift
- Insider Trading Concerns
- Other concerns (shareholder agreements/market stand-off provisions/other contractual limitations)

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

## Tax Issues

9

- Private company vs. publicly traded (i.e., post-IPO) company
- Conditional pledge of privately held stock
- Gifts of stock options or warrants

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

## Gifts of Private Company (Pre-IPO) Stock

10

- Pre-arranged sale issues
- Public charity donees
- Qualified appraisals
- Due Diligence

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

## Gifts of Private Company (Pre-IPO) Stock (cont'd)

11

- Pre-Arranged Sale
  - Can be an issue for pre-liquidity gifts
  - What is the test?
    - Legally obligated to go through with the sale
    - “Substantially certain to occur”

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

### Gifts of Private Company (Pre-IPO) Stock (cont'd) 12

- Public Charity Donees
- To get charitable income tax deduction at fair market value rather than the cost basis of the stock:
  - Donor must have held the stock for at least one year; *and*
  - Gift must be to a public charity
    - Operating charities
    - Donor advised funds
    - Charitable remainder trusts where remainder beneficiary must be public charity

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

### Gifts of Private Company (Pre-IPO) Stock (cont'd) 13

- Qualified Appraisals
  - Required to substantiate charitable income tax deduction for gifts of \$10,000 or more
  - Qualified appraiser
    - 409A vs. income tax appraisal
  - IRC 170(f)(ii) and Treasury Regulation Section 1.170A-13(c)
  - Donor must pay for the cost of the appraisal

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

### Gifts of Private Company (Pre-IPO) Stock (cont'd) 14

- Due Diligence
  - Articles of Incorporation
  - Bylaws
  - Shareholder Agreement/Lock-up Agreement
  - Voting trusts
  - Audited financial statements
  - SEC filings
    - Post-IPO restrictions?

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

### Pledge of Pre-IPO Stock 15

- Contingent on liquidity event
- No current deduction, but:
  - Larger deduction when gift matures
  - No need for qualified appraisal of closely held stock
  - Donor can maintain voting rights
    - Watch out for *partial interest rule* on gift of pre-IPO stock
  - Charity prefers gift of marketable securities
    - Significantly less due diligence and transaction costs
    - More certainty

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

### Public Company Stock Gifts 16

- No pre-arranged sale issues
- Deduction for gift to private foundation or public charity at FMV
  - So long as donor has held stock for at least one year
- Very low transaction costs

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

### Public Company Stock Gifts (cont'd) 17

- Appraisals generally not required
  - Unless the securities are subject to any restrictions that materially affect their value to the donor or prevent the securities from being freely traded. Treasury Regulation Section 1.170A-13(c)(7)(xi)(c)(1)
  - A restriction on a subsequent sale by charity means an appraisal will be required. PLR 9247018
  - Structure contributions to avoid restrictions, if possible.

Being Charitable With Stock Issues for the Donor and the Charity | Manatt, Phelps & Phillips, LLP

manatt

316633640