

## **FAQs for UNIVERSITY GIFTS WITH RESTRICTIONS**

Gifts to NC State may be either for the general purposes of the University or for the specific use of one of its colleges, institutes, centers, departments, programs or units. While the University's preference is for unrestricted gifts, a donor often has several reasons for making a gift to NC State, including furthering a particular goal or supporting a particular purpose. In general, NC State cannot accept gifts that contain restrictions in violation of the University's Equal Opportunity and Non-Discrimination Policy, POL 04.25.05 and/or Federal and State law. Under the University's Equal Opportunity and Non-Discrimination Policy, discrimination is defined as the "unlawful and unequal treatment based upon race, color, religion, creed, sex, national origin, age, disability, or veteran status." Discrimination based upon sexual orientation is also prohibited by this Policy. While most gifts are directed or submitted to one of the University's foundations, pursuant to their operating agreements, all foundations are subject to and must comply with University policies.

Below are some frequently asked questions regarding certain restrictions donors often desire.. For each restriction, alternative clauses or language is provided to help achieve the donor's intent in a legally compliant manner. Please confer with University Advancement for assistance and approval of any alternative language for scholarship agreements that is not set forth below.

### **Can a gift or scholarship award be restricted on the basis of race?**

No. This restriction violates University policy as well as Federal and State law. NC State, as a public institution, is subject to the Fourteenth Amendment of the Constitution, which guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws" (Equal Protection Clause). Any scholarship award by the University is considered a "state action". In addition, public and private institutions are subject to Title VI, which provides that "no 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." As a result, any race based award, whether benign or pernicious, is subject to a strict scrutiny standard of review by the courts, and would likely be deemed or struck down as unlawful discrimination.

### **If the donor desires a gift or scholarship award to be restricted by race or only awarded to specific minorities, what are our options?**

While the University cannot restrict scholarships on the basis of race, we can use race-neutral criteria to help increase the pool of the intended recipients the donor desires, even if that means a disproportionate share of the award or aid is directed toward a particular race or minority. Below are some examples of race-neutral criteria that can increase the likelihood of the award being made close to the donor's intended purpose:

"The scholarship is awarded to a student with demonstrated interests in the Latino heritage."

"The Donor desires that when awarding this scholarship special consideration be given for students who have demonstrated experience in or a commitment to working with the African-American community."

“The Donor desires that when awarding this scholarship, priority should be given for students who (1) are underrepresented in the NC State student body population or (2) have overcome obstacles such as socioeconomic or educational disadvantage or (3) are first generation in their family to attend college; and who reside in a rural NC county.”

### **Can we accept a gift or award with the intent to achieve diversity in the student body?**

Yes. The U.S. Department of Education has stated that an institution may use financial aid to create diversity under limited circumstances. For example, a university may use its financial aid program to promote diversity by considering factors which are a part of the university’s diversity definition such as geographic origin, English as a second language, diverse experiences, or socioeconomic backgrounds. In addition, a university may consider diversity as a plus factor in combination with other race-neutral criteria in awarding financial aid. In addition to the previous examples, below are other examples that can be used to increase diversity:

"The purpose of this scholarship is to support educational diversity at NC State by giving priority to students who are under-represented in the NC State undergraduate student body population majoring in sciences."

"The purpose of this scholarship is to support educational diversity at the University consistent with its mission and admissions policy. Therefore, it is the donor's intent to consider all highly qualified students in an inclusive and broad spectrum of characteristics and categories."

“The Donor desires that when awarding this scholarship, special consideration should be given for students who: (1) have overcome obstacles such as socioeconomic or educational disadvantage or disabilities, or who are the first generation in their family to attend college; or (2) are members of groups that are underrepresented at the University, such as African Americans, Native Americans or Hispanics.”

### **What if a donor wants to limit an award to individuals from certain countries or based upon alienage?**

No. This restriction violates University policy as well as Federal and State law. As discussed above, Title VI prohibits discrimination on the basis of national origin and the United States Supreme Court has recognized alienage as a suspect classification under the Equal Protection Clause. According to the Equal Employment Opportunity Commission (“EEOC”), 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. Most commonly, this discrimination occurs by restricting the award to individuals or groups from a particular country or a group of people sharing a common language, ancestry, and/or other similar social characteristics, such as ethnicity.

However, we can use geographic criteria to help the donor achieve his/her intent for the award. For example, we can use “residing in” China as an eligibility requirement rather than “from” China.

**Can we restrict a gift or scholarship award to requirements of US citizenship alone?**

No. The Supreme Court holds that such a restriction by public universities is an unlawful discrimination based on alienage. At best, the restriction can be based on “US citizen or permanent resident.”

**Can we limit the recipients of certain awards to women or men only?**

Generally no. This restriction violates University policy as well as Federal law. Most courts have found that discrimination based on gender is unlawful under the Equal Protection Clause. In addition, Title IX prohibits discrimination based on gender in any education program or activity that receives federal financial assistance, and its regulations prohibit scholarships that are restricted on the basis of sex, with a few limited exceptions. Athletic scholarships, within certain parameters, are one of the exceptions under Title IX.

However, we can use gender-neutral criteria to help achieve the donor’s desire in the award. For example:

"The Donor desires that the Fund be used to assist students who are pursuing degrees in disciplines such as [specify areas where there are few women] or where steadily progressing careers in and leadership positions are not readily available to them."

"The donor desires that when awarding this scholarship special consideration be given to students who are under-represented in the NC State undergraduate student body population majoring in sciences."

**A donor wants to make a gift or scholarship award based upon a person’s religious beliefs. Can we do that?**

No. This restriction violates University policy as well as Federal law. As a public institution, NC State is also subject to the First Amendment’s Establishment Clause of the U.S. Constitution, which prohibits government from promoting or opposing religion.

However, we can use non-religious criteria which can closely match the donor’s intent in the award. For example:

“Although not a specific criteria of the award, the award is intended to recognize and support students who have shown an interest or have participated in outreach or service learning work in partnership with a faith-based organization.”

**Are we allowed to restrict gifts by marital status?**

Maybe. Discrimination based on marital status has been prohibited in the context of employment. Title VII of the Civil Rights Act of 1964 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 EEOC decisions indicate that such distinctions may constitute sex discrimination under Title VII. Therefore, any gifts likely cannot discriminate based upon the marital status. Consult with University Advancement and the Office of General Counsel (“OGC”) before accepting any other gifts or awards based upon marital status.

**If a donor wants to focus the award on people with disabilities can we do that?**

Maybe. While disability is a protected category under University policy, and federal and state law, a restriction may be permissible if is reasonable. The difficulty in using disability as a criteria is that proof would have to be submitted to the Disability Services Office (DSO) as a baseline for the award. A person with a disability is not required to register with DSO. Thus, the application of such an award is burdensome to the university and would be difficult to implement. Please consult with the OGC before agreeing to such an award. One option is: “This scholarship is intended to support students who have overcome physical challenges.”

**Can we restrict an award based upon sexual orientation?**

No. As with disability, the implementation and application is burdensome to the university to establish such a criterion. A permissible clause would be:

“This scholarship is intended for those students who have worked in the GLBT community or have an interest in GLBT issues.”

**Can a scholarship be designated for a particular individual, family, or a small group of individuals?**

No. Critical to a determination that a gift is eligible for a charitable deduction for tax purposes is that the scholarship and like awards are awarded to a charitable class. The group of individuals from which the recipients are selected must be sufficiently broad as to be considered a charitable class. Normally a charitable class must be sufficiently large and indefinite so that assisting members of the charitable class benefits the community as a whole. Earmarking scholarships to help a particular pre-selected individual violates this requirement. The donor of a scholarship cannot take a charitable deduction for a scholarship that is earmarked for the benefit of a specific individual, even if that individual is unrelated to the donor. Therefore, gifts from any donor for a fellowship or scholarship made on the condition or with the understanding that the award will be made to a student of the donor's choice will not be accepted.

Examples of valid charitable classes include 9/11 victims, lower income students, students graduating in the top 10% of their class, all graduating seniors of a particular school, students in a particular city, or valedictorians in a state. Each of these examples is broad and indefinite.

**Can a scholarship be designated for a military veteran?**

**Yes.**

**Can a scholarship be designated for a single parent?**

**Yes.**

**What is a Savings Clause?**

A Savings Clause is a clause in a gift agreement that allows the University to revise or modify the gift of the donor if the criteria or purposes of the gift is no longer lawful. A Savings Clause must be present in all gift agreements. Examples of Savings Clauses include:

“Donor agrees that the university may modify the criteria for this gift over time if it determines that the purposes of the gift are in whole or in part contrary to law or changes occur such that the program or purpose is unable to be fulfilled. In such an event, the university shall use the gift in the matter that most closely satisfies the intentions of the donor to the extent possible.”

“The University may modify or disregard any selection criteria if determined in whole or in part to be contrary to law or then existing University policies.”

“The wishes of the Donors shall be loyally observed, so long as in the opinion of the University such wishes do not conflict with the proper administration of the University under changes that may develop in the course of time or are in contrary to law. Should such changes occur, the University shall use the gift in a manner that satisfies the intentions of the Donors as closely as possible.”