What's New in the New Forms of (American) Philanthropy?
A View from History

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In recent years, a number of new and reputedly new forms of the philanthropic foundation have attracted a good deal of attention in the United States. This paper reviews these forms, notes historical antecedents, argues that most of the forms are not really new, suggests that several of them represent efforts to reverse limitations imposed on "private" foundations by the Tax Reform Act of 1969, and offers two or three comments on what really is new about the "new" philanthropic forms.

1. Context: Big Changes in American Philanthropy?

The most important new development in American philanthropy in the decades since World War II is the return of philanthropy to the quite moderate, limited importance it held in the nineteenth century.

In the long-term perspective two things about the leading foundations of the early twentieth century are most striking:

> First, the exceptional size of the fortunes that Andrew Carnegie, John D. Rockefeller and his partners, Elizabeth Milbank Anderson, Julius Rosenwald, Richard and Andrew Mellon, Marshall Field, Mrs. Russell Sage, Anna M. Harkness, several members of the Guggenheim family, Edward A. Filene, and a few other put into philanthropic foundations.
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> Second, the impressive ability of the leaders of those foundations to take advantage of the special conditions of their day so as to help shape distinctive American approaches to public libraries, secondary education, the research university, the science-based medical center.

The combination of exceptional wealth with unusual ability to direct wealth to the creation of distinctive new institutions lasted for four or five decades. The success of these foundations created high expectations for future philanthropy.

What was new after World War II was the change in conditions that made it impossible for new foundations to exert a comparable impact. After World War II, all foundations found their resources much reduced. Reduced relative to the size of the fields foundations wished to address. Relative to the earned and endowed income of the nonprofits in those fields, and to the professional competencies of their leaders and staffs. Relative to the purchasing power of

American consumers of health, education, social services, and the arts. And relative to the spending of the federal and state governments.

Starting with those who reorganized the Ford Foundation in 1950, ambitious foundation leaders have declared that their funds will adopt new approaches, take new forms, and accomplish greater things. American foundations HAVE continued to do very useful things, and to make important contributions to American life. But they have not had sufficient wealth, or sufficient leverage, to replicate the transformative influence of their early twentieth-century predecessors.

The spectre of the great accomplishments of the early twentieth century continues to challenge and haunt the foundation world. It encourages critics to demand that foundations do things they cannot hope to do. And it haunts donors and foundation leaders who understandably wish to outshine their predecessors. After all, in America everything is supposed to be "new" and "improved."

2. New <u>FORMS</u> of Philanthropy?

Finding their resources increasingly limited in relation to their fields of interest, foundations seek ways to do more with less—to **help their grantees find outside resources, to employ leverage, to find and strategic ways to intervene**. More foundations seek impact through **policy innovation, social innovation, and social entrepreneurship**. And seek to be efficient, effective, and **strategic**.

Across almost all fields, foundations continue to emphasize **self-help, sweat equity, and earned income**. They encourage grantseekers to search for hitherto-untapped sources of private donations by any effective means including new social and web-based media as well as all the well-established fundraising techniques. They continue to urge their grantees to be prudent with resources and to keep a clear focus on their missions

Many also give much attention to new forms of philanthropy, designed to facilitate these efforts to do more with less. Helmut Anheier and I laid out an account of these new forms in the concluding chapter of ***A Versatile American Institution***:

> Although American **COMMUNITY FOUNDATIONS** date to World War I, they won financially advantageous status as "public charities" rather than "private foundations" under the 1969 revisions to the federal tax code. They have grown more rapidly than other kinds of foundations since about 1980. Yet by 2009 they held only about 8 percent of the wealth of private foundations. Community foundations have always catered to donors, but with increasing donor-advised and designated or field-of-interest funds, they have found new ways to give donors influence if not full control over the flow of foundation and foundation-like funds.

COMMERCIAL GIFT FUNDS won important endorsement in the U.S. Claims Court decision in the case of National Foundation, Inc. v. United States in 1987. Tax-exempt entities that hold and invest charitable funds and make gifts from them in accordance with the advice of their donors, commercial gift funds first appeared in the 1990s as entities controlled by commercial and investment banks and by investment firms such as Fidelity Investments, Vanguard, and Charles Schwab. They now hold as much money as the biggest community foundations.

SUPPORTING ORGANIZATIONS also resemble community foundations in seeking contributions from many donors, paying close attention to donors' wishes, and enjoying the "public charity" advantages of the organizations they support. Supporting organizations include both the "foundations" linked to many state universities and increasing numbers of public schools and libraries, and also a wide range of public charities, including fundraising organizations linked to nonsectarian, Protestant, Catholic, and Jewish causes. Rapid growth of and allegations of abuses such as self-dealing and inappropriate degrees of donor control led Congress to include tighter rules in the 2006 Pension Reform Act.

Seeking to use their assets as well as their incomes, some foundations have taken legal steps to make **MISSION-RELATED LOANS**. Probably the most notable result has been the Local Initiatives Support Corporation (LISC), launched in by the Ford Foundation in 1979. LISC in turn created subordinate foundation-supported initiatives, including Living Cities, which offers low-interest loans. LISCs claim to have "raised $11.1 billion to build or rehab 277,000 affordable homes and develop 44 million square feet of retail, community and educational space nationwide." Impressive though these numbers are, we should keep in mind that a development for 20,000 people, such as Disney's town of Celebration in Florida, required an investment of 2.5 billion.

The decision of the National Endowment for the Arts to eliminate individual fellowships led to several efforts by the Ford Foundation and others **TO HELP INDIVIDUAL ARTISTS RAISE THEIR INCOMES**—and to enable foundations to help this cause, which was also complicated by limitations on individual fellowships as well as risky investments in the Tax Reform Act of 1969. One result was the Andy Warhol Foundation's launch of Creative Capital, a sort of community foundation for the arts, in the mid-1990s. Creative Capital has also received major support from the Rockefeller Foundation and the Doris Duke Charitable Foundation. At the end of the decade, Ford, Rockefeller, and Prudential joined Alaska's Rasmuson Foundation to launch United States Artists, hoping it would come to resemble even more a special-purpose community foundation, sustainably building an endowment to support fellowships for artists.

As James A. Smith has noted, a number of individual artists—or their estates—have also set up **ARTIST FOUNDATIONS** designed to promote the artist's particular vision, as well as to preserve and promote his or her work. Like program-related investments and the charitable gift funds, such artists' funds can raise questions about charitable purpose (most artists are, after all, hoping to earn their living—ideally a very good living—and leave something to their families, by selling their works) and have attracted continuing attention from the Internal Revenue Service.

Both Peter Omidyar of EBay and several early leaders of Google proposed to **COMBINE FOR-PROFIT FUNDING MECHANISMS WITH CHARITABLE ACTIVITIES APPROPRIATE TO NONPROFIT FOUNDATIONS**. They also emphasized socially responsible investing and environmentally and socially "sustainable" approaches to business.[i] Omidyar Network donations and investments have gone to microfinance and "participatory media," to transparency in government, and, as through Common Sense Media, to help families influence the media they consume. Omidyar's early investments in socially focused, profit-seeking enterprises included Meetup.com and Socialtext (vehicles for building social capital) as well as Prosper (an online person-to-person lending business) and the Enthusiast Group (which proposes to assemble online communities of fans of sports and other activities).[ii]

The first president of e-Bay, created the SKOLL FOUNDATION, devoted to "**SOCIAL ENTREPRENEURSHIP**," in 1999. The Skoll Foundation says it seeks the rare people who will be "change agents for society, seizing opportunities that others miss, and improving systems, inventing new approaches, and creating sustainable solutions to change society for the better." It also underwrites the Skoll Centre for Social Entrepreneurship at Oxford and the widely ranging Skoll Awards for Social Entrepreneurship.

Established in 2005 with an announced commitment of about $1 billion, **GOOGLE.ORG** proposed to combine philanthropic grantmaking with business investments to address issues such as global warming, renewable energy, global health, poverty, and citizen empowerment. Its early investments went to energy and power companies to promote research on solar and wind power and also the development of hybrid vehicles. Further, it made philanthropic grants intended to advance policy debate and government accountability in India and Africa. More recently, however, Google has moved to a more conventional approach, moderating its claims and separating its philanthropic giving from its efforts to address social problems through creative, and hopefully profitable, engineering.

The Omidyar, Skoll, and Google efforts have yet to receive large permanent funds, so they have operated on a year-to-year basis, in the style of company foundations. Unless federal and state laws governing charitable and exempt activity are changed, the new hybrid of profit-seeking foundations will have to devote great care to assuring that philanthropic donations are not working chiefly to enhance commercial profits. This new foundation form is attracting attention, but only time will tell whether they develop into a significant part of the foundation world.

To encourage the wider use of program-related investments, some foundations have recently encouraged changes in the legal form of nonfoundation organizations, including enterprises that are usually thought of as "businesses." Robert Lang of the Mary Elizabeth and Gordon B. Mannweiler Foundation proposes the creation of **LOW PROFIT LIMITED LIABILITY CORPORATIONS**—"**L3Cs**"— explicitly devoted to "charitable or educational purposes" rather than to profit-making, although they may still make and distribute "limited" profits.[iii] By 2010, a few state legislatures had approved legislation intended to authorize this new form, or the related "**B CORPORATION**," businesses certified by B Lab, a Philadelphia-area nonprofit launched in 2006, as following sustainable, beneficial practices. Under the current U.S. tax code, however, L3Cs and B Corporations do not at present enjoy tax advantages or priority in relationship to government programs; a number of experts have criticized them on several legal grounds.[iv]

The rising cost of drugs led to the creation of another specialized form of foundation. From the mid-1990s the largest American pharmaceutical corporations moved to establish operating **PHARMACEUTICAL FOUNDATIONS**—rather than corporate giving offices— "for the purpose of distributing medications to patients" who could not afford to pay for them, and for providing public information about diseases and medications. The pharmaceutical foundations were designed in part to implement new laws and regulations governing the sale and promotion of drugs, and they will inevitably continue to attract attention as the United States seeks to contain the costs of health care.[v]

State courts and attorneys general have in recent years occasionally resolved disputes by directing that corporations place money into new foundations. Most prominently, this approach produced a number of "**HEALTH CONVERSION FOUNDATIONS**" funded by the transfer of legally "charitable" assets, as a condition for the transformation of a nonprofit health insurance company or hospital into a profit-seeking business. Courts have also directed that class-action lawsuits in such industries as electronics, managed care, and tobacco be resolved by the payment of funds into new foundations charged to address the issues in dispute. Suits concerning the privacy of Facebook accounts and the violation of environmental regulators are among those resolved in this way.[vi] Reflecting the role of government in their creation, these **COURT-DIRECTED FOUNDATIONS**—unlike the corporate-directed foundations of the big pharmaceutical corporations—have included on their boards "community" representatives who sometimes give their funds a distinctively populist quality.

A number of funds also engage in **SHAREHOLDER ADVOCACY**, pressing the corporations in which they invest, as the Rockefeller Foundation puts it, to adopt policies that support the foundation's "program and values," and "barring holdings in companies deemed particularly problematic."[vii] Shareholder advocacy can also raise challenging questions: will it reduce income, have the intended effect, split the board? But this approach offers yet another way for foundations to maximize the impact of the funds they control, even as they recognize that those funds are very limited in relation to their ambitions.

I would add that it appears that many long-established **RELIGIOUS FUNDS** have taken advantage of new laws applying to insurance, and of the American willingness to keep government largely out of the affairs of religious groups, to define or redefine themselves as "religious" entities rather than as "foundations." Some, including notable Baptist and Methodist funds, have a considerable line in annuities and other insurance products for clergy, and even for lay people. Yet many religious funds continue to use the term "foundation" in their names, and continue to act exactly like private or community foundations in that they hold and invest substantial funds, using the income, and sometimes the corpus, to make grants for purposes described as "charitable" under U.S. law. Religious funds, especially it appears the funds of Protestant groups, are now generally excluded from lists of "foundations" prepared by the Foundation Center and the Council on Foundations. Yet some religious funds are among the largest charitable funds in the U.S. The Presbyterian Foundation holds, I believe, more than $2 billion; the Baptist Foundation of Texas holds more than $1.5 billion. A few Jewish funds (including the Rose Community Foundation in Denver) hold comparable assets; the foundations that support Catholic charities are also growing quickly.

3. What Is Not New?

The purposes that animate these new forms of foundation philanthropy are mostly not new.

The Elizabethan Statute of Charitable Uses, which governed charities in the British colonies and was taken over in most U.S. states as a key to charities law after the American Revolution, defined what activities were "charitable" and hence eligible for preferential treatment under the law. We can class these under four headings. The first three might be described as "traditional":

Aid for the poor and unfortunate – classic corporal mercies in the Christian tradition:

relief of aged, impotent, and poor people,

relief, stock, or maintenance for houses of correction,

relief or redemption of prisoners or captives, and

Underwriting basic responsibilities of government

maintenance of sick and maimed soldiers and marines,

repair of bridges, ports, havens, causeways, churches, seabanks, and highways,

aid or ease of any poor inhabitant concerning payment of Fifteens, setting out of soldiers and other taxes.

Preserving the Social Order by underwriting marriages of poor maids,

schools of learning, free schools, and scholars in universities,

relief, stock, or maintenance for houses of correction,

relief or redemption of prisoners or captives,

aid or ease of any poor inhabitant concerning setting out of soldiers and [payment of] . . . taxes,

support for “persons decayed” – such as respectable women who had lost status and support when their husbands gambled away the family fortune .

But several ways of helping people listed in the Statute of Charitable Uses had to do with

investing in people's ability to sustain themselves, including funding the:

education and preferment of orphans,

marriages of poor maids,

schools of learning, free schools, and scholars in universities,

support, aid, and help of young tradesmen, handicraftsmen,

Nineteenth century American funds made many entrepreneurial, venturesome charitable investments intended to use the sweat equity of donees to create leverage and to enable charities to earn income through the sale of services and goods and the rental of space.

America's Protestant religious denominations built funds for the support of divinity students, schools, and clergy, and for the printing and distribution of bibles, tracts, and Sunday school books.

The early Protestant funds operated very much like community foundations, taking gifts large and small from large numbers of people, investing and distributing the income and principal as appropriate to the fund's stated purposes. College endowments developed in the same way, and often as denominational offshoots.

By the middle of the nineteenth century, Harvard, Yale, Columbia, and Cornell (like several colleges, including Oberlin in Ohio) all had substantial endowed funds, which they used in part for innovative units devoted to science; when they appeared in the 1880s and 1890s, Johns Hopkins, Clark, Stanford, and the University of Chicago all held endowments that subsidized tuition for their new, science-based curricula.

All of these institutions strove to imbue students with the sense that they belonged to a larger community; that their predecessors had created opportunities for them, and that as graduates they had a corresponding obligation to add to the school's ability to aid new students in the future.

When in the 1830s Stephen Girard set up a large fund to support a great orphanage and other non-religious charities, the City of Philadelphia created what was in effect the nation's first non-sectarian community foundation to manage the Girard Fund's assets as well as other funds and trusts.

Ben Franklin, the now-obscure Oliver Smith, and other early American donors followed precedents in Enlightenment Europe in launching revolving loan funds to help young tradesmen and farmers get started in life, to provide dowries to enable young women to marry, and to build large charitable funds. In these cases, those who received help early in life had a legal – not merely a moral – obligation to repay the funds – and with interest.

Beginning in the 1860s and 1870s, George Peabody, Abbott Lawrence and others created funds to build and subsidize model apartments: again, the plan was to subsidize rents, not to provide housing as a gift. Limited dividend, 5% philanthropy built numbers of housing units in the Northeastern U.S. up to the time of the Great Depression, including the substantial Russell Sage Foundation developments of Forest Hills and Sunnyside Gardens in Queens, New York. The American Bible Society and the American Tract Society both built very large buildings in Manhattan as investments as well as facilities to house offices and printing plants. In 1893 a single donor – a Scottish investment banker named John Stewart Kennedy – built the United Charities Building in NY to provide housing and meeting facilities to dozens of Protestant charities; after World War I, Margaret Olivia Sage had the foundation she named in her late husband's memory build a large building nearby to house the offices of the leading national societies in the many fields of social work.

4. What Is New in the New Forms of American Philanthropy?

A. Much of what <u>IS</u> new in the New Forms of American Philanthropy is a series of efforts to reverse some of the limits on the freedom of action of private foundations imposed by the Tax Reform Act of 1969, and by related legislation passed in the preceding fifteen years. At that time, Congress, official of the Department of the Treasury, and such political leaders as Harry Truman and Lyndon B. Johnson were concerned that many wealthy people were creating foundations for selfish, rather than for legitimately charitable purposes.

Wealthy Americans did have reason, in the decades after World War II, to avoid taxes. In the context of the Great Depression, the war, and the Cold War, U.S. taxes were quite high. From 1941 to 1976, estates were taxed at a rate that could rise, for the largest estates, to 77%. From 1942 to 1963, the top income tax rate was above 90%; until 1981, it remained above 70%.

Accountants and financial advisors developed a significant line of business in helping people avoid these high tax rates. Some encouraged clients to use foundations for this purpose. To avoid estate taxes, people transferred businesses and other assets to foundations – then had the foundations employ their children, own their homes and vacation homes and automobiles, etc. – and charge the salaries and other expenses to foundation expenses. To maintain family income, people divided stock shares in their businesses into two classes, assigning shares that received low dividends to their foundation, shares that received the bulk of income to members of the family. To increase income without increasing their own investments, people had their foundation loan money to their own businesses, or to their close relatives and *their* businesses, at far below-current rates of interest. Even when they did not use their foundation to direct money promised to charity to themselves, people did sometimes use a foundation to *control* a family business even when members of the family no longer held a majority – or perhaps any – of its shares.

> The tax reform act mandated the writing of rules to prevent such devices, and imposed significant financial penalties and took away tax-exempt status from foundations when they were found guilty of disobeying the new rules.
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> The new rules made it almost impossible for foundations to control businesses, or even to invest in small businesses. The new rules also made it more difficult for foundations to give money directly to individuals. Additional rule changes in the 1980s made it more difficult for any charity to provide office space or housing to employees, or to other charities.

These rules made it much more difficult for foundations to support efforts to improve housing, to subsidize employment, to subsidize other charities or businesses, or in general to invest in the economic redevelopment of impoverished urban or rural communities. So in part, the New Forms of philanthropy reflect efforts to moderate these limitations, to make it easier for foundations to make program-related, mission-related loans and investments, to invest directly in real estate, or to make it easier for business firms to mix giving with business development.

B. Tax Avoidance Today?

In part, too, it may well be that some of those who are pushing "hybrid" forms that claim to mix charitable activity with business, are simply seeking to avoid today's taxes – which are much lower than in the 1950s, but which are still at a top 40% for estates and 39.5% for income – not including state and local taxes that can easily raise the total tax obligation, for the best-paid, to more than 50%.

C. A Speculative Question: Do Some of the New Forms Reflect an Impulse to Standardize?

Strictly as a thought for future research, we might ask whether some of the New Forms in philanthropy reflect a new approach to employer-employee relations in the fields of health, education, and social welfare. Are we seeing some foundations shift – in their search for "leverage," "impact," "scale," and "strategy" – to an emphasis on overall "systems" thinking? To technologies of software and hardware and vaccines and drugs, rather than to investment in the training of self-directed, professional problem-solvers? To top-down control over teachers and doctors and providers of social services, to the imposition of defined scripts and protocols, to the determination and then the imposition of "best practices" and toward the elimination of professional discrimination, professional discrimination, professional judgement?

The fields addressed by philanthropy, and occupied in the U.S. by nonprofit organizations, have always posed critical principal-agent questions. When philanthropy is involved, the person who receives the service is not the one who is purchasing the service, is not really the one who is selecting the service or the spirit in which it is delivered. When services were paid for by charity and by direct payment – in most fields in the U.S., before the Great Society programs of the mid 1960s created Medicaid, Medicare, a massive federal program of loans for college students, and significant government funding for Foster Care and associated mental health services for children – most U.S. services were provided through facilities that were closely tied to particular cultural communities – religious, ethnic, racial, cosmopolitan – or to local funding sources such as public school districts. In those contexts, the principal-agent problem was approached through the education and training and selection of staff through the different cultural communities and their institutions.

Many foundations found their purpose in underwriting the formal and informal education and career development of teachers, health care workers, and social service providers within their own cultural communities. Foundations provided scholarships for professional education, underwrote conferences and workshops and other re-education and networking opportunities, subsidized travel, paid the overhead costs for professional and religious associations. Through such subsidized experiences, teachers, health care providers, social workers, and religious and cultural workers were more or less socialized to the norms of a particular community. Professional and religious leaders and the foundations that supported them believed, I think, that staff who were trained and directed through such experiences could be trusted to make professional judgements that their communities would see as appropriate when confronted with a particular child, patient, client, or believer.

As the histories of many religious and professional communities attest, such arrangements worked more or less well for those who were well-organized, somewhat affluent, politically well-positioned. As many recent histories document in great detail, these arrangements did not work at all for those who were marginal, especially not for African-Americans or for many workers on farms and in forests and mines.

Since the 1950s, principal-agent conflicts have become more and more complex. Consumers have paid from their own resources for much larger shares of education, especially professional education. The government share grew dramatically with the Great Society, and then under George W. Bush with Medicare coverage of drugs (for those over 65 years of age), with the Accountable Care Act (Obamacare) of 2010, and with the trend toward state and school district funding for nonpublic elementary and secondary schools. Meanwhile private giving declined as a share of all funding in all fields; foundation funding remained at a small part of private giving.

Government funding has made it possible to significantly improve access to health, education, and social support for the elderly. It has also led to rising expectations for the equal, or at least universal, delivery of services. At the same time, government funding has also been accompanied by conflict over the control of staffing, and over the character of the services that governments fund.

In this wider context, "strategic" philanthropy often seems to focus on finding ways to achieve expectations of universal service provision, using technological means and insisting on the production of earned income – and not to concern with the cultural commitments that in the past did something not only to motivate, but also to compensate those who delivered services.

To the extent that the new philanthropic forms are intended to focus foundation resources on short-term efficiency and effectiveness, and on earned income, they may reflect the influence of strategic thinking. That is a topic for another investigation. For that investigation, it may be relevant that the Ford Foundation has recently announced a shift away from demands that its grantees be more "strategic" and more concerned with their own bottom lines, to an emphasis on efforts to mobilize people to work toward reducing inequality, in part by doubling the share of the foundation's grants that go to the overhead of the organizations it supports.

These are very preliminary thoughts. They need much further consideration, and in our discussion today I hope to hear some thought about where that consideration should begin.

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[i] Douglas McGray, "Network Philanthropy," *Los Angeles Times*, January 21,2007. See also www.omidyar.net.

[ii] Stephanie Strom, "What's Wrong With Profit," *New York Times*, November 13, 2006. http://www.nytimes.com/2006/11/13/us/13strom.html?pagewanted=print, viewed on September 23, 2012.

[iii] Yunus (2010, p. 127).

[iv] See (*http://www.bcorporation.net*); The Chronicle of Philanthropy, October 3, 2010 (*http://blog.pappastax.com/index.php/2010/06/26/whats-a-b-corporation*); both sites viewed June 23, 2015; Doeringer (2010); Kleinberger (2010).

[v] Particularly important have been the "anti-kickback" terms of the Medicare and Medicaid Patient Protection Act of 1987 and the rulings of the Office of the Inspector General in the federal Department of Health and Human Services. As the Foundation Center observed, "[N]othing in the prior history of the nation's foundation community approaches the scale of product giving seen with this handful of recently established foundations." Foundation Center (2007, p. 5. As Shah (2008) notes, the large pharmaceutical

companies also provide the great bulk of funding to several large, independent “copayment foundations” that by 2007 were helping more than 10,000 patients meet costs of expensive drugs that were not fully covered by health insurance.

[vi] S. R. Smith (2010). See also (*http://www.physiciansfoundations.org/;* *http://www.legacyforhealth.org/25.aspx*; *http://www.circleid.com/posts/a_look_at_the_facebook_privacy_class_action_beacon_settlement*; and *http://www.bmtfoundation.com/bfa/about-overview.html*), viewed September 22, 2012. The Northern Coastal California Restoration Fund, for example, was established by the U.S. Fish and Wildlife Service and the National Fish and Wildlife Foundation with community service payments from settlement agreements entered into by the owners of marine vessels charged with violating federal maritime pollution laws. For detailed information see (*http://foundationcenter.org/pnd/rfp/rfp_item.jhtml?id=253300030*), viewed September 22, 2012.

[vii] “The Rockefeller Foundation Social Investing Guidelines,” (*http://www.rosefdn.org/article.php?id=201*); the Investor Environmental Health Network, (*http://www.iehn.org/home.php;* *http://www.uua.org/leaders/finance/sri/shareholderadvocacy/index.shtml*), both sites viewed March 31, 2010.