Hot Topics in Board Governance

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Agenda for the Day

• Board Adopted Policies, Generally
• Conflicts of Interest/Self Dealing
• Investment Oversight
• Mission Measurement and Mission Drift
• Transparency and Public Disclosures
• Submitted Q&A
Board Policies

Few legal requirements for formal policies (IRS requirements, state law requirements)

Benefits include:
• Continuity (the “hit by a bus” scenario)
• Ensure objective and nondiscriminatory grantmaking – evidence of compliance
• Transparency and public accountability
• “Defensive” documentation
IRS Requirements

From Form 990 – Sec. B of Part VI:

- Conflicts of interest policy
- Policy regarding relationship with affiliates
- Whistleblower policy
- Document retention and destruction policy
- Executive compensation procedure
- Joint venture policy
As part of organizational documents:

• Prohibition on private inurement
• Distribution of assets upon dissolution
• Scholarship policies and procedures (IRS Form 1023)
Sarbanes Oxley Policies

- Passed in 2001
- Generally applicable to publicly-traded corporations
- Whistleblower policy
- Record retention (and destruction) policy
Other Policies to Consider (Community Foundations)

• Inactive funds policy (DAFs)
• Use of donor recommended investment managers policy
• Donor-initiated fundraising policy
Conflicts of Interest

- Written Policy is Key
- Does not Necessarily Prohibit Activity
- Define Covered Persons & Entities
- Define What is a Conflict
- Address “Perception” of a Conflict
- DISCLOSURE, DISCLOSURE, DISCLOSURE
- How Not to Participate
Conflicts of Interest, cont.

- IRS Sample Policy available
- Distribution and acknowledgment
- Annual re-affirmation
- Overlap with self-dealing rules, particularly where corporate funders are involved
Self Dealing (Private Foundations)

- IRC Section 4941
- Prohibits certain financial transactions directly with “disqualified persons”
- Prohibits certain financial transactions with 3rd parties that provide more than an incidental benefit to “disqualified persons”
- Penalty tax will be imposed for violations
What is Self Dealing?

- Sale, exchange or leasing of property between foundation and disqualified person
- Lending money to a disqualified person
- Furnishing goods or services to a disqualified person
- Fulfilling financial obligations of a disqualified person
- Advertising for a disqualified person
- Providing preferential recruitment or business opportunities for a disqualified person
Who are Disqualified Persons?

– Foundation managers - officers, directors, trustees, and employees with authority to act on behalf of the Foundation
– Substantial contributors to the Foundation (including parent company)
– Family members of the above
– Certain government officials
– Business entities with at least 35% ownership by disqualified persons
What is Not Self Dealing?

• Paying compensation for personal services that are reasonable and necessary to carry out the exempt purpose of the Foundation if the compensation is not excessive

• Incidental and tenuous benefits
  – Public recognition for the Company
  – Consumer goodwill for the Company
  – Increased morale of Company employees

• Providing goods and services to the Company and Company employees on the same terms as the general public
Investment Oversight

• Legal and fiduciary responsibility of managing foundation investment assets lies with the board of directors – cannot fully delegate

• Uniform Prudent Management of Institutional Funds Act (UPMIFA) provides guidance related to the governance of investment assets (endowments)
Investment/Finance Committee

Responsible for initiating an investment policy statement that:

• clearly outlines the investment objective
• roles and responsibilities
• performance expectations
• spending needs
• any prohibitions on investments
Often responsible for hiring or recommending investment managers:

- RFP or proposal process
- Written engagement letter or agreement
- Ability to terminate relationship
- Performance measurements
- Appropriate fees
Mission Measurement

• Hot topic today – funders want to know exactly how their money is being used
• Growing pool of consultants available to assist
• Provides valuable data to work smarter and spend less

Ask: Who or what purpose does your organization serve and what change do you seek to create, when?
Performance Measurement

(courtesy of Bridgespan Group)

Performance measurement lifecycle

A. Define
- Define intended impact (what results you will achieve) and theory of change (how you will achieve those results)
- Anchor your measurement and learning strategy to the above

B. Measure
- Collect information
- Verify/validate
- Input into data system

C. Learn
- Analyze information
- Generate reports
- Draw out insights
- Wrestle with and refine insights (using learning forums)
- Propose improvements from the insights

D. Improve
- Agree on improvements (in decision forums)
- Implement improvements
Mission Drift

Key Signs:

• Board members cannot clearly articulate mission

• Chasing dollars and building programs around dollars

• Regularly questioning whether you are violating ethical or legal standards

• Core group of board members are pushing foundation in certain direction

• Large turnover of staff/board members
Public Disclosures

Per IRS, exempt organizations must make available for public disclosure and provide copies upon request:

- Annual returns (990, 990-PF, 990-EZ)
- Application for exemption (IRS Form 1023)
- Reasonable fee allowed for copies
- 30-days for written requests, immediately if requested in person
- Penalty of $20 per day up to maximum $10,000
990 Disclosure Specifics

• Returns must be available for a 3-year period beginning with the due date of the return (including any extension of time for filing) or, if later, the date it is actually filed.
• The return includes any schedules and attachments that are filed with the form.
• Exempt organizations other than private foundations, need not disclose the name and address of any contributor (generally Schedule B).
• An organization is not required to provide a copy of its Form 990 if the organization has made that form publicly available (e.g., through Internet posting), but must make the form available for in-person inspection.
• More information is available on Form 990 instructions, Appendix D, Public Inspection of Returns.
• Board is responsible for financial oversight of foundation

• Board needs to be aware of 990/990-PF information - IRS Form 990 – Part VI(B) Question 11a: “Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?”

• State laws may require audits for foundations of a certain asset size
State Law Disclosure Requirements

- Charitable solicitation registration required in 40 states
- Often requires copy of 990 and/or annual financial report (and can then become public)
- May not always mirror federal law (California rule regarding Schedule B)
- Additional state law provisions vary by state (watch for lobbying, electioneering)
Review: Ten Basic Responsibilities of the Board

- Determine mission and purpose.
- Select the chief executive.
- Support and evaluate the chief executive.
- Ensure effective planning.
- Monitor and strengthen programs and services.
- Ensure adequate financial resources.
- Protect assets and provide proper financial oversight.
- Build a competent board.
- Ensure legal and ethical integrity.
- Enhance the organization's public standing.
Duties and Responsibilities:

✓ Duty of care/duty of loyalty
✓ “Good faith” standard
✓ Reliance on experts when needed
Questions?
Contacts & Additional Resources

Web Resources
www.cof.org
www.cfstandards.org

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