

Hot Topics in Board Governance

Suzanne S. Friday, Esq.
Senior Counsel and Vice President of Legal Affairs



Housekeeping Items

Access the Help Desk: Click the “?” in the upper right corner of the gray webinar navigation bar or dial 888-569-3848.

Ask a Question of the Presenters: Click the “Q&A” icon in the gray webinar navigation bar.

Exit the Webinar: Click the gray “X” in upper right corner of the gray webinar navigation bar.

For Telephone Participants: If you are using the telephone to listen to the webinar, please make sure to use a landline to ensure call clarity.

Webinar Recording: A recording of this webinar will be made available upon request shortly after the webinar’s conclusion.

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

IRS Requirements, cont.

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

Investment/Finance Committee cont.

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

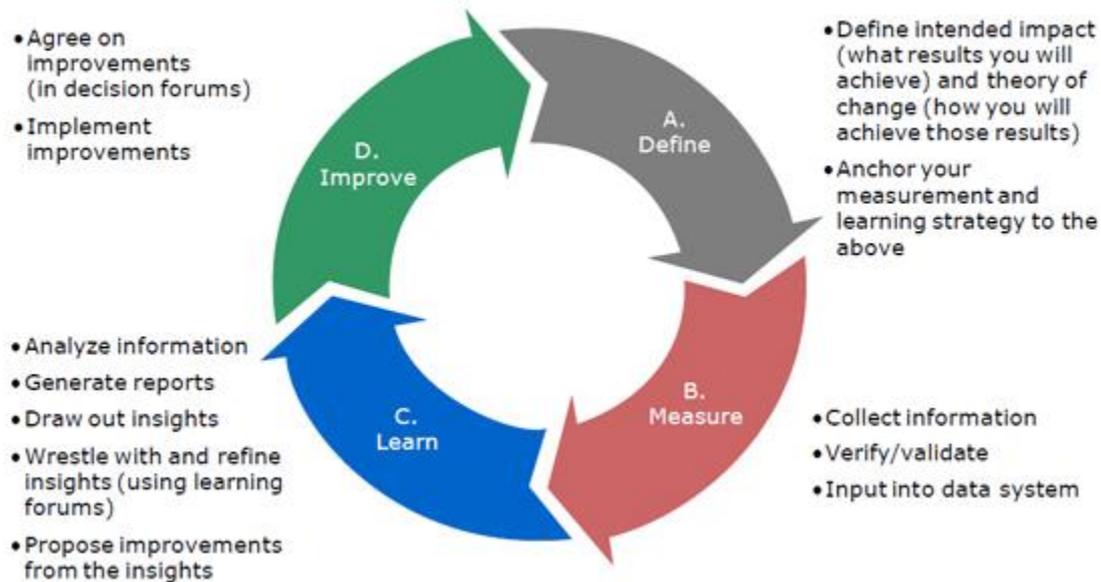
Mission Measurement

- 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



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*.

990 Reporting and Audits

- 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.

Board Governance Review

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

E-mail:

legal@cof.org

govt@cof.org

Call:

(703) 879-0718

(703)-879-0705 (Suzanne)