Roles and Responsibilities of Foundation Directors

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To begin... what is a charitable foundation?

- A not-for-profit* corporation that is organized and operated under the laws of the state of incorporation and the state in which it is doing business;

- Exempt from the payment of federal income tax under Section 501(c)(3) of the U.S. Internal Revenue Code
  - Tax exemption under Section 501(c)(3) provides a number of benefits:
    - exemption from Federal income tax
    - tax-deductible contributions
  - The organization must be organized and operated exclusively for exempt purposes (charitable, religious, educational, scientific)
Roles and Responsibilities of Foundation Directors

- Foundations, and their Directors, have a variety of legal obligations that must be met if the organization is to survive, thrive and fulfill its exempt purposes

- **Directors’ Legal (fiduciary) Duties**
  - Care and Loyalty
  - Avoidance of Conflicts
  - Confidentiality

- **Board’s Role**
  - Governance
  - The Business of the Foundation

- **Individual Director’s Responsibilities**
Duty of Care

Foundation Directors must discharge their duties:

- **with due care**, including reasonable inquiry,* as a prudent person would act in similar circumstances, and

- in good faith and always **in the best interests of the Foundation** - and **only** the Foundation
Duty of Care

- A Director may look to information/opinions from other persons/organizations

  **BUT**

- When **voting on a matter** before the Foundation, consideration of any interest other than the best interest of the Foundation, violates the Director’s fiduciary obligations.
Duty Of Loyalty

- Simple concept: **the interests of the Foundation always come first**
- Directors cannot take an opportunity for themselves or another person or entity that’s within the Foundation’s scope of interest
Duty Of Loyalty: Examples

A Director owes a duty of loyalty to the Foundation and may not:

- disclose confidential information of the Foundation;
- compete with or take a business opportunity of the Foundation;
- obtain secret or unfair profits through a transaction with the Foundation; or
- assist another person or entity to do any of the above*
Conflicts Of Interest

Any interest that may affect whether a Director is acting solely in the best interests of the Foundation is a potential conflict of interest and must be disclosed before the Director participates in any relevant decision-making on behalf of the Foundation.
Conflicts Of Interest: Examples

- The Director has a financial or personal interest in a matter up for vote
- The Director received – or will receive - a payment or gift from a person or entity that has an interest in the matter
- The Director is an officer, director, employee or consultant to, or has a close personal relationship with, a person or entity that has an interest in the matter
  - Dualities of interest = conflicts of interest
Resolution of Conflicts

**DISCLOSURE** of all potential conflicts – personal, financial, others

- Annually
- **Before every meeting** - carefully review the meeting agenda and disclose whether any potential conflict of interest exists.
- **During the course of the meeting** - make sure to disclose any potential conflict of interest as it arises.

Recusal from voting

Recusal from discussion

- Multiple recusals may be grounds for removal
Confidentiality

- Directors are exposed to highly confidential information — written and oral -- regarding the Foundation and its activities.

- All information presented to or discussed by Directors, at a Board meeting or in committee, is confidential and may not be discussed with or disclosed to anyone outside of the Board.

- Confidentiality lasts forever.
Breach of Fiduciary Obligations

- Grounds for removal

- If result is financial or reputational damage to the Foundation, breaching Director may be liable
  - Boeing directors agree to $237.5 million settlement over 737 MAX safety oversight (Nov. 5, 2021)
    
      But … very unlikely with nonprofit boards

- Loss of insurance and indemnification
Board’s Role

- Governance
- The Business of the Foundation
Stages of Board Engagement

**Early Stages – highly operational, hands on**
Small staff, Board is actively involved (usually as a whole), closely oversees “management,” regularly involved in operational/day-to-day decisions

**Gaining maturity - more focused on efficiency, outcomes**
Larger staff, Board still intervenes in programmatic and operational activities, starts to develop committees, begins to look at strategic directions

**Mature Board– big picture oversight**
Board delegates significant autonomy to management, focuses on strategy, major program development, avoidance of liabilities

Level of engagement depends on maturity, but also will vary with business cycle and challenges the organization may face
Board’s Role

- Governance
  - Recruit and appoint CEO
  - Conduct performance appraisals, develop plans for succession and transition
  - Attract, assess and retain Board talent
  - Recruit and appoint Board and committee members
  - Manage conflicts
Board’s Role

The Business of the Foundation

- Provide vision and strategy
  - Develop strategic plan in collaboration with CEO and monitor implementation
- Delegate with clarity
  - Supervise management without meddling; avoid the weeds
- Review and approve finances
  - Develop operating budget, program financing, fiscal management plans in collaboration with CEO
- Routinely evaluate operational and financial performance
Individual Director’s Responsibilities

- Be familiar with Bylaws, policies and procedures
- Regularly attend and participate in Board meetings
- Request legal/accounting consultation as seems necessary
- Consider board and committee nominees with due care
Individual Director’s Responsibilities

Effective Participation - Before the meeting

- Review agenda and all related materials before the meeting
  - Including minutes, reports and financial statements
  - what is a 990?
- Analyze assignments and prepare reports in a timely manner
- Declare all conflicts and recuse as necessary
Individual Director’s Responsibilities

Effective Participation - During the meeting

- Listen; consider other views; speak up
- Engage in thorough deliberations – take action only after sufficient consideration
  - Reports, reviews and other written materials, including financial reports, MUST contain sufficient evidence to support decisions
- Beware of your conflicts and the conflicts others may have
- Exercise good faith, independent judgment, only in the best interests of the Foundation
Individual Director’s Responsibilities

Effective Participation – After the meeting, all decisions are unanimous

- Once approved by the Board, an action must be accepted and supported by all Directors
- All Directors must maintain the confidentiality of Board/Board Committee deliberations
- Ensure that meeting minutes accurately reflect action; include dissents and abstentions as requested or prudent
Communications

The Board speaks with one voice

- Only the Chair or the CEO can speak for the Foundation, unless otherwise directed

- No individual Director has authority to speak for the Foundation, but all have *apparent* authority
  - Directors always must avoid giving the impression that they speak for the Foundation
  - The Foundation can be held liable for the actions of its Directors, even if the Foundation didn’t know about, approve of, or benefit from those actions
Immunity, Indemnification and Insurance

- Immunity/limits on liability make it harder for you to be successfully sued
- Indemnification/insurance will pay the costs of your defense if you are sued
- The Foundation may indemnify a Director if that person acted in good faith and in a manner reasonably believed to be in the interests of the Foundation
  - Indemnification/insurance generally will not be available if a Director breaches fiduciary obligations, is found liable for gross negligence or misconduct, or is found guilty of a crime