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Legal Best Practices for Non-Profit School Foundations

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Topics

- Board Governance
- Charitable Solicitation Requirements
- Fiscal Sponsorships
- Private Foundation v. Public Charity Status
- Governance Policies
- Q&A

BOARD GOVERNANCE

Board Governance

- Responsibilities
  - Oversee/Evaluate
  - Review/Monitor
- Leadership
  - Guide mission and direction of organization in partnership with Executive Director and staff
- Stewardship
  - Ensure dedication to, and use of assets for, benefit of public

Board Governance

1. Determine the Organization's Mission and Purpose
2. Select the Executive Director
3. Support and Evaluate the Executive Director
4. Ensure Effective Organizational Planning
5. Monitor and Strengthen Programs and Services
6. Ensure Adequate Resources
7. Protect Assets and Provide Proper Financial Oversight
8. Build a Competent Board
9. Ensure Legal and Ethical Integrity
10. Enhance the Organization's Public Standing

Board Governance

- Director fiduciary duties generally governed by state law
- Five principal duties:
  - Duty of care
  - Duty of loyalty
  - Duty of good faith
  - Duty of disclosure
  - Duty of oversight

Duty of Care

- Director must:
  - Exercise the degree of care an ordinarily prudent person in a like position would exercise under like circumstances in a manner reasonably believed to be in the best interest of the corporation
  - Take steps to become informed – it's a job
  - Reasonably rely on committees, accountants, counsel, consultants, and others as to information within their areas of expertise
  - Attend meetings and participate
  - Actually participate in "governance" – no "dummy" or nominee Boards

Duty of Loyalty

- Act in good faith, act in the best interest of the public, and to refrain from receiving improper personal benefits as a result of their relationship with the organization

Duty of Good Faith

- A subset of the duty of loyalty
- Act in best interests of the corporation and stockholders at all times
- Bad faith is not simply bad judgement or negligence
- Bad faith is the conscious doing of a wrong because of a dishonest purpose or a state of mind affirmatively operating with furtive design or ill will

Duty of Disclosure

- A subset of the duties of care and loyalty
- Directors and officers must provide open disclosure of facts and circumstances which may impact the boards' deliberations or decisions in matters under consideration

Duty of Oversight

- Duty to provide reasonably ongoing oversight of the corporation
- Focus on corporate systems and processes
- Reasonably assure themselves that the corporation <u>has</u> and <u>follows</u> effective processes and chain of command for financial oversight, compliance, mission advancement, planning, etc.
- Liability premised on abrogation of duty, not a bad decision

CHARITABLE SOLICITATION REQUIREMENTS

Charitable Solicitation

- Charitable Solicitation: a request for someone to make a donation or purchase of something with the implication that such purchase will benefit a charity

- Commercial Co-Venturer (CCV): a representation that a portion or dollar amount of the purchase price of their good or service will benefit a charity

Charitable Solicitation

- 44+ states have some sort of regulation on these
- Charity itself may also need to register
- May need to register with state office <u>prior</u> to solicitation
- Annual reporting may be required

Charitable Solicitation

- Nebraska does not have any specific laws on charitable solicitation
- Most other states, however, require registration with a state agency, annual reporting requirements, and specific disclosures given to the public

Charitable Solicitation

- What Is The Risk?
  - Attorney General has discretion to enforce
  - Unlikely that you will go to jail on day one
  - If you receive notice from the Attorney General (or other authority of the state), you must stop soliciting, reply, and comply

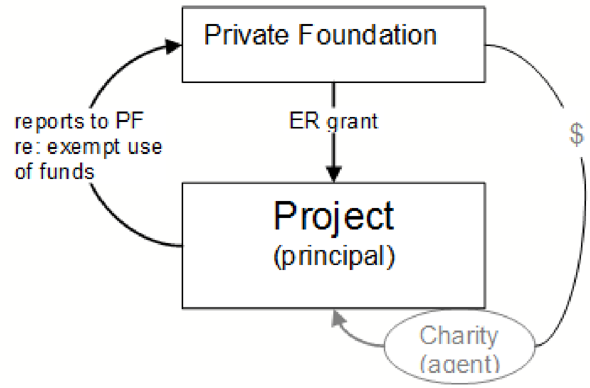
FISCAL SPONSORSHIPS

Fiscal Sponsorship

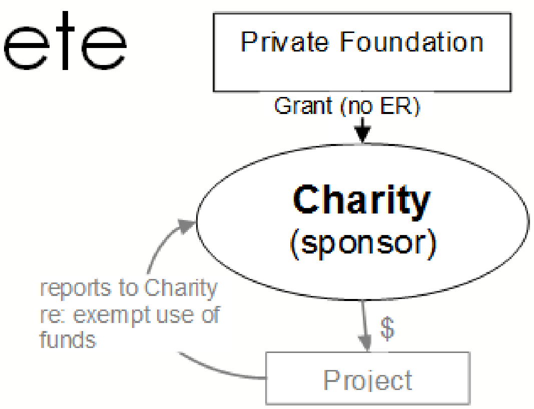
- Fiscal Sponsor
  - Public charity controls
  - Non-exempt “Project” must act to further the public charity’s exempt purpose
- Fiscal Agent
  - Public charity is subject to the control of the Project
  - IRS would consider the grant funds to be made directly to the Project

Fiscal Sponsorships

- No fiscal "agent"



- Sponsor must have complete discretion and control



- Need written agreement

Fiscal Sponsorship

- Terms in Agreement
  - Term & Termination
  - Description of Project
  - Delegation
  - Restricted Fund
  - Performance of Charitable Purposes

PUBLIC CHARITY
VS.
PRIVATE FOUNDATION

Public Charity v. Private Foundation

- To qualify as a public charity, the Organization will need to prove to the IRS that it is "publicly supported", as defined under (somewhat complicated) IRS regulations.
  - (1) public contributions normally equal or exceed *one-third* of the organization's total support (determined over a five year period), with contributions from a single source excluded in excess of 2% of total support, or
  - (2) such public contributions normally equal or exceed *ten percent* of the Foundation's total support and the Foundation is "so organized and operated as to attract new and additional public or governmental support on a continuous basis."

Public Charity v.
Private Foundation

- To satisfy the one-third test, direct or indirect public contributions must "normally" equal or exceed one-third of the Organization's total support.

- "Normally" aggregates an organization's support for *its current tax year and the four taxable years immediately preceding the current taxable year*. If public support during such period exceeds one-third of its total support, it will have satisfied the test.

Public Charity v. Private Foundation

- ***Two Percent Limitation***. In calculating contributions for purposes of the numerator of the fraction (the public "support") under the 33 1/3 Percent-of Support Test, <u>the aggregate contributions from a single source are excluded to the extent such contributions exceed 2% of total support</u>. However, the entire amount of the single-source contribution is included in the denominator portion of the calculation (the total support).
- Exception: Contributions received by the Organization from another publicly-supported charity are generally not subject to the 2% limitation.

Public Charity v. Private Foundation

- **<u>Facts and Circumstances (10 Percent) Test</u>**. Mandatory factors:
  - *Ten Percent-of-Support Limitation*. The Organization must "normally" receive at least ten percent of its total support from governmental agencies or from direct or indirect public contributions.
  - *Attraction of Public Support*. The organization "must be so organized and operated as to attract new and additional public or governmental support on a continuous basis."

Public Charity v. Private Foundation

- Additional factors: In addition, the organization must show additional “non-mandatory” factors such as:
  - Percentage of financial support
  - Sources of support
  - Representative governing body
  - Access to public

Public Charity v. Private Foundation

- Failure to meet tests = Private Foundation
- Additional Limitations for Private Foundations:
  - self-dealing,
  - mandatory pay-out requirements,
  - excess business holdings,
  - jeopardizing investment practices, and
  - taxable expenditures.

GOVERNANCE POLICIES

Governance Policies

- Conflict of Interest Policy. *Provides for disclosure and discussion related to any conflicts of interest held by board members. Requires annual disclosure by board members, which helps each member to review any potential conflicts.*
- Confidentiality Policy. *Ensures that all board members are operating on a confidential basis.*
- Investment Policy. *Supports smart and stable financial investments and confirms compliance with the Nebraska Prudent Management of Institutional Funds Act ("NPMIFA").*

Governance Policies

- Compensation Policy. *Used to avoid providing economic benefits in excess of fair market value to disqualified persons.*
- Gift Acceptance Policy. *Outlines procedures for accepting charitable gifts and delegates the authority to do so. This policy is especially helpful for organizations that receive non-cash gifts.*
- Expense Reimbursement Policy. *Sets forth the procedures for reimbursement of expenses by directors, officers, and others to ensure that such expenses are correctly processed as reimbursements rather than as taxable compensation to the individual.*

Governance Policies

- Document Retention and Destruction Policy. *Used to ensure proper retention and destruction for operational, legal, technical or historical purposes, including compliance with applicable laws.*
- Whistleblower Policy. *Outlines the procedure for submission of good faith concerns on a confidential and anonymous basis, protecting such persons from retaliatory action.*
- Joint Venture Policy. *Protects the tax exempt status of the organization by providing procedures to evaluate joint venture opportunities with for-profit organizations.*

Questions?

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