



COUNCIL *on* FOUNDATIONS

Community Foundations Gearing up for Year-End

Legal Webinar

(and a few COF friends dropping by)

National Standards

Chief Financial Officer

Community Philanthropy Director

November 2017



Housekeeping Items

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Thank you for joining us. The webinar will begin shortly!



Agenda

- Introductions
- Housekeeping Items
- Core Topics
 - Top 10 Legal Questions for Year-end
 - 3 Key considerations for Board/Mgmt
 - Top Governance Issues | National Standards for 2018
 - Considerations as you close the books
 - Calendar of Activities for Board Governance
 - Celebrating #CFWeek and #GivingTuesday
- Question & Answer
- Q&A



Moderator



Brad Ward
Director, Community
Philanthropy

Speakers



Bryan Del Rosario
Staff Counsel



Christina Gonzalez
Executive Director of
National Standards and
Staff Counsel



Brian Crowe
Chief Financial Officer



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Top 10 Legal Questions for Year-end

Bryan Del Rosario, Legal Counsel

10. Recordkeeping Rules

Requirement:

- A donor cannot claim a tax deduction for any contribution of cash, a check or other monetary gift unless:
 - The donor maintains a record of the contribution in the form of either a bank record (such as a cancelled check); or
 - A written communication from the charity (such as a receipt or letter) showing the name of the charity, the date of the contribution and the amount of the contribution

9. Written Acknowledgment

Requirement:

- A donor cannot claim a tax deduction for any single contribution of \$250 or more unless the donor obtains a ***contemporaneous, written acknowledgment*** of the contribution from the recipient organization.
 - Contemporaneous?
- It is donor's responsibility to obtain a written acknowledgment
- Goods or Services
 - Acknowledgment must describe goods or services an organization provides in exchange for a contribution of \$250 or more.
 - Token Exception – insubstantial goods or services

8. Timing of Contribution

“detached and disinterested generosity”

- A contribution is made at the time of its unconditional delivery

Personal Check (US Mail):

- Delivered on date mailed (mailbox rule)

Credit Card:

- Contributions charged are deductible in the year donor made the charge, not when donor pays statement

Stock Certificate:

- Properly endorsed stock certificate completed on date of mailing or other delivery to the charity or to the charity’s agent

7. Gift Acceptance Policy

Guidelines for negotiating and accepting gifts

National Standards Required Element:

- Types and specifications of gifts and assets accepted
- Procedures for accepting gifts and establishing funds, including any necessary approvals
- If gifts of illiquid assets are accepted, the policy should address process foundation uses to ensure such gifts will have charitable benefit to foundation
- Conditions under which board approval is required to accept a gift or asset type or to establish a fund

6. Contributions of Property

Related Use Rule:

- Applies to gifts of tangible personal property
- Donated object must be related to foundation's charitable purpose

Cars, Boats and Airplanes:

- Deduction usually limited to the gross proceeds from sale (if < \$500)
- IRS Form 1098-C (similar statement) must be provided to donor

Partial Interest in Property:

- Generally, donor cannot deduct charitable contribution of less than her entire interest in property (SEE Treas. Reg. § 1.170A-7 and IRS Pub. 526)

6. Contributions of Property (cont.)

Coins:

- Can be either considered a gift of money (follow cash tax rules) or tangible personal property (if related use, donor receives full FMV of deduction)

Artwork:

- Can include paintings, drawings, photography and sculptures
- Original work of art and its copyright are considered separate property for gift and estate tax purposes

Selling Instead of Giving to Charity:

- The major advantage of a taxpayer making a gift of tangible personal property lies in the amount of the capital gains taxes that are avoided by gifting

5. Real Property

Due Diligence:

- Acceptance consistent with Foundation's Gift Acceptance Policy?
- Questions:
 - Cost of selling property?
 - How marketable is the property?
 - Is it free of all mortgages and liens

Tax Issues for Donor:

- Donor required to obtain qualified appraisal to substantiate deduction
- Recommended that Foundation consider obtaining own appraisal

4. Business Interests

Q: We have a donor interested in gifting his dental practice

A: There are so many variables here-

What is the ownership type?

What percentage does the donor want to contribute?

Will the donor continue to be employed with the practice?

4. Business Interests (cont.)

Sole Proprietorship

- What interest can the owner give?

Partnership

- Partnership interests can be donated to charity, but there are a myriad of issues, including if the partnership has debt; whether interest can be transferred; how do you value it; will the partnership interest generate UBIT; what liabilities will the charity be assuming; etc.?

S Corp.

- Foundation is a permitted shareholder, but subject to UBIT on dividends and interest paid by S Corp.

3. Qualified Retirement Plans or IRA

Tax “Wash”:

- Except for the charitable IRA rollover, the only way for donors to make lifetime charitable gifts of their retirement plan funds is to withdraw funds and then gift such funds to charity

IRA Charitable Rollover:

- Dec. 18, 2015, President Obama signed “Protecting Americans from Tax Hikes” into law and, among other things, the Act finally make IRA Charitable Rollover permanent
 - Unfortunately, rollovers into DAFs prohibited



2. Donor Advised Funds

Tax Deduction Today; Grant Later

- Donors allowed to make charitable contribution, receive an immediate income tax deduction, and retain the right to recommend grants from the DAF over time



1. COF Legal Happy to Assist

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Top 3 Key considerations for Board and Management on year-end budgetary and regulatory activities

Brian Crowe, CFO

Presentation & Analysis

- Dashboards and analytics; multi-year budgeting
- Complete/update Enterprise Risk Mgmt. analysis (i.e. ERM)

Focus on Major Expense Categories

- Salary & Fringe Benefit analysis & review
- Consultant contracts
- Fixed Asset and other capital expenditure assessment
- Information Technology needs (*FASB ASU 2015-05 for cloud-based internal use software*)
- Business insurance

Review various policies & procedures

(e.g. investment spending allocations, data retention, travel reimbursement, etc.)

- Updates to the chart-of-account mapping to track strategic initiatives
- Updates to expense classifications and definitions

Review & reconciliation of various quarterly and annual payroll reports

- 940 & 941 reports
- Review & assessment of applicable sales & use tax filings

990 documentation and work-paper preparation

- Annual Financial Interpretation No. 48 (i.e. FIN 48) analysis
- Review for any Unrealized Business Income (UBI)

5500 documentation and work-paper preparation and required notices

- Review of Human Resource items & compliance



Top Governance Issues | National Standards for 2018

Christina Gonzalez, Executive
Director of National Standards |
Staff Counsel



Top Ten State Charities Issues

1. **Absentee board and lack of board governance**
2. **Not safeguarding assets**
3. **Conflicts of interest – “Would the media and your mom understand?”**
4. **Executive Director with too much power**
5. **Clear failure to follow mission of the nonprofit**
6. **Membership issues and managing board conflicts**
7. **Misusing your endowment or restricted assets/*de facto* application of *cy pres***
8. **Fundraising issues**
9. **Lack of public accountability and transparency**
10. **Ignore the Attorney General’s office – Don’t do it!**

Excerpts from remarks of James Joseph (Partner, Arnold & Porter LLP), Janet Kleinfelter (Deputy Attorney General, Office of Attorney General of Tennessee), and Verneta Walker (Vice President for Programs and Chief Governance Officer, BoardSource) at October 17, 2016 NAAG/NASCO meeting in Washington, D.C.



Top Federal Charities Issues

- **Charities make the IRS “Dirty Dozen” list year after year. In 2017, the list again included fake charities.**
 - The IRS warned, “Be on guard against groups masquerading as charitable organizations to attract donations from unsuspecting contributors. Be wary of charities with names similar to familiar or nationally known organizations. Contributors should take a few extra minutes to ensure their hard-earned money goes to legitimate and currently eligible charities. IRS.gov has the tools taxpayers need to check out the status of charitable organizations. ([IR-2017-25](#))”
- **Donor Advised Funds**
 - In meetings we get questions about use of donor advised funds used by private foundations and whether there is abuse.

Excerpts from the 2017 IRS Dirty Dozen List, last accessed November 14, 2017, <https://www.irs.gov/newsroom/irs-summarizes-dirty-dozen-list-of-tax-scams-for-2017>



Top Federal Charities Issues

- **Treasury is troubled by the following:**
 - **Does the sponsoring organization allow donors to place limitations on the amounts that may be distributed from funds?**
 - These types of limitations may indicate that the assets in the account are not being used primarily to accomplish charitable purposes.
 - **Does the sponsoring organization permit investments in closely held corporations, limited partnerships, or limited liability corporations?**
 - These types of investments could be an indicator that the sponsoring organization is serving the private interests of its donors.
 - **Does the sponsoring organization allow the assets in its donor advised funds to be used for fundraising events, for travel, or for other types of administrative items?**
 - This could mean that the assets in the donor advised funds are being used to subsidize the donor's lifestyle rather than being used primarily to accomplish charitable purposes.



What are the Top Issues National Standards Reviewers Think About?

1. **What information or decisions does your board approve?**
 - a. What information or decisions do not get approved by the board?
 - b. Do board and staff have the same understanding?
2. **For each policy, procedure or agreement, do you have evidence of when it was adopted or approved?**
3. **Does your board have enough information to make informed decisions?**
 - a. Regulators ask, “where was the board?”
4. **Does use of variance power for endowment funds require any additional action under state law?**
 - a. What does UPMIFA or the like say in your state?
 - b. Does your donor understand variance power?
 - c. Does your board understand variance power?
5. **Does your Form 990 accurately reflect your activities?**
 - a. See Part V, Questions 8 a-b and 9.



What Issues Are National Standards Reviewers Thinking About?

6. **Do you know who is in charge of implementing your policies?**
 - a. Is that written down somewhere for board and staff?
7. **Do your bylaws go above and beyond what the law requires?**
 - a. If yes, then you must follow the additional restrictions in the bylaws.
8. **Did you have an organizational name change or a DBA?** Do you have the government paperwork to prove it?
9. **Regardless of what is in your policies, what do your donors and grantees know?** Is it enough?
10. **Conflicts of interest disclosures must be done annually. Confidentiality acknowledgements can be done once.**
11. **Is your template blank or does it have another entity's name on it?**
 - a. If you use the National Standards templates or others, make note of that in a footer (e.g., "adopted from [NAME]" or "adapted from [NAME]").



National Standards Board Approval Requirements

- **All items that ask for board approval need to demonstrate board oversight in one of two ways.**
 - Option 1: Have the board review and approve items listed for board approval.
 - Option 2: Provide documentation of corporate signing authority or board delegation to staff or committee. This information would also be found in board minutes.
 - If your board is delegating, we want to know the procedure for keeping them informed of what they have delegated. Please attach a short narrative about how the board is updated.



Why is Board Approval or Proof of Delegation Required for What Seem to Be Management Tasks?

- **The board of directors is ultimately responsible for the governance of an organization. While delegation of responsibilities is an option, that will not relieve the board of responsibility.**
 - One of the most famous legal cases is the Sibley Hospital case. In *Sibley*, the board had delegated the organization's investment function to the treasurer and did not provide any oversight. The court held that each of the board members breached their fiduciary duties by failing to supervise management with respect to the investment activities.
 - In *Verret v. United States*, a federal district court in Texas determined that the chairman of a nonprofit hospital's board of trustees was personally liable for the hospital's nonpayment of withholding taxes. Responsibility for payment of the withholding taxes had been delegated to staff, but the board was ultimately responsible.
 - In the Pennsylvania case [*In re Lemington Home for the Aged*](#), No. 13-2707 (3rd Cir., 2015), board members failed to supervise staff managing a charitable organization with serious financial problems. In this case, **individual board members were each found personally liable for \$2.25M in damages for providing inadequate oversight, relying on incompetent officers, and in failing to take adequate action once they knew there were problems.** In all these cases, proper board oversight could have protected the board members individually.

ADEQUATELY EDUCATING YOUR BOARD IS KEY.

Problems can be prevented when your board is educated and engaged.



Considerations as you close the books; prepping audits

Brian Crowe, CFO

- Internal Control policy documentation & review
- General Ledger analysis & review
- Review of accruals for liabilities/obligations
- Prepared by Client document list
 - Information requests to vendors
- General knowledge of Various FASB updates (e.g. ASU 2014-09, 2016-01, 2016-02; 2016-14)



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Calendar of Activities for Board Governance

Brad Ward, Director of Community
Philanthropy

Key Considerations

- **Consider Consent Agenda**
 - Allows streamlining of committee reports and action-oriented approvals; maximizes discussion time
- **Focus on critical issues (limit to 1-2 topics per meeting)**
 - Leave time for critical/unforeseen issues
- **Prioritize activities based on calendar of activities**
 - Define topics in advance on a calendar of activities
 - Allows board to come prepared, aware, ready to dialogue
 - Ensures all priority issues are tackled timely and consistently

Example of a Calendar of Governance Activities

January | February

- Conflict of Interests Statement Reinstated
- Year-end Review
Financials & Org Objectives
- New Board Orientation Commences

March | April

- Audit Committee Report
- Compensation and Salaries Report
- Investment Committee Update

June | July

- Board Self Assessment (bi-annual)
- Governance Committee/Board Recruitment
- Grantmaking Statement of purpose

August | September

- Review of Financial Progress
- Grantmaking Update
- Review of IRS 990 Report for Filing

October | November

- Strategic Plan Review
- Independent Audit Report
- Market Landscape Assessment

December

- Operating Review
- 2018 Overarching Goals Approved
- Officers, Chairs/Committee Appointments | Re-appointments

Ensure annually:

- Form 990 is reviewed, understood, filed by the Board
- Conflict of Interest policy and Document retention and destruction in place
- Executive compensation process
- Evidence to comply with objective and nondiscriminatory grantmaking process
- Transparency and public accounting and “Defensive” documentation
- Continuity in planning (the “hit by a bus” scenario)
- 100% Board Giving Levels Achieved
- Board self-assessment (bi-annually)



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Celebrating #CFWeek | #GivingTuesday

Brad Ward, Director of Community
Philanthropy

Prime opportunity to highlight critical role of community philanthropy in supporting a thriving local community.

What is #CFWeek?

- Created in 1989 by former president George H.W. Bush
- Recognizes important work of CFs throughout America
- Opportunity to highlight the collaborative and innovative approach to working with the public, private, and nonprofit sector.
- November 12-18, 2017, marks the 28th annual Community Foundation Week, and the 103rd year of community foundations as a force for change
- As in years past, Community Foundation Week coincides with National Philanthropy Day (sponsored by the Association of Fundraising Professionals) on November 15 (today).

A Global Giving Movement | November 28, 2017

What is #GivingTuesday

- #GivingTuesday is a global day of giving
- Fueled by the power of social media and collaboration.
- Celebrated on the Tuesday following Thanksgiving (in the U.S.)
- And widely recognized shopping events Black Friday and Cyber Monday

What the use?

- #GivingTuesday kicks off charitable season
- Helps put the focus on holiday and end-of-year giving.
- Many CFs utilize the platform to raise awareness for their own operations or the nonprofit sector as a whole

Resources available: www.givingtuesday.org



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Thank You for Joining Us for

Community Foundation Legal Webinar

In partnership with Council staff in finance, National Standards, and Community Philanthropy

Upcoming Events:

New Way to Engage for Community Foundations

[Webinar](#) | November 30, 2017, 1:00-2:00pm EST

Data: Not a Four Letter Word

Webinar | January 23, 2018, 1:00-2:00pm EST

North American Community Foundation Summit

[In-Person Summit](#) | February 5-7, 2018 | Mexico City

Learn more and register at www.cof.org