FOUNDATION BOARD GOVERNANCE & COMPLIANCE

How to Avoid Common Pitfalls

PSW PROFESSIONAL LEARNING WEBINAR

DATE/TIME

WEDNESDAY, SEPTEMBER 2
10 AM CT

PRESENTED BY

Philanthropy southwest
Connected, Impactful Philanthropy

CARL B. AND FLORENCE E. King FOUNDATION

Michelle Monse, President

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Arabella
Advisors

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Agenda

- Welcome and Introductions
- General Overview
  - Legal and Regulatory Framework
  - Other Stakeholders
  - Rules of the Road
- Common Applications and Pitfalls
- Governing Through a Crisis

Logistics

This call will include numerous participants, so here are a few housekeeping notes:

- Take a moment to download the Zoom software directly onto your computer. Desktop access allows for full functionality (including the chat box) and participation while the mobile browser access has its limitations.
- Everyone joining the call will be muted automatically; this webinar is being recorded.
- If you have issues with your bandwidth, you may want to close any web-based applications or ask other household members to hold off on using the Internet during this time period. These actions should help boost your bandwidth for Zoom Conference.
- We will be taking questions following the presentation. Please feel free to type your question in the “Q/A Box” at any time during the webinar.

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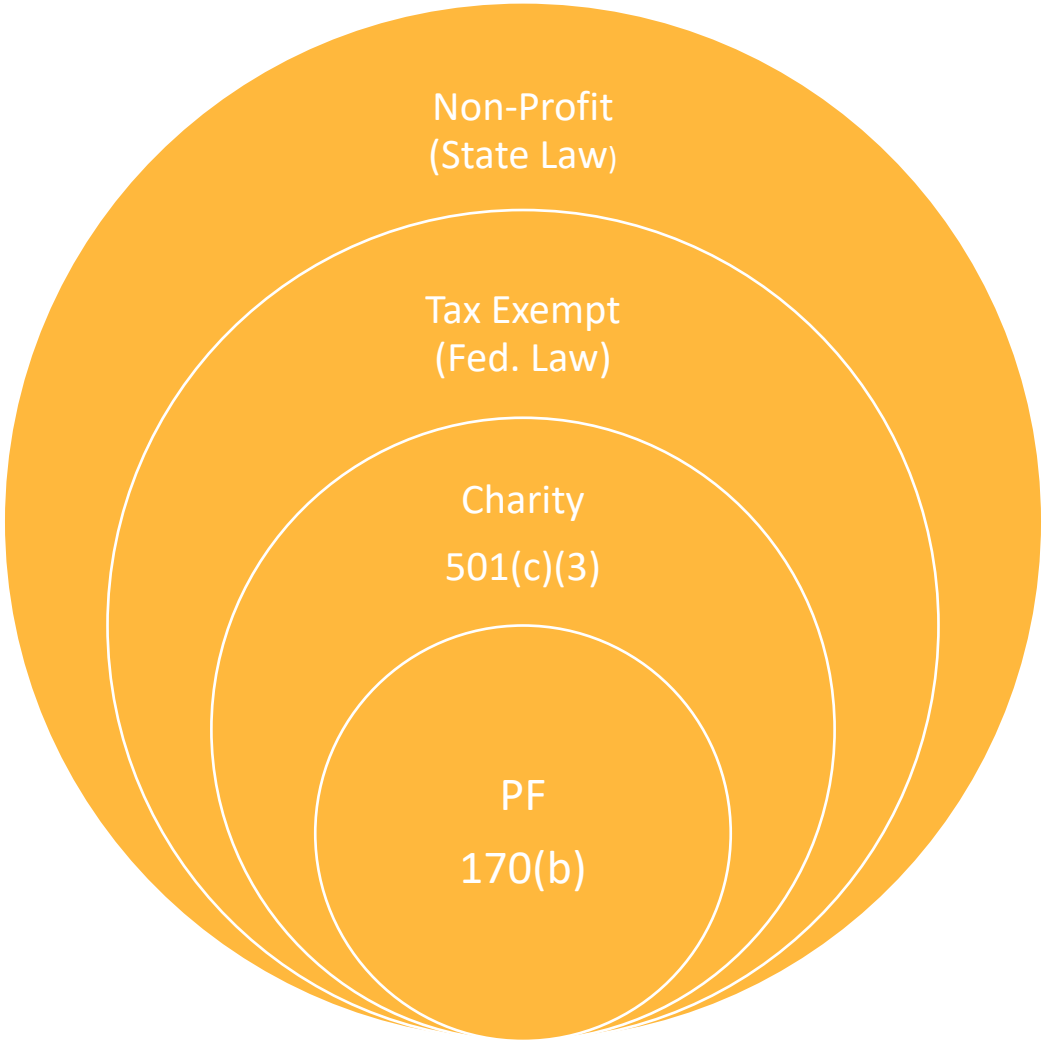
General Overview of Accountability and Governance

Legal Framework



Governing Documents

- State
  - Articles of Incorporation / Declaration of Trust
  - Bylaws
  - Policies and Procedures
  - Annual report or other state/local filing (if any)
- Federal
  - Application for Exemption (Form 1023)
  - Determination Letter
  - Annual Return (Form 990-PF)

State Law: Three Fiduciary Duties

- Duty of Care
  - Reasonable diligence- awareness and participation
- Duty of Loyalty
  - The foundation comes first
  - Avoid conflicts of interest
- Duty of Obedience
  - Honor donor intent
  - Focus on the charitable mission
  - Observe rules and policies

Private Foundation Rules

- Excise Tax (§4940)
- Self-dealing (§4941)
- 5% Payout (§4942)
- Excess Business Holdings (§4943)
- Jeopardy Investments (§4944)
- Taxable Expenditures (§4945)

Self-Dealing

No transactions with "disqualified persons"

Officers, directors, trustees

Substantial contributors

Family members of the above

Businesses they control

Major Exception – Compensation

Reasonable

Furthers exempt purposes

Personal services (legal, accounting, banking, investing, etc.?)

Penalties –

10% on self-dealer, 5% on managers

5% Payout

- Basic Rule
  - Each year make qualifying expenditures that equal or exceed about 5 percent of average assets
- What counts?
  - Grants
  - Program-related investments
  - Reasonable administrative expenses (except for investment management)
  - Direct charitable activities
  - Cost of assets purchased to carry on charitable activities
- Set asides

Excess Business Holdings

Private foundation may not own a controlling interest in a for-profit company

- Generally 20 percent
- Add up what the foundation owns PLUS all shares owned by disqualified persons.

2 percent safe harbor

5 years to divest assets

Jeopardy Investments

- No investments that jeopardize exempt purposes
- No *per se* jeopardy investments
- Modern portfolio theory - each investment considered within the entire risk/asset allocation of all investments
- Some investments will attract extra IRS attention
- Penalties apply first to foundation managers, then to the foundation.

Taxable Expenditures

- Political activity
- Lobbying
- Grants to individuals for travel, study or research
- Grants to other than public charities
- Grants for purposes that are not charitable

Applying the Rules

Governance Policies

- Should be in writing, approved by the Board, reviewed at least annually, and updated as needed

Common Policies

- Board membership
- Meeting management
- Personnel (if any)
- Records retention
- Investment and spending
- Travel & expense reimbursement
- Attending fundraisers
- Trustee compensation
- Whistleblower
- Conflicts of interest

Conflicts of Interest

- Personal interest differs from the foundation's
- Conflicts range from per se legal violations to ethical considerations
- Not all conflicts are prohibited; often may be managed
- Adopt and follow written conflict of interest policy
  - Disclosure
  - Abstain from voting (some leave the room)
  - Document, document, document

Managing Risk

Organizational Liability

- General Liability
- Employment-related
  - Worker's comp., wage and withholding, OSHA, EEO, etc.
- Other potential liabilities
  - Securities laws, environmental laws, ERISA, IRS rules, OFAC, etc.

Personal Liability

- Directors can be held personally liable for their actions as directors
- Directors can be named as defendants for actions of the foundation
- Defending a case can be expensive for both the individual and the foundation

Mitigation

- Indemnification
- D & O Insurance

Practical Responsibilities

- Effective Planning
- Resources – Financial Stewardship
- Mission, Purpose, and Strategy
- Programs and Services
- Public Standing
- Law and Ethics
- Executive Staff
- Board Succession, Evaluation

Hiring Family Members

- Personal Services:
  - Banking, legal, accounting, investments
  - Not – interior decoration, janitorial
  - Query – real estate management
  - Narrow interpretation by IRS
- Reasonable:
  - What similar people get paid for similar work in similar circumstances
  - Generally no percentage-based compensation
- Necessary: Consistent with exempt purposes
- Follow Conflicts Policy

Travel Expenses

- Spouses and children are disqualified persons
- Paying travel expenses for them is self-dealing
- Two Exceptions:
  - Family has reasonable foundation duties, or
  - Treat as taxable income to person who is related to the reimbursed
- Expenses must be reasonable

Sharing Resources

PF can only pay for “personal” services

Ok to pay third parties

O% loan to foundation ok

Keep meticulous records

Disqualified person can usually donate resources

No deduction for partial interests in property

No deduction for services

Scholarships

- Pursue education, achieve an objective, develop a skill
- Charitable class
- Objective and non-discriminatory basis
- No disqualified persons
- IRS pre-approval required

"I know so much, I don't know where to begin."

Disaster Relief / Hardship

- Charitable class
- Process for determining who gets assistance
- Follow your process
- Keep Records
- Tips
  - Plan ahead
  - Intermediaries

Key Lessons on Crisis Governance

Q+A

Type all questions using the Q+A window

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