



Association of Governing Boards
of Universities and Colleges
2011 Foundation Leadership Forum

Ten Compliance Issues for Foundation Boards

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Ten Compliance Issues for Foundation Boards

- Relationships with college and university boards
- Form 990 disclosures
- Regulatory and legislative scrutiny
- Executive compensation
- Board development
- UPMIFA implementation and investment policies
- Conflicts of interest
- Tax-exempt public charity status issues
- Governance best practices
- Routine maintenance



Relationships With College and University Boards

- Corporate relationship
 - Sole member
 - Interlocking directors
 - Ex officio directors
 - No formal relationship
- Bylaws language
- Joint committees
- Going rogue
- Form 990 reporting of relationships
- Control over distributions
- Public foundations

Form 990 Disclosures

- Governance disclosures
 - Core Form, Part VI
- Related organization disclosures
 - Directors and officers
 - Compensation from related organizations
- Schedule D- Supplemental Financial Statements
 - Part V-Endowment Funds
 - Type of endowment: board-designated (quasi); permanent; term
 - Details regarding revenue, expense, usage
- Schedule R- Related Organizations

Regulatory and Legislative Scrutiny

- IRS Compliance Check Questionnaire for Colleges and Universities
- IRS is looking at how colleges and universities:
 - report income and expenses on Form 990;
 - calculate and report losses on Form 990-T;
 - allocate income and expenses in calculating their unrelated business taxable income;
 - invest and use their endowments; and
 - determine executive compensation (including coaches).
- Compliance Check Questionnaire sent in October, 2008 to 400 public and private colleges and universities of varied sizes
- Is leading to increased scrutiny, media reporting, IRS audits, additional 990 reporting obligations
- Focus on endowments

Regulatory and Legislative Scrutiny

- AGB/NACUBO Report on CCQ Responses released December 17, 2009; IRS Interim Report issued on May 7, 2010
- Initial Takeaways:
 - 344 out of 400 responded (177 private/167 public)(13 did not respond/31 did not qualify)
 - IRS has opened audits of over 30 of the respondents (includes the 13 that did not respond) focusing on unrelated business income and executive compensation, but also collecting and reviewing governance data
 - Average and median endowment target spending rate was 4.75%-5.0%; actual rates consistent
 - Larger institutions most likely to have governance policies in place
 - Most institutions make audited financial statements available to the public

Regulatory and Legislative Scrutiny

- Senate Finance Committee—Senator Grassley
 - Proposal for mandatory endowment spending
 - Status of proposal: OBE
 - Change in status of Senator Grassley
 - State attorneys general
 - New Jersey AG suit against Stevens Institute of Technology
 - State court claims: breach of fiduciary duty; violation of UMIFA (excessive spending and portfolio lack of diversification); excessive compensation; mismanagement of endowment funds; gross negligence

Regulatory and Legislative Scrutiny

IRS Charitable Spending Initiative

- long-range study to examine fundraising, public contributions, grants, and revenues from related or unrelated trades or businesses, types and amounts of direct and indirect unrelated business income expenses, officer compensation, fundraising expenses, program service activities and the effect each has on funds available for charitable spending.

Executive Compensation

- Increasing focus on compensation by donors, regulators, media, competitors
- Compliance check questionnaire initial results
 - Inadequate use of rebuttable presumption of reasonableness
- Rebuttable presumption of reasonableness
 - Review by independent board or board committee; reliance upon objective evidence of reasonableness; reporting in the records of the corporation
- Knowledgeable board with full board involvement

Board Development

- Term limits
 - Stevens “reforms”
- Full board involvement
- Committee work
- Diversity initiatives

UPMIFA Implementation and Investment Policies

■ UPMIFA

- UPMIFA now the law in 46 states, introduced in two more.
- **Investment freedom.** Portfolio managers are generally not limited in the kinds of assets that may be sought for the portfolio. (Broader than UMIFA)
- **Expenditure of funds.** Total return expenditure is expressly authorized under comprehensive prudent standards. (More comprehensive standard than UPMIFA)
- UPMIFA **abolishes the historic dollar value limitation** on expenditure in UMIFA.
- **Seven percent rule.** States may adopt an optional rule that presumes expenditure exceeding 7% of total return is imprudent. (Not addressed in UMIFA)

UPMIFA Implementation and Investment Policies

■ UPMIFA

- **Release of restrictions for small institutional funds.** New procedure for releasing restrictions on small institutional funds (less than \$25,000) held for a long period of time (20 years), requiring only notice to the Attorney General 60 days in advance of the release. (Not addressed in UMIFA)

UPMIFA Implementation and Investment Policies

- Average annual return of Foundation endowments for 2010 fiscal year was 12.1%*
 - S&P 500 Index had return of 14.4% for same period
 - Return range among survey respondents of 36.2%-4.8%
 - Smaller institutions outperformed larger ones
- Average effective spending rate of Foundation endowments was 4.0%*
- Median gift to endowments was \$1.1 million
- Average percentage of institutions' operating budgets supported by annual giving was 6.2%
- Status of investment policy, need for updates

- *2010 NACUBO-Commonfund Study of Endowments® (embargoed until 1/26/11)

Conflicts of Interest

- Disclosure and materiality
- Committee responsibility
- Who reads the disclosure forms?
- Who is covered by the policy?
- Same policy as for supported entity?
- Duality of interest
 - Competing fundraising interests

Tax-Exempt Public Charity Status Issues

- Pension Protection Act of 2006 restrictions on supporting organizations
 - Type III supporting organizations
 - Treatment like private foundations
 - Functionally integrated Type III organizations
 - Health system parents
 - Changes in public charity status

Governance best practices (according to the IRS and AGs)

- IRS Governance Checklist (December, 2009)
 - To be used by EO Revenue Agents in examination of 501(c)(3) public charities
 - Inquires about:
 - Governing body and management
 - Compensation
 - Organizational control
 - Conflict of interest
 - Financial oversight
 - Document retention
 - Significance is that it is now a part of the audit process
- Stevens Institute of Technology Consent Agreement

Routine Maintenance

- Meetings
 - In-person, conference call, unanimous written consents, web meetings
 - Use of e-mail for voting purposes; proxy voting issues
- Form 990 filings, automatic revocation for failure to file for 3 consecutive years
- Director and officer vacancies, elections
- Annual report filing
 - Good standing
- Registered agents
- Charitable solicitation registration and reporting
- Lobbying registration and reporting
 - Federal (Lobbying Disclosure Act)
 - State

Questions

