

OCCASIONAL PAPER No. 40

Public-Policy Influences on Public College and University Foundations

By Anne H. Moore

Private foundations that support public colleges and universities have existed for more than a century. Yet only in the past 25 years have they grown dramatically in number and visibility in the wake of unsteady tax-dollar support for public higher education institutions. Indeed, foundations once designed to provide an added margin of excellence for public institutions have, in the past decade, evolved into aggressive fund-raisers to support day-to-day operations and endowments.

The sums they bring in nowadays are startling. By 1992, for example, state university-related foundations already accounted for five of the 16 institutions that raised more than \$100 million that year. Currently, 76 public institutions have endowments that top \$100 million, and several have joined the \$1 billion club, according to a study by the National Association of College and University Business Officers.

As the size and influence of public institution-affiliated foundations have grown, so has the call for increased accountability for these sometimes-murky entities that seem to straddle the line between public and private. Several newspaper investigations and a series of court cases have forced foundation leaders to step out of their insular worlds and pay attention to external influences—state and federal legislation and regulations, political change, and public-relations challenges—that could alter their way of doing business.

What follows is an overview of the key public-policy influences that affect today's institution-affiliated foundations. By clarifying the salient issues, this paper can help the foundations, their volunteer leadership, and their paid staff members (1) maintain appropriate and beneficial relationships with their

EXECUTIVE SUMMARY

College and university foundations originally set up to provide an added margin of excellence for their host institutions have evolved into aggressive fund-raisers to support day-to-day operations and endowments. Their rise has coincided with cuts in government spending on higher education and with public demands for more accountability for officials entrusted with spending taxpayer dollars.

Because foundations sometimes can straddle the line between public and private, they occasionally encounter legal challenges from news organizations and interest groups seeking to make public their internal financial records. A growing body of case law has made it clear that foundations need to take prescribed steps to preserve their privacy and the sensitivities of their donors while retaining the public trust.

Some state legislatures have created statutes and policies that impose requirements on college and university-affiliated foundations in such areas as disclosure and operations. At the federal level, the trend is toward greater disclosure and increasing responsibility for foundations to keep clear records related to gifts, financial analysis, and financial reporting.

Campus-based foundations should heed new Internal Revenue Service regulations designed to deter nonprofits from overcompensating their executives. They also should be familiar with guidelines from accounting industry authorities that permit foundations to borrow the common business practice of pooling different types of assets for purposes of strategic planning.

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institutions, (2) manage their affairs effectively and efficiently in times of organizational and political uncertainty, and (3) successfully carry out their mission of raising funds for the host institution.

While specifics may vary from state to state, this overview highlights the major trends and common issues that foundations can't afford to ignore.

The Context. Public college and university foundations have blossomed in an era in which taxpayer funding of American higher education has been flat, and in some cases declining. In the early 1990s, federal funding and policy related to higher education began departing from the centralized, activist course set in the 1960s. Cuts in state appropriations also prompted many public institutions to rely increasingly on private-sector support.

Though not directly connected, the federal government's evolution toward an approach that leaves much of education policy to the states, coupled with the decreasing state funding, led public institutions to trim budgets and restructure. This trend continues today.

Some of the changes on campus—ranging from piecemeal adjustments to integrated

restructuring efforts—began as responses by institutions to demands for more accountability as to how they spend public resources. Such demands are common today in public discourse in many arenas—in the church, in government, in the military, and in education at all levels. In the higher education context, the debate has been sparked by taxpayers and elected officials who express concern about whether tuition and fees are reasonable, whether waste and abuse of public funds are being minimized, whether publicly funded instruction meets the demands of a knowledge-based economy, and whether funds for research and development are supporting activities that are relevant to the economic development of the region, state, or nation.

Discussion of these issues in the news media often sounds disjointed, particularly as political rhetoric waxes and wanes. But there are consistent links between higher education and the larger forces at work in society, particularly those affecting business and industry. The tumultuous transition from an industrial economy to a more knowledge-based, global economy may be viewed as an evolutionary process or a transformational one. Either way, it is changing local, state, and

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national behavior, and the community of colleges and universities is not being spared.

The changes are hardly easy. Expectations run high for public higher education in most states, even as uncertainty prevails as to what the institutions should be accomplishing and how. On one hand, it is said, colleges and universities should serve more students with fewer resources than previously. On the other hand, they should revolutionize teaching and learning with the latest technological resources, which often are expensive. Faculty members, one hears, should spend more time

community understand the distinctions between responsibilities assigned to self-perpetuating, institution-affiliated foundation boards and those belonging to politically appointed or elected governing boards of the public universities and colleges themselves.

What's more, answers to key public-policy questions need clarification. For example: For what, precisely, are institution-affiliated foundation boards accountable and to whom? Does the recent surge of interest (by courts, legislatures, and the press) in the workings of university-affiliated foundations reflect a

The array of policies enacted in recent years points in one clear direction: greater public disclosure of foundation records.

in the classroom but also should create research discoveries that will generate jobs and economic opportunity.

Meanwhile, legislators and governors, faced with so many competing demands for public funds, often are happy to pass the responsibility for filling gaps in higher education funding onto the private sector. Private individuals cannot fully assume this responsibility, but they can play a variety of strategic roles, particularly those offered by institution-affiliated foundations.

Many foundation leaders have won praise by bringing influential people and productive partnerships to bear on college and university enterprises in such areas as medicine, telecommunications, and computing, to name a few. Some high-profile volunteers also have sought to influence policy in such areas as tenure and institutional hiring (an intrusion not welcomed by governing board members and institutional leaders).

Foundations of varying sizes and levels of influence have stepped in to provide discretionary funds for institutions. The more mature foundations have served as catalysts, as safety nets, and on occasion, as change agents themselves. Small wonder, then, that foundations affiliated with public institutions and the volunteer boards that oversee them have moved from the back-stage wings of higher education to center stage.

In satisfying public demands for accountability among these foundations, it is essential that all players in the higher education

healthy desire to serve the public's right to information about public institutions? Or does it reflect an effort to limit or control the foundations for political purposes?

Accountability discussions that revolve around the public interest and institutions' strengths—those held in a spirit of supporting an institution's mission and its desired results—can strengthen relationships and enhance the public trust. But accountability proposals that play to public and institutional fears—those held in a spirit of defining punishments or consequences for unclear or piecemeal reasons—will impede the vital work of higher education and detract from public trust.

The search for the proper approach can begin with a review of recent relevant legal, regulatory, and legislative actions.

Rulings, Regulations, Laws The array of policies enacted in recent years affecting university-related foundations points in one clear direction: greater public disclosure of foundation records.

In authorizing and encouraging public institution-affiliated foundations, some state legislatures have created statutes and policies with specific requirements in such areas as disclosure and operations. At the federal and national level, the trend is toward greater disclosure and increasing responsibility for foundations to keep clear records related to such things as gift process, financial analysis, and financial reporting.

HOW FOUNDATION BOARDS CAN STAY OUT OF TROUBLE

A significant portion of court cases, state statutes, and national initiatives begin in reaction to a specific incident. So it seems wise for each institution-affiliated foundation and its volunteer board to examine its own operations with a healthy awareness of the potential for trouble. Here are some practical steps foundations and institutions can take to improve business, legal, government, and public-relations operations in the future:

- Examine institutional and foundation positions in relation to state open-records laws.
- Review institutional and foundation positions in relation to the state court decisions about what constitutes a public body.
- Determine the desired degree of operational and policy independence between the college or university and its affiliated foundation.
- Define clearly and review periodically the mission of the foundation and its relationship to its college or university—and vice versa. Both may be evolving differently in response to social, economic, or political change.
- Monitor national issues affecting institution-affiliated foundations and foundations in general. With today's instant communications, social, political, and economic trends in one sector now spill into other sectors faster than ever.
- Keep up with current thinking concerning prudent investment (in the public and private sectors) while continually reexamining institutional and affiliated foundation operations, expenditures, pay-out policies, investments, and reporting.
- Report as regularly as the law requires, and use common sense to respond to specific requests for information even when responding is not legally required. Always be careful to maintain appropriate donor-partner privacy.

By paying scrupulous attention to organizational boundaries and by dealing openly with emerging issues, public institutions and their affiliated foundations can better position themselves to sustain the partnerships that are increasingly necessary for higher education as it prepares for a future of continuous social, political, and economic change.

Individual states have responded differently to pressure for accountability because of statutory differences over such questions as what constitutes an open record. Generally, state courts reach decisions by interpreting the meaning of terms that stem from two basic questions: (1) Is the foundation a public body? (2) If so, are the foundation's donor records subject to the disclosure requirements of the state's Freedom of Information Act (FOIA)? A brief review of major rulings:

The court noted that its board consisted entirely of private citizens (except for the university president, who served on the board in an ex-officio capacity) and that the foundation paid a nominal fee to rent university office space.

3. In 1990-91, the Supreme Court of South Carolina held that the **Carolina Research & Development Foundation** was subject to the state's FOIA. Like the two foregoing decisions, this ruling hinged on the

1. In 1980, the Court of Appeals of Kentucky decided that the **University of Louisville Foundation** was not a public agency and therefore was not subject to the state's open records law, as had been argued by the *Louisville Courier-Journal*. The foundation had been created to hold the assets of the university for an interim period during the University of Louisville's switch from private status to status as a public university. The court deemed the foundation to be private even though its board of directors included members of the university's board of trustees and even though the foundation admittedly served the university in an advisory, policy-making capacity. In declining to declare the foundation a public agency, the court nevertheless opened foundation meetings to the public, citing the number of public officials involved.

2. In 1989, the Supreme Court of Appeals of West Virginia found that the **West Virginia University Foundation** was not a public agency. Unlike the foundation in the Kentucky case, the West Virginia Foundation was neither created nor funded by state authority, and it dealt only with donations made directly to the foundation.

“public body” question. Although the foundation was set up to operate for the benefit of the University of South Carolina, that exclusivity was not the deciding factor for the court. Rather, it was the movement of some public funds into the foundation’s coffers that suggested that the foundation was supported by public dollars. The foundation also disbursed funds on behalf of the university to help develop a university building, and it received cash grants from the city and county through real-estate transactions. The court noted, however, that if the public funds had been received in exchange for defined goods or services, the court might have ruled differently and declared the foundation private and not subject to disclosure under the FOIA.

There is a clear trend recommending greater delineation between public and private interests, with directives for individual foundation operations surfacing in each case.

4. In 1992, the Kentucky Supreme Court, in revisiting the earlier open-records question, found the **Kentucky State University Foundation** to be a public agency and a unit of government and hence subject to the state’s public-disclosure law. In differentiating between the two cases, the court noted that the earlier case dealt both with open-records and with open-meetings laws. The Kentucky State University case, by contrast, was exclusively an open-records question. The ruling turned on an inclusive interpretation of what constitutes a public agency.

5. Also in 1992, the Supreme Court of Ohio deemed the **University of Toledo Foundation** to be a public agency that must disclose its donor records. The court found that the foundation received funding support from the state in that it operated out of rent-free office space at the university, and its staff enjoyed university-paid retirement benefits. The court also said that the foundation played a policy-making role as the fund-raising arm of the university and noted that it provided funds to supplement the salary of the university president. (The subsequently required release of donor records, complete with such information as names and addresses of donors, their giving histories, and the names

of donors’ friends, impeded later foundation fund-raising.)

6. In 1995, the Court of Appeals of Indiana ruled that the **Indiana University Foundation** need not submit its accounts to auditing by the State Board of Accounts. The court said that private donations received by the foundation to benefit the state university were not “public funds” for purposes of the State Board of Accounts statute, that the foundation was neither a “public office” nor a “public entity” under that statute, that the foundation had received a fee for services rendered that did not constitute a grant or subsidy from a public agency, and that the foundation’s records were not subject to inspection under the Public Records Act.

Overall, the record of state courts is divided almost equally between rulings that lean toward private status for university-related foundations and those that lean toward public status, with all its accompanying obligations. Yet there is a clear trend recommending greater delineation between public and private interests, with directives for individual foundation operations surfacing in each case.

Close analysis reveals that the disagreements that air during public discourse surrounding such litigation often can be attributed to actions by individuals, to debates overly focused on personalities, to unclear boundaries concerning the procedures of foundations and universities, or to various combinations of these factors. Even so, the conflicts suggest two major tasks for foundation and board leaders:

1. Pay attention to the legal requirements for establishing separate procedures for handling public and private funds, funds earmarked for salaries and benefits, and arrangements for record-keeping and use of facilities.

2. Know how and when it is permissible to match funds from institution-affiliated foundations with public funds, as in supple-

menting a president's salary or an institution's discretionary fund (or that of an eminent scholar), or in providing supplementary funds for facilities that are partially publicly funded.

Foundations and institutions would be wise to keep an eye on future conflicts and cases involving issues of this nature; others are sure to arise.

Active State Legislatures. Unlike court rulings, which nearly always grow out of specific disputes between interested parties, legislative actions surrounding university-related foundations just as often arise out of political tensions heightened by economic changes in society. Reduced appropriations for public higher education have prompted many legislatures to formally recognize the benefits of private support. For example, in 1997 the Louisiana legislature added the following language to its statutes:

"The legislature finds that private support enhances the programs, facilities, and research and educational opportunities offered by public institutions of higher education in Louisiana. Therefore, each higher education management board and institution is hereby encouraged to promote the activities of alumni associations, foundations, and other private, non-profit organizations that raise private funds for the support of public institutions of higher education. Further, it is recognized that private, nonprofit organizations under the direction and control of private individuals who support institutions of higher education are effective in obtaining private support for those institutions."

The Louisiana provision goes on to spell out appropriate roles for voting members of a nonprofit corporation as well as appropriate procedures for management and control by a board of directors for reimbursement to the affiliated institution for specific services, for receipt and disbursement of funds, and for maintaining accounting and auditing standards.

In 1999, the Maryland legislature enacted a statute that for the first time allows all state higher education institutions to establish

campus-based foundations without obtaining permission from the state regents, as was previously required. (The foundations still must conform to operating conditions set by the regents.)

That same year, the Virginia General Assembly inserted the following language in its Appropriations Act to reinforce a long-standing provision in the Code of Virginia that encourages private giving to public colleges and universities as well as the work of independent foundations established to support them:

"No officer, employee, or agent of the Commonwealth shall take any action that may discourage private giving, and other than the requirements of current state and federal law, no officer, employee, or agency of the Commonwealth shall place, or attempt to place, limitations or requirements upon independent foundations regarding the conduct of their business. It is the intent of the General Assembly that the independence of the foundations of the public colleges and universities be respected and not interfered with in any way. However, nothing in this provision shall be construed as diminishing either the power of an institution's board of visitors to determine operating and policy standards for its related independent foundations or the authority of an institution's president to execute the duties assigned to him under regulations of the National Collegiate Athletic Association. Further, it is the intent of the General Assembly that the public colleges and universities maximize revenues from private giving to enhance their programs."

It remains to be seen how the Virginia legislature will address issues related to the privacy of institution-affiliated foundations. Before the legislative session in which this encouraging language was adopted, a study had been launched to consider changes to Virginia's Freedom of Information Act. As the study progressed, the Virginia Press Association proposed language that would define institution-affiliated foundations as public

bodies for the purposes of the FOIA. Currently, foundations are required to make public only their tax returns, specifically Internal Revenue Service Form 990. Beyond that, the amount of disclosed information required by law is subject to interpretation, and rulings often turn on the question of what constitutes a public body.

Although the privacy issue is paramount, the timing of a gubernatorial commission to study higher education in the state raised

taxes; real-estate taxes on property not held for exempt purposes; raffle, gambling, and gaming issues; revenue from specialty license plates; and reporting to the state.

For example, Nebraska's Nonprofit Corporation Act defines the powers and responsibilities of institution-affiliated foundations across 17 areas, among them the number, qualifications, and election procedures of directors and officers; voting procedures; conflict of interest for directors; and

Foundations will suffer if forced toward greater public disclosure of donor records, giving histories, and private business records.

concern that more may be at issue than simply disclosure. Virginia's code states that private funds held by an institution-affiliated foundation may not be considered by the legislature when determining levels of state support for an institution. Yet the existence of the commission and of a special legislative committee to examine higher education funding formulas has caused concern that this statute (which shields education appropriations from considerations of the availability of private funding) might be weakened, especially given an overriding consideration in Virginia and across the nation with reducing the costs of higher education.

Around the country, as many as 27 states, among them Connecticut, Florida, Maine, Maryland, Nebraska, Oklahoma, and Virginia, have provided public funds to match private funds raised for such purposes as professorships, student scholarships, and capital projects. These efforts can be viewed as a sign that states are acknowledging the need for responsible public-private partnerships to support higher education.

Other legislatures, among them those in Florida, Indiana, Nebraska, and Texas, have begun to spell out general guidelines for nonprofit corporations. These guidelines speak to such issues as disclosure of information; membership on foundation boards; officer and director immunity; legal protection for volunteers; insurance regulation and its relationship to gifts and annuities; sales

liability for unlawful distributions. Nebraska law also requires that nonprofits pay real-estate tax on property not held for exempt purposes.

In Georgia, the legislature in 1998 enacted a law that assigns individual state agencies responsibility for reviewing the records of nonprofits with which the agency signs a contract to ascertain that the nonprofit is financially viable, is capable of performing the contract, and is not violating conflict-of-interest law. (It does not, however, apply to fund-raising foundations affiliated with the University System of Georgia.)

More generally, Florida and other states have enacted what are commonly called "legislative exemptions." In the Sunshine State, this means university-related foundations are exempt from the state's public-records law as it relates to "direct support organizations." This allows foundations to protect the confidentiality of their donor lists.

In response to these legislative initiatives, institutions and foundations in such states as Connecticut, Florida, Hawaii, Maryland, Minnesota, and Virginia have moved to clarify foundation operations and relationships. For example, the Florida Board of Regents actively regulates university-affiliated foundations and other direct-support organizations. In turn, the University of Florida Foundation provides detailed "information sheets" to help volunteer leaders and foundation staff in such activities as establishing

various kinds of trusts, making transfers to charitable remainder trusts, and transferring real property to the foundation.

Still other states, notably New Jersey, have adopted prudent-investor rules that have become a standard for fiduciary investment. These rules have encouraged New Jersey foundations to examine their portfolio and investment strategies, to diversify their portfolios, and to employ professional money managers.

Such actions by institutions and regents are examples for governing boards to consider as they seek to help foundations raise money without stumbling over the blurry line between public responsibility and private domain.

To summarize, states' activities related to public institution-affiliated foundations are aimed at three goals:

1. encouraging and defining the development of institution-affiliated foundations;
2. encouraging the match or leveraging of public funds with private support for such purposes as professorships, scholarships, and capital projects; and
3. delineating guidelines for nonprofit corporations such as institution-affiliated foundations by publishing standards and disclosing information pertaining to their governance, finance, and operations.

Federal and National Activity. Many regard federal regulations—and we're talking chiefly about those in the tax code—as having only a marginal effect on university-affiliated foundations. But such regulations do have their role. For example, because most foundations are subject to section 501(c)(3) of the federal tax code, they must adhere to specific guidelines about calculating a donor's charitable deduction, gift recognition, and valuation. These guidelines speak to such things as a foundation's tax-exempt status, private inurement, lobbying, and political activities.

Some foundations suggest that the proposed intermediate-sanctions regulations currently under review in Washington (they accompany Section 4958 of the Internal Revenue Code) have potential for significant influence on institution-affiliated foundations. Already, these sanctions, which were issued in response to financial abuses several years ago at the United Way of America, have

increased the requirements imposed on foundations for due diligence and documentation. Previously, if a foundation was found to be violating the law in its use and reporting of funds, the IRS could impose only one sanction: The nonprofit would forfeit its tax-exempt status. This consequence was thought to be too severe for every circumstance, so Congress stepped in to provide intermediate sanctions that stop short of revoking 501(c)(3) status.

The proposed intermediate sanctions regulations govern two areas:

1. *Compensation for highly paid individuals working for a foundation.* For example, if an individual is paid an annual salary of more than \$80,000, the foundation board must show appropriate compensation comparisons that justify it.

2. *Rules for foundation activities that involve volunteer board members.* For example, if a transaction such as selling foundation property involves a voting member or the extended family of a voting member of the foundation board, the board must certify it is receiving reasonable compensation for what it is selling. The penalties for failing to record certification of reasonable transactions or reasonable compensation could be substantial for foundation staff or board members. To document such "excess benefit transactions with disqualified persons," the boards of institution-affiliated foundations must review an ever-expanding volume of material.

Another area where federal disclosure policy is affecting institution-related foundations concerns university research data that is developed by recipients of federal grants. In 1998, Congress adopted a provision requiring that any data generated through federal research funding be subject to the federal Freedom of Information Act. Research universities and many of their partners in the private sector protested that such a requirement would have a chilling effect on research by prompting premature release and/or improper use of data. They also argued that forced disclosure of federally backed research would have a negative effect on the creation of public-private partnerships for the commercialization of intellectual property. This issue now is being debated within the federal Office of Management and Budget, which is develop-

ing implementation guidelines for the statute. OMB Circular 110 is the relevant document.

Foundations also are monitoring potential changes in federal tax laws affecting the deductibility of charitable contributions. Officials are concerned that if charitable gifts no longer are tax deductible, private support of higher education and other worthy efforts will diminish. Foundations also are keeping abreast of discussions on the federal and state levels concerning taxes on unrelated business income in traditional businesses and on Internet-based businesses. They also are monitoring the impact of new laws such as the Volunteer Protection Act, which provides new shields against legal liability for volunteers working for nonprofits.

Finally, institution-affiliated foundations continue to feel the influence of national accounting regulations and principles. The Financial Accounting Standards Board (FASB) recently issued financial and reporting guidelines that influence such things as preparation of financial statements, recognition of contributions, donated materials or services, and split-interest agreements, and accounting for investments. In 1993, FASB issued guidelines that discontinued requirements for individual “fund accounting” so that foundations today may commingle funds strategically in the manner of a private business. Other recent national guidelines worthy of attention include Statement of Position 98-2 from the American Institute of Certified Public Accountants, which requires greater analysis and disclosure of fund-raising activities.

In sum, the federal and national policy changes affecting university-related foundations are aimed at two goals:

1. increasing responsibility for institution-affiliated foundations for due diligence, clear record-keeping, and timely reporting; and
2. continuing pressure for open records of many types.

The Road Ahead. If the public-policy environment moves institution-affiliated foundations toward greater public disclosure of donor records, giving histories, and private business records, then these foundations undoubtedly will suffer. Donors who believe that their financial affairs are a private matter will be reluctant to associate with affiliated foundations, and this reluctance will extend to the foundations’ private business partners. In fact, institution-affiliated foundations already have experienced some competition from for-profit investment managers who can ensure the privacy of their clients’ gift and investment transactions. Should this trend continue, consternation over the future of institution-affiliated foundations will increase.

Change frequently entails anxiety and risk. Yet institution-affiliated foundations have the potential to play an increasingly important role in higher education if they can develop new approaches to organization, financing, and alliances. Institution-affiliated foundations can provide seed capital for strategic initiatives. They can serve as connections to business, industry, government, and the community; as laboratories for new revenue-sharing arrangements; and as the safety net for innovative projects whose outcome may be uncertain, though worthy of pursuit.

Volunteer leaders of foundations can serve their communities, regions, and states as effective communicators—not only of an institution’s goals but also of the affiliated foundation’s work toward realizing those goals. To do so effectively, these leaders must help the foundation and institution clarify their organizational boundaries and ensure that the day-to-day operations are conducted with efficiency and integrity. Doing so will help maintain the public trust and protect the privacy required by responsible public-private partnerships. ♦

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