

You're a Trustee. Now What?

~ Elizabeth C. Marshall

You may one day be invited to join the board of trustees of a private foundation. You should feel honored to be selected, as you are in good company. Many leaders in philanthropic efforts work with private foundations to improve life in Sarasota, elsewhere in the United States, and all around the world.

Two features of private foundations distinguish the duties and responsibilities of their trustees from those of a public charity. One stems from the fact that a private foundation is generally formed by one donor or a small group of donors (perhaps a family group). Because of this, trustees are not generally selected because of their ability to give money to or raise money for the foundation, which is one largely unwritten area of expectation for trustees of a public charity. The other stems from the fact that there are a large number of private foundations operating away from the public eye, so the government imposes additional rules on these organizations to make sure that the management and expenditures are consistent with the organization's charitable purposes.

Sarasota is supported by a large group of active, local private foundations that include (among many others) the William G. and Marie Selby Foundation, the Patterson Foundation, the Roberta Leventhal Sudakoff Foundation, and the Charles and Margery Barancik Foundation. The trustees of these foundations make grants to carry out the charitable purposes of these generous individuals, and in doing so, they both quietly and dramatically improve the overall quality of life in this area.

Whether the private foundation you are invited to lead is local, national, or international, it is essential for you to be an informed and engaged board member from the very beginning. General duties of a board of trustees include the employment of the foundation's executive director, the stewardship of the foundation's assets, and the granting of funds to carry out the mission of the foundation. Most local private foundations are non-operating foundations, which means that the grants are made to other charitable organizations and, in some cases, for scholarships. The responsibility for careful oversight of all of these activities rests with the board of trustees.

As trustee of a private foundation, you are generally expected to:

- Understand how the private foundation was formed and how it operates.
- Understand its mission statement and the intention and scope of its charitable activities.
- Focus your activities as trustee on carrying out these charitable purposes and avoiding those that are not in furtherance of these purposes.
- Understand how the organization operates, including its staffing, its grant-making, its internal policies and procedures, its compliance with any requirements for filings at the state and federal level, its insurance coverage for officers and employees, and its reliance on outside professionals such as financial advisors, tax and external auditors, and legal advisors.
- Adhere to the duties and responsibilities of a trustee under the foundation's governing documents, as well as state and federal law (explained in further detail below).
- Review in advance all financial information presented to trustees and inquire if any appears incomplete or erroneous.
- Be watchful with regard to any suggested or actual financial relationship between the foundation and any persons or businesses associated with it.

The principal sources of guidance regarding your duties and responsibilities as a trustee are three: (1) the operating documents establishing and governing the private foundation, (2) the state laws applicable to the private foundation, and (3) the federal laws imposed on all private foundations.

Operating Documents Governing Trustees of Private Foundations

The nature of a private foundation's operating documents will depend on whether it is formed as a trust or as a corporation. For an excellent comparison of the two, we suggest that you review Susan Hecker's article, "Philanthropy as a Family Affair: Using a Private Foundation to Achieve Your Charitable Goals," from the earlier "Philanthropy" edition of *Requisite*, reprinted for your convenience in this issue of *Requisite*. If yours is formed as a corporation, you will want to read the most up-to-date versions of the Articles of Incorporation and Bylaws. If yours is formed as a trust, you will want to read the trust document itself. These documents will identify the purposes for which the private foundation was formed, the principles of its governance and operation, the manner in which prohibited activities are to be avoided, and the state law of its governance.

The private foundation's mission statement and its policies and procedures are equally important. A well-articulated mission statement will guide the board of trustees in carrying out the purpose of the private foundation. The policies and procedures will set clear expectations for trustees, as well as rules of governance and operation. These should address key areas such as conflicts of interest, whistleblowing, and codes of conduct for board members and employees.

One often-overlooked document you should review is the private foundation's annual information return—the 990 PF. The Internal Revenue Service (IRS) requires that this return be filed, and it includes a wealth of detailed information about the foundation. It also provides valuable insight into what the IRS deems important to the proper operation of a private foundation. Private foundations are required to make the return available to the public for inspection, so it is an important document to review in advance of accepting the trusteeship and each year of your service thereafter.

State Laws Governing Trustees of Private Foundations

If the private foundation is formed as a corporation, the state's laws governing directors of not-for-profit corporations will apply to the board of directors. If the private foundation is formed as a trust, the state's laws governing trustees will apply. In each case, a director or trustee of a private foundation is a fiduciary in a position of trust with regard to the stewardship of the foundation and its assets.

Under Florida law governing directors of not-for-profit corporations, a director is to discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances and in a manner he or she reasonably believes to be in the best interests of the corporation. These duties include the duty of care, the duty of loyalty, and the duty of obedience.

- The duty of care is the duty to exercise reasonable care when making decisions for the foundation. Attending meetings, reviewing financial information, exercising oversight of the foundation's assets, supervising employees as appropriate, and exercising independent judgment are indications that the duty of care is being met.
- The duty of loyalty is the duty to act in a manner that is consistent with the best interests of the foundation and avoids putting the interest of self or other interested persons above the interests of the foundation. In short, a trustee should avoid prohibited activities such as self-dealing and improper conflicts of interest.
- The duty of obedience is the duty to understand and conform to the governing documents of the foundation and the laws affecting its governance. Many foundations require trustees and key employees to sign certifications that conflicts of interest are disclosed or avoided and that other codes of conduct are being met.

Likewise, in Florida, a trustee has the duty to administer the trust in good faith and with loyalty to the interests of the trust. A trustee is called upon to administer the trust as a prudent person would: by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee is to exercise reasonable care, skill, and caution. The same actions as those that demonstrate the care, loyalty, and obedience required of a director can be applied to the actions of a trustee in meeting these standards.

Federal Laws Governing Trustees of Private Foundations

Many federal laws govern the operation of all organizations exempt from taxation under the Internal Revenue Code, but some of these are specifically applicable to private foundations. These laws are aimed at discouraging so-called “self-dealing” between the private foundation and its particular set of “disqualified persons,” which include its substantial contributors, the foundation managers (including trustees and certain employees), and

certain family members of and businesses owned by any of these individuals. The penalty for these transactions includes excise taxes as high as 200 percent of the amount involved in the transactions. Mike Wilson’s article in *Requisite IV – The Patron Edition* explains in more detail that the types of “self-dealing” targeted by these rules can include the sale or lease of property, the lending of money, and the furnishings of goods, services, or facilities. Because it is immaterial whether the transaction results in a benefit to the private foundation, it is important that any financial transaction between a private foundation and one of its “disqualified persons” be carefully analyzed and, in most cases, avoided.

Other federal laws applicable to private foundation activities generally include a requirement that the private foundation make charitable expenditures each year of at least 5 percent of its net investment assets and avoid making non-charitable expenditures such as lobbying, making improper investments, and acquiring or retaining excess business holdings.

Conclusion

The duties and responsibilities of a trustee of a private foundation can best be carried out by understanding the rules, exercising diligence and good faith in oversight of the foundation’s activities, and identifying any potential transaction where the interests of individuals, especially the foundation’s so-called “insiders,” are at risk of being placed above those of the charitable organization. With common sense and care, a trustee can be confident that his or her service to the foundation will be both reliable and valuable.



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