



Navigating Your Role as a Director in a Time of Legal Uncertainty

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Overview

- Nonprofits are currently operating in a rapidly shifting environment where legal compliance, government scrutiny, and funding uncertainty is increasingly complex.
- In these times of uncertainty, the nonprofit boards must be proactive in protecting their organizations.
- During today's presentation, we will discuss recent legal developments, and the role of individual directors and boards in navigating these changes.



Agenda

- Role of Board Members
- Reviewing DEI / Race Conscious Programs
- Navigating Government Funding Disruptions
- Impact on Tax-Exemption
- Seeking Additional Guidance
- Strengthening Compliance Practices
- Building Reliance



Role of the Board

- Board members are the fiduciaries who steer the organization towards a sustainable future by adopting sound, ethical, and legal governance and financial management policies, as well as by making sure the nonprofit has adequate resources to advance its mission.
- Individual directors have fiduciary duties to the organization.
 - Duty of Care
 - Duty of Loyalty
 - Duty of Obedience



Role of the Board

■ Duty of Care

- Directors must act in good faith and discharge their duties with the care that a person in a similar position would reasonably believe is appropriate under similar circumstances

■ Exercising the Duty of Care

- Regularly attend board meetings and come prepared
- Exercise independent judgement
- Use special knowledge
- Only rely on information obtained from trustworthy sources
- Exercise high level financial oversight
- Ask questions



Role of the Board

- **Duty of Loyalty**

- Directors must exercise their powers in a manner that furthers the interests of the nonprofit, and not their own interests or the interest of another entity or person

- **Exercising the Duty of Loyalty**

- Recognize and report conflicts of interest
 - Keep information confidential



Role of the Board

■ Duty of Obedience

- Directors must be faithful to the charitable purposes of the nonprofit.
- Directors are also responsible for ensuring the nonprofit acts in accordance with its governing documents, tax-exempt status, and applicable laws.

■ Exercising the Duty of Obedience

- Review the nonprofit's governing documents and policies
- Understand how the nonprofit's activities support its charitable purposes
- Ensure the nonprofit is complying with its tax and legal obligations



Role of the Board

- Whether an individual director has complied with these fiduciary duties will be evaluated based on the steps undertaken by that director before voting or making the decision in question (e.g., what information was reviewed or what guidance was obtained).
- When a Board acts in accordance with its fiduciary duties, courts and regulators give strong deference to its business decisions.



Role of the Board

- In times of legal uncertainty, the role of the Board is largely defined in the context of these fiduciary duties.
 - **Duty of Care**
 - Seek to understand the issues coming before the Board.
 - Pay attention to significant changes that could materially impact the organization.
 - Delegate properly and obtain guidance from professional advisors.
 - Analyze risk and engage in scenario planning.
 - **Duty of Obedience**
 - Help the organization monitor legal developments.
 - Ensure the organization is adhering to its mission, governance documents, tax-exempt status, and applicable law.



Role of the Board

- Consistent with these fiduciary obligations, today we would like to highlight a few action steps that your Board could consider as it is navigating recent legal developments.
 - Reviewing DEI and Targeted Programs
 - Preparing for Government Funding Cuts and Freezes
 - Seeking Additional Legal Guidance for Certain Programs
 - Strengthening General Compliance Practices
 - Building Resilience





Reviewing DEI / Race Conscious Programs

- In recent years, there has been increased scrutiny in connection with DEI programs. This includes legal challenges to race-exclusive and race-conscious charitable programs operated by nonprofits.
- ***Students for Fair Admissions v. Harvard / UNC (Supreme Court)***
 - Race was used as a plus factor in a highly competitive admissions process. In some cases, the use of race as a factor was determinative. The Supreme Court found that the use of race in admissions violated the equal protection clause (UNC) and Title VI (Harvard).
 - The majority opinion noted, “eliminating racial discrimination means eliminating all of it.”
 - While the *decision* did not change the legal basis for scholarships, contracts, tax-exemption, or grantmaking, the *rationale* is being applied in these contexts.





Reviewing DEI / Race Conscious Programs

- Following *Students for Fair Admissions*, plaintiffs have filed lawsuits seeking to dismantle race-exclusive and race-conscious charitable programs. These lawsuits are typically based on the following laws:
 - **Equal Protection Clause:** Prohibits government actors (such as a state agency or public university) from discriminating based on race.
 - **Title VI of the Civil Rights Act of 1964:** Prohibits entities receiving federal financial assistance from discriminating based on race.
 - **Section 1981 of the 1866 Civil Rights Act:** Prohibits all discrimination based on race, color, ethnicity when making and enforcing contracts. *Applies to private entities, including nonprofits that are not federally funded.*





Reviewing DEI / Race Conscious Programs

- Public institutions and publicly funded organizations should review any race-conscious or race-exclusive programs with legal counsel.
- For most nonprofits that are not funded with public dollars (e.g., local, state, or federal funding), the law remains largely the same. These nonprofits can likely continue to operate race-conscious programs that achieve recognized charitable objectives. *However, there is some risk involved with continued operation of these programs.*





Reviewing DEI / Race Conscious Programs

- What does risk mean in this context?
 - Litigation Risk
 - Reputational Risk
 - Government Investigation Risk
 - Risk of Change





Reviewing DEI / Race Conscious Programs

- While not required, some nonprofits are modifying programs that are race-conscious or race-exclusive with a goal of protecting their programs and planning for potential changes in the law.
- At this point, it's largely a business decision for a nonprofit's board, as they will need to weigh the risk and mission alignment of programs.
- Organizations may have different risk tolerances in this space and may be subject to different legal requirements based on their funding and jurisdictions of operation.





Reviewing DEI / Race Conscious Programs

- Risk Mitigation Strategies
 - When possible, use race neutral standards to achieve programmatic objectives.
 - Update website and public statements to limit discussion of the use of race in programs. *Keep in mind that plaintiffs are using AI to target programs for legal challenge.*
 - Preserve flexibility in legal agreements related to program funding or operations.
 - Request demographic information for assessing impact, not making grantmaking decisions



Navigating Government Funding Disruptions

- After he was sworn into office, President Trump signed dozens of Executive Orders covering a broad range of issues, a number of which will have a direct effect on nonprofits with federal grants and contracts.
- Nonprofits with federal grants and contracts providing DEI training, or work on immigration, LGBTQ+ rights, or environmental protection should review their programs and contract language as it relates to the Executive Orders.
- As the Administration takes steps to reduce the federal government, there are fewer staff at agencies, causing delays when responding to nonprofit inquiries.



Navigating Government Funding Disruptions

- As a result of the Executive Orders and other agency actions, many nonprofits receiving federal grants have experienced funding disruptions.
- In some cases, grants have been suspended or terminated because they allegedly fail to align with current administration and/or agency priorities.
- If your organization receives federal funding, the Board can take steps to:
 - Understand the federal funding that your organization receives.
 - Understand the circumstances under which the organization's grants or contracts can be terminated or cancelled.



Navigating Government Funding Disruptions

- If your organization receives federal funding, continued:
 - Review the Executive Orders and executive branch memos that focus on the areas covered by your nonprofit's mission and programs.
 - Audit your organization's public facing profile.
 - Conduct stakeholder outreach on any changes made.
 - Ensure that grant expenses are properly allowable under the grant agreement.
 - Consider drawing down grant funds on a regular basis to limit the financial impact if funding portals are suspended or reimbursement is delayed.
 - If your organization receives a notice of a grant suspension or termination, seek guidance from legal counsel with expertise in federal grants on the options for disputes and termination claims.



Navigating Government Funding Disruptions

- Review your portfolio of funding sources and consider the potential impact of a temporary or permanent loss of government funds. Keep in mind the impact may be indirect (partner organizations or program participants).
- Consider how these changes could impact your organization's financial stability, programmatic goals, and program participants.
- Strengthen financial reserves to provide greater flexibility to navigate funding disruptions.
- If your organization is materially impacted by funding cuts or disruptions, the Board may need to explore strategic partnerships, cost-saving opportunities, or merging with a like-minded nonprofit.



Impact on Tax-Exemption

- In recent months, the media has discussed efforts by the Trump Administration to weaponize tax-exempt status.
- President Trump has suggested that nonprofits (e.g., Harvard) should lose tax-exempt status if they are engaged in “illegal” activities that are contrary to the administration’s priorities.
- Under the public policy doctrine, a tax-exempt organization’s activities will not be charitable if they are **illegal**, or they are contrary to **established public policy**.
- If these activities constitute a **substantial part** of the organization’s activities, the organization may fail to qualify as a charitable organization described in § 501(c)(3).



Impact on Tax-Exemption

- Under existing law, revocation of tax-exemption is a highly unusual and extreme remedy. It would typically require an audit, procedural back-and-forth with the IRS, a final determination, and an opportunity to appeal using the judicial process.
- It is unclear if the current administration's priorities will change how the IRS analyzes whether a nonprofit has engaged in illegal activity.



Seeking Additional Guidance

- In addition to the topics we have mentioned, there are additional areas should be discussed with your organization's legal counsel to the extent they are directly relevant to your organization:
 - Gender, sexual orientation, and LGBTQ+ services
 - Climate and environmental justice programs
 - Programs serving undocumented individuals
 - Immigration enforcement considerations
 - Race or gender conscious scholarships
 - DEI in schools and higher education
 - Foreign aid





Strengthening Compliance Practices

- In this time of legal uncertainty, it is a good time to review your organization's governance and compliance practices.
 - Confirm the organization's annual tax and regulatory filings are current.
 - Review how your organization's mission and programs are described on the organization's Form 990 and any state-level filings.
 - Check-in with legal counsel on your current governance and compliance practices.
 - If you are a funder, review grant agreements and your rights in connection with grants. If you are grantee, understand any donor or funder-imposed restrictions, request flexibility where needed.
 - Review website language, public statements, and materials to ensure they align with your organization's mission and do not create unnecessary risk in the current legal and political environment.





Building Resilience

- A nonprofit board should think proactively about how to navigate these challenges.
- Organizations should be discussing the potential consequences of new policies, evaluating risks and opportunities, and determining the best course of action across key.
- As a Board, it may be helpful to work through a scenario planning process, that asks the “what if” questions and design response options.
- Consider whether there are groups of like-minded organizations that share resources and strategy.
 - Council on Foundations, National Council on Nonprofits
 - Minnesota Council on Foundations, Minnesota Council of Nonprofits



Questions?