

UNDERWOOD

GOVERNANCE ISSUES FOR EDUCATION FOUNDATIONS

Presented by

Janet S. Bubert

Janet.Bubert@uwlaw.com

Underwood Law, PLLC
1008 Macon Street, Suite 101
Fort Worth, Texas 76102
817/885-7529

I. TYPES OF NON-PROFIT ORGANIZATIONS

- A. Non-profit Corporations** - Many, but not all, non-profit organizations choose to incorporate. A non-profit corporation is typically created by filing a certificate of formation with the Secretary of State. Generally, a non-profit corporation may be created for any lawful purposes, which purposes must be fully stated in the certificate of formation. Not all non-profit corporations are entitled to exemption from state or federal taxes.
- B. Unincorporated Non-profit Associations –**
 - 1. An unincorporated non-profit association is an unincorporated organization consisting of three or more members joined by mutual consent for a common, non-profit purpose.
 - 2. Generally, an unincorporated non-profit association may, but is not required to, file with the Secretary of State a statement appointing an agent authorized to receive service of process on behalf of the non-profit association. The filing of the statement does not represent the creation of the non-profit association; it simply provides a method for a non-profit association to receive notice of any lawsuit brought against it.

II. DEVELOPMENT OF AN EDUCATION FOUNDATION

A. Certificate of Formation

- 1. Only one organizer is required for the formation of a corporation. An organizer may be a natural person 18 years of age or older, or any

corporation, partnership, or other legal entity; there are no residency requirements for an organizer.

2. Mergers involving a nonprofit corporation or an unincorporated nonprofit association cannot result in the loss of the entity's charitable status or conversion to a for-profit entity. (Bus. Org. Code §§ 10.010, 10.108)
3. Certificates of Formation become effective as of the date of filing with the Secretary of State, unless there is a request to delay the effective date. Tex. Bus. Organizations Code §4.052 and §4.053. The effectiveness of the Certificate of Formation may be delayed up to ninety (90) days from the date of filing with the Secretary of State.
4. Minimum statutory filing requirements. Tex. Bus. Org. Code §3.001 *et seq.*
 - a. **Corporate Name:** Provide a corporate name; the corporation name need not, but may contain an organizational ending such as "Corporation" or "Incorporated." If the name chosen is the same as or deceptively similar to the name of an existing corporation, limited partnership, or limited liability company, the document cannot be filed. The administrative rules adopted for determining entity name availability may be viewed at www.sos.state.tx.us/tac/index.shtml. The Secretary of State can provide a preliminary determination on "name availability." Call (512) 463-5555 or e-mail the name inquiry to corpinfo@sos.state.tx.us. A final determination cannot be made until the document is received and processed by the Secretary of State. Do not make financial expenditures or execute documents utilizing the name before the name is cleared. Also note that the pre-clearance of a name or the issuance of a certificate of formation under a name does not authorize the use of a name in violation of another person's rights to the name.
 - b. **Initial Mailing Address:** State the initial mailing address of the non-profit organization.
 - c. **Registered Agent and Registered Office:** The registered agent can be either an individual resident of the state or a Texas corporation or foreign corporation that is registered to transact business in Texas. The corporation, however, may not be designated to serve as its own registered agent. The street address is required, and it cannot be a mailbox service or telephone answering service, although it does not have to be the actual place of business. Tex. Bus. Org. Code §5.201. The corporation should maintain the registered agent's written consent to serve in that capacity with the books and records of the corporation.
 - d. **Period of Duration:** The period may be perpetual.

- e. **Non-profit Statement:** The certificate must state that the corporation is non-profit.
- f. **Organizer:** The name and street address of the organizer must be listed.
- g. **Management:** A non-profit corporation that has members may be managed by its members or by a board of directors. A minimum of three directors is required for a board of directors; their names and addresses must be listed. The maximum number of directors must be stated. A director must be a natural person; there are no residency requirements for directors.
- h. **Membership:** If the non-profit has no members, it must state that in its certificate of formation.
- i. **Organizational Structure:** A non-profit corporation may have one or more classes of members or be organized without members. The qualifications and rights of the members are generally set forth in the corporation's by-laws. The certificate of formation must state whether the corporation is to have members.
- j. **Purpose:** A specific statement of a lawful purpose must be included. A lawful purpose may be a charitable, benevolent, religious, patriotic, civic, missionary, educational, scientific, social, fraternal, athletic, or agricultural purpose; or the conduct of a professional, commercial, industrial or trade association. The Secretary of State will not accept general language such as "any or all lawful purposes." However, the Secretary of State will accept the statement of purposes suggested by the Internal Revenue Service.
- k. **Distribution of Assets:** If the corporation is to be authorized upon its dissolution to distribute its assets in a manner other than the manner described in Tex. Bus. Org. Code §22.304 (which refers in part to the distribution of assets for tax-exempt purposes to organizations exempt under section 501(c)(3) of the Internal Revenue Code of 1986 and related statutes), the Certificate of Formation must contain a statement describing the manner of distribution of the corporation's assets.

5. Supplemental provisions

a. **Prohibition of Lobbying Statement**

- b. **Nondiscrimination Statement:** In the administration of its educational programs, the foundation cannot discriminate on the

basis of race, religion, ethnicity, sex or national origin. (This statement will be necessary for the IRS filing for an education foundation.)

- c. **Non-distribution Statement:** Net earnings may not inure to the benefit of directors, officers, or others, except to pay for services rendered.
 - d. **Liability Statement:** Foundation accepts liability for officers and directors acting in course and scope of their duties.
 - e. **Indemnification Statement:** Foundation can indemnify officers and directors, except when they breach their duties, receive improper benefits, or commit a statutory violation that specifically holds directors liable.
6. File with Texas Secretary of State
- a. The organizer must sign the Certificate of Formation.
 - b. A person commits an offense under the Texas Business Organizations Code if the person signs a document the person knows is false in any material respect with the intent that the document be delivered to the Secretary of State for filing. The offense is a Class A misdemeanor. Tex. Bus. Org. Code §4.008
 - c. Corporations organized under the Texas Non-Profit Corporation Law DO NOT automatically qualify for exemption from federal and state taxes. Those forms must be filed separately.

B. Bylaws of Foundation

- 1. Establish policies of foundation
- 2. Establish roles and responsibilities
- 3. Typical provisions:
 - a. Purpose
 - b. Offices
 - c. Board of directors, including number, names of original directors, manner of election, qualifications, annual meetings, regular and special meetings, meeting notice, basis of quorum, voting, compensation, removal, resignation and vacancies
 - d. Officers and their responsibilities

- e. Committees and their responsibilities
- f. Financial matters, including contracts, checks, deposits, gifts and fiscal agents
- g. Records, including financial reports, tax records, fiscal year, audits and fiscal restrictions
- h. Indemnification and insurance
- i. Bylaw amendments

C. Foundation Policies

- 1. Nondiscrimination policy
- 2. Whistleblower protection policy
- 3. Document preservation policy
- 4. Gift acceptance policy
- 5. Employment policies
- 6. Governance policies

D. Designation of Directors

- 1. "Director" means a person who is a member of the board of directors, regardless of the name or title used to designate the person. The term does not include a person designated as a director of the corporation, or as an ex officio, honorary, or other type of director of the corporation if the person is not entitled to vote as a director. Tex. Bus. Org. Code § 22.001.
- 2. Non-Director Rights & Limitations Tex. Bus. Org. Code § 22.210

Authorizes the certificate of formation or bylaws of a corporation to provide that a person who is not a director is entitled to receive notice of and to attend meetings of the board of directors. Establishes that by having those rights, the person does not have the authority, duties, or liabilities of a director and is not a governing person of the corporation. Deletes designations of subsections and all references to an individual as an ex officio member of the board.

E. Foundation Meetings

- 1. The Texas Business Organizations Code does not include a provision expressly requiring a minimum number of meetings of the board of

directors. However, unless the Certificate of Formation or bylaws provides otherwise, directors are to be elected at an annual election and officers are to be elected annually, thereby necessitating at least one meeting each year. Tex. Bus. Org. Code §§ 22.208(b) and 22.232(b).

2. A director present at a board meeting at which action is taken is presumed to have assented to the action, unless the director's dissent or abstention is entered in the minutes, filed with the board secretary before the meeting is adjourned, or is sent in writing to the board secretary within a reasonable time after the meeting. A director who voted in favor of an action may not dissent or abstain with respect to the action. Tex. Bus. Org. Code § 21.414.
3. **Quorum**
 - a. Directors may transact business at a meeting only if a quorum of directors is present at the meeting. The required minimum number of directors for a quorum is the lesser of (a) the majority of the number of directors set by the corporation's bylaws or, in the absence of a bylaw setting the number of directors, a majority of the number of directors stated in the corporation's certificate of formation, or (b) any number, not less than three, set as a quorum by the certificate of formation or bylaws. Tex. Bus. Org. Code § 22.213(a).
 - b. A director present by proxy at a meeting may not be counted toward a quorum. Tex. Bus. Org. Code § 22.213(b).
 - c. Directors participating in a meeting through the use of telephones or other electronic means are counted as being present at the meeting.
4. The act of a majority of the directors present in person or by proxy at a meeting at which a quorum is present at the time of the act is the act of the board of directors of a corporation, unless the act of a greater number is required by the certificate of formation or bylaws of the corporation. Tex. Bus. Org. Code § 22.214.
5. **Use of Proxies**
 - a. A director of a corporation may vote in person or, if authorized by the certificate of formation or bylaws of the corporation, by proxy executed in writing by the director. Tex. Bus. Org. Code § 22.215.
 - b. A proxy expires three months after the date the proxy is executed and is revocable unless otherwise provided by the proxy or made irrevocable by law. Tex. Bus. Org. Code § 22.216.
6. **Meetings by Remote Technology**

- a. A meeting of the board of directors or any committee designated by the board of directors of a corporation may be held by means of a conference telephone or similar communications equipment, another suitable electronic communications system including videoconferencing technology or the Internet, or any combination of those means in accordance with Business Organization Code Section 6.002 (Alternative Forms of Meeting). Tex. Bus. Org. Code § 22.002.
- b. Section 6.002 requires:
 - (1) The meeting method permits each person participating in the meeting to communicate with all other persons participating in the meeting.
 - (2) If voting is to take place at the meeting, the entity must:
 - (a) implement reasonable measures to verify that every person voting at the meeting by means of remote communications is sufficiently identified; and
 - (b) keep a record of any vote or other action taken.

7. Action without Board Meeting for Nonprofit Corporations

- a. The certificate of formation or bylaws of a nonprofit corporation may provide that an action by the corporation's board of directors may be taken without a meeting if a written consent, stating the action to be taken, is signed by the number of directors or committee members necessary to take that same action at a meeting at which all of the directors are present and voting. The consent must state the date of each director's or committee member's signature. If the action is passed by less than unanimous written consent, the corporation must provide prompt notice to each director or committee member who did not consent in writing to the action. Tex. Bus. Org. Code §22.220.
- b. Any photographic, facsimile, or similarly reliable reproduction of a consent in writing signed by a director may be used instead of the original writing for the purpose of taking an action without a meeting. Tex. Bus. Org. Code § 6.205(a).
- c. Except as otherwise provided by an entity's governing documents, an electronic transmission of a consent by a director is considered a signed writing if the transmission contains or is accompanied by information from which it can be determined that the electronic transmission was transmitted by the director; and the date on which

the director transmitted the electronic transmission. Tex. Bus. Org. Code § 6.205(b)(1-2).

8. Meeting Minutes

- a. Minutes are the official record of the actions taken at a meeting and are evidence of the actions so taken. See, e.g., *City of Hughes Springs v. Hughes Springs Volunteer Ambulance Service, Inc.*, 223 S.W.3d 707 (Tex. App.—Texarkana, 2007).
- b. Every nonprofit corporation is required to keep minutes of the meetings of its members, of its governing body, and of committees of its members and governing body. Tex. Bus. Org. Code § 3.151(a).
- c. Minutes may be in written paper form or another form capable of being converted into written paper form within a reasonable time. Tex. Bus. Org. Code § 3.151(b).
- d. Right to Inspect
 - (1) Members and directors of a nonprofit corporation have the right to inspect the minutes that are required to be maintained. Tex. Bus. Org. Code §§ 3.152 and 3.153.
 - (2) The Attorney General also has the right to inspect the minutes of a nonprofit corporation. Tex. Bus. Org. Code § 12.151.
 - (3) If an education foundation is subject to the Public Information Act because of the support it receives from a school district, the public may also have a right to inspect the minutes of the education foundation subject to the provisions of the Act.
- e. Contents
 - (1) Minutes should include the actions considered and discussed at the meeting, the decisions made and actions taken at the meeting, and the persons in attendance and voting at the meeting. In the event that a conflict of interest is addressed at a meeting, the Bylaws or Conflict of Interest Policy of a nonprofit corporation may require that the votes of each person be separately recorded in the minutes.
 - (2) The minutes of a meeting of the board of directors should reflect the dissent of any director who was present at such meeting and dissented to a particular action taken by the

board. Absent such dissent being “entered in the minutes of the meeting,” the director is presumed to have assented to the action so taken. Tex. Bus. Org. Code § 22.227.

F. Correcting Defective Corporate Acts

1. Texas Business Organizations Code Sections 22.501-22.516 allow an organization to correct the discovery of transactions, board actions or elections that occurred without formal or completed authorization as required by statute or the corporation’s governing documents.
2. Two kinds of defective corporate acts are defined:
 - a. An election or appointment of directors that is void or voidable due to a failure of authorization, or
 - b. Any act or transaction that would have been within the power of the corporation but is void or voidable due to a failure of authorization.
3. A defective corporate act may be ratified in accordance with the subchapter, or in a district court proceeding under Section 22.512. There are separate ratification procedures for a member-governed corporation.
4. Under Section 22.503, to ratify one or more defective corporate acts, the board of directors of the corporation shall adopt resolutions stating:
 - a. the defective corporate act or acts to be ratified;
 - b. the date of each defective corporate act;
 - c. the nature of the failure of authorization with respect to each defective corporate act to be ratified; and
 - d. that the board of directors approves the ratification of the defective corporate act or acts.
5. The quorum and voting requirements applicable to the adoption of the resolutions to ratify a defective corporate act under Section 22.503 are the same as the quorum and voting requirements applicable at the time of the adoption of the resolutions for the type of defective corporate act proposed to be ratified.
6. Adoption of the validating resolutions in the form prescribed are retroactive to the time of the defective corporate act.
7. If a defective corporate act ratified under these provisions would have required the filing of an instrument or other document, the corporation must file a certificate of validation with respect to the defective corporate act in

accordance with the filing requirements in Chapter 4 of the Business Organizations Code. A certificate of validation can be filed with the Secretary of State.

8. Certain persons may bring an action in district court to determine the validity of the ratification of the defective act under Section 22.512. The court may order the parties to undertake additional activities, meet additional conditions, or provide notices to members or others. A court proceeding involving a charitable entity requires notice to the Texas Attorney General under Texas Property Code Chapter 123.

III. SOURCES OF REVENUE

A. Monetary Donations

1. In general, a taxpayer making a donation to a charitable organization may take a charitable contribution deduction on the taxpayer's income taxes for the value of that donation, within certain limitations. However, if the taxpayer benefits in some manner by making the contribution, then the value of that benefit must be subtracted from the amount of the contribution, and only the amount in excess of the benefit received can be deducted. The only time this rule does not apply is when the amount of the benefit received is insubstantial.
2. Generally, a donor cannot claim a tax deduction for a contribution of \$250.00 or more unless the receiving charitable organization provides an acknowledgement of the contribution, which contains: (1) the organization's name and address; (2) the date and location of the contribution; (3) the amount of a cash contribution or description (but not the value) of a non-cash contribution; (4) a statement that no goods or services were provided by the organization in exchange for the donation, and (5) a description and good faith estimate of the value of goods or services provided in exchange for the donation. 26 U.S.C. § 170(f)(8)(B); 26 CFR § 1.170A-13(f). The acknowledgement is then retained by the donor taxpayer to substantiate the charitable contribution. 26 U.S.C. § 170(f)(8)(A); 26 C.F.R. §1.170A-13(b).
3. To deduct any charitable donation of money, a taxpayer must have a bank record or a written communication from the charity showing the name of the charity and the date and amount of the contribution. Although this provision does not place an affirmative requirement on charities to provide receipts for all donations, charities should expect requests for receipts because of this burden placed on taxpayers. 26 U.S.C. § 170(f)(17) (2007).
4. The Internal Revenue Code contains an additional requirement that a charitable organization must provide a written disclosure to a donor who makes a donation exceeding \$75.00 partly as a contribution and partly for

goods and services provided by the organization (i.e., a *quid pro quo* contribution). 26 U.S.C. § 6115(a). The disclosure must inform the donor: (1) that the amount of the contribution that is deductible for federal income tax purposes is limited to the excess of the fair market value of the donated property over the value of the goods and services provided by the organization; and (2) the organization's good faith estimate of the value of the goods or services provided. 26 U.S.C. § 6115(a). The disclosure must provide the donor with a good faith estimate of the value of the goods and services the donor is receiving. 26 U.S.C. § 6115(a)(2). The good faith estimate is to be determined using the fair market value at the time of the contribution. Treas. Reg. § 1.170A-1(h)(4).

5. The I.R.S. requires that this disclosure appear in all solicitations (written, broadcast, telephone, or in person) and on all tickets, receipts, or other documents issued in connection with the contribution, and must be noticeable by the donor, not hidden in small print. Rev. Proc. 90-12, 1990-1 C.B. 471. A charitable organization's failure to follow these disclosure rules is punishable by a fine of up to \$10 per contribution, not to exceed \$5,000 per fundraising event or mailing. 26 U.S.C. § 6714.
6. Failure to follow disclosure rules is punishable by a fine of up to \$10 per contribution, not to exceed \$5,000 per fund-raising event or mailing, unless the failure is due to a reasonable cause. 26 U.S.C. § 6714.

B. Charitable Raffles

1. "Raffle" means the award of one or more prizes by chance at a single occasion among a single pool or group of persons who have paid or promised a thing of value for a ticket that represents a chance to win a prize. Tex. Occ. Code § 2002.002.
2. Charitable raffles are regulated by federal and state law and must comply with the Texas Charitable Raffle Enabling Act found in Texas Occupation Code Chapter 2002 and Internal Revenue Code §511; Treas Reg. 1.53-1a.
 - a. Organization must be a 501(c) that has existed for three years, does not devote a substantial part of its activities to lobbying and does not distribute income to members.
 - b. Only one raffle at a time may be conducted.
 - c. Qualified organization may conduct up to four raffles per calendar year.
 - d. Raffle ticket must contain:

- (1) Name of organization
 - (2) Address of organization
 - (3) Ticket price
 - (4) General description of each prize over \$10
 - (5) Date of award
- e. Raffle prize may not be money, Visa gift cards, credit or debit card, etc.; but may be a lottery ticket.
 - f. Prize may not exceed \$75,000 (or \$250,000 if a residence) if organization purchases prize or provides consideration for it. However, raffle prize may be a ticket in the state lottery with a face value of \$75,000 or less, regardless of potential lottery winnings.
 - g. The organization may not: promote a raffle by paid advertising through a medium of mass communication (television, radio, or newspaper); or advertise or promote a raffle statewide other than on the organization's website or through a publication (newsletter or e-mail) provided only to previously identified supporters of the organization; or sell or offer to sell raffle tickets statewide.
 - h. The organization may not compensate a person directly or indirectly for organizing or conducting a raffle or for selling or offering to sell tickets to a raffle. A member/employee of the organization may organize and conduct a raffle, but the work may not be more than a de minimis portion of the member's employment with the organization.
 - i. County attorney, district attorney, or Attorney General may seek temporary or permanent injunction against raffle that violates state law against gambling.
 - j. Charity must report raffle winnings to IRS if the prize is valued at \$600 or more and is at least 300 times the amount of the wager. For more information, see IRS Publication 3079.

IV. FOUNDATION'S RELATIONSHIP WITH THE SCHOOL DISTRICT

A. School District Board Can Accept Donations Directly.

- 1. Government Affirmation Letter from Internal Revenue Service
 - a. School board member must request letter.

b. Describes government entity exemption from federal income tax and cites Internal Revenue Code Sections pertaining to deductible contributions and income exclusion. c.

2. Donations to school districts qualify as tax deductible charitable contributions as long as the donations are for a proper public purpose. IRC §170(b)(1)(A)(ii) and (v).

B. District Cannot Make Donations of Public Money for a Private Benefit. Tex. Const. Art. III § 51, 52(a).

C. District Support of Foundation

1. Tex. Const. Art. III Section 51, 52(a); Art. XI, Section 3; Art. XVI, Section 6(a) prohibit granting public money for a private benefit ("gift of public funds"). Tex. Att'y Gen. Op. JC-138 (1999).

2. Provision of office space, personnel, copying, mail, equipment, supplies, and other contributions may be allowed only in limited circumstances

3. Can be provided only if:

a. Arrangement serves proper public educational purpose

b. Adequate controls exist to ensure public educational purpose is served

c. The District receives some return benefit (*i.e.*, accomplishment of its public purpose). Tex. Att'y Gen. Ops. DM-256 (1993); MW-373 (1981); GA-252 (2004).

d. Determination is subject to judicial review.

4. Trustee decision is subject to judicial review

5. Lease of District property is allowed if above test is met. Tex. Att'y Gen. Op. GA-252 (2004).

D. Public Information Act

1. District support may trigger coverage of Texas Public Information Act (TPIA) to Foundation's records.

2. Under the TPIA, "governmental body" includes "the part, section, or portion of an organization, corporation, commission, committee, institution,

or agency that spends or that is supported in whole or in part by public funds.” Tex. Gov’t Code § 552.003.

3. Tex. Att’y Gen. OR 2002-2159 (2002) (clerical support, computer use and photocopying from district sufficient to determine foundation was "governmental body" for purposes of the Texas Public Information Act.)
4. Tex. Att’y Gen. OR 2011-5663 (TPIA did not apply to alumni association’s use of school equipment and staff to coordinate association activities because agreement with between the two included annual payment for services).

E. Using District Employees

1. District staff must be selected, supervised and evaluated by the Superintendent
2. Foundation staff should be selected, supervised and evaluated by Foundation board
3. There is no authority for a public entity to hire an employee to work for another entity, as it is an unconstitutional appropriation of public money. Tex. Att’y Gen. Op. MW-373 (1981); DM-256 (1993).
4. Unconstitutional gift of public funds unless: proper educational purpose; adequate controls to ensure educational purpose is served; and the district receives a return benefit.
5. Solicitation of donations to Educational Foundation by district employees
 - a. Bribery statute – Tex. Penal Code § 36.02 – public servant cannot receive benefit if it is in consideration for public servant's vote or decision. Violation is second degree felony.
 - b. Gift to public servant – Tex. Penal Code § 36.08–36.10 - public servant cannot accept gift, unless it is a: fee required by law; campaign contribution; gift given because of friendship; item costs less than \$50; or food, lodging, transportation or entertainment received as a guest while the host is present. Violation is a Class A misdemeanor.
 - c. Possible unconstitutional gift of public funds if district employees solicit for a third party while working for the District. Tex. Att’y Gen. Op. H-1309 (1978).
6. Foundation employee ineligible for Teacher Retirement System if more than 20 hours per week of work is for the foundation. Tex. Att’y Gen. Op. MW-373 (1981); 34 TAC § 25.1.

F. Trustees as Foundation Directors

1. District trustee may serve on Foundation board, as long as no compensation is received. Tex. Local Gov't Code § 171.009.
2. However, possible negative legal consequences can arise if interests of District and Foundation conflict or when they must negotiate with each other. Tex. Atty Gen. Op. DM-256 (1993); H-1309 (1978).
3. Consider identifying trustees with non-director status - no voting power and no duties to the Foundation, but authority to receive notice and attend meetings.
4. Quorum of trustees triggers Open Meetings Act. Tex. Gov't Code § 551.001 *et seq.*

G. To Avoid State Constitutional Restrictions – Independent Foundation with Separate Board of Directors and No District Support

1. Eliminates constitutional concerns
2. Keeps donor information private (not subject to Public Information Act)
3. Eliminates pressure on district staff to work for the Foundation
4. Eliminates potential Open Meetings Act requirements

H. Memorandum of Understanding between District and Foundation

1. Any memorandum of understanding or contract between the Foundation and District should state a "specific and definite obligation...to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." *See e.g.*, Tex. Atty Gen. Op. JM-821 (1987).
2. Articulate a solid public educational purpose
 - a. Detail all support to be provided
 - b. Donations in Board of Trustees' discretion
 - c. Contract subject to annual non-appropriation decision

3. Establish sufficient controls
 - a. Foundation's only charity is the district
 - b. Foundation contributes more money to the District than the value of what it receives from the District
 - c. Personnel must follow District policies
 - d. Annual reports to Board
 - e. Annual reports to Internal Revenue Service
 - f. Annual cost-benefit evaluations
 - g. Abide by Texas Public Information Act (opinions vary on this issue)
 - h. All accounting and books reflect that Foundation funds are separate from District funds
 - i. Create arms-length transaction like a vendor.

I. Limitations on Soliciting Contributions

1. A school district board of trustees or school district employee is prohibited from directly or indirectly requiring or coercing any school district employee to:
 - a. make a contribution to a charitable organization or in response to a fund-raiser; or
 - b. attend a meeting called for the purpose of soliciting charitable contributions.
2. A school district board of trustees or school district employee also may not directly or indirectly require or coerce any school district employee to refrain from making a contribution to a charitable organization or in response to a fund-raiser; or attending a meeting called for the purpose of soliciting charitable contributions. Tex. Educ. Code §22.011.
3. Because terms are not defined in the statute, the common meanings should apply. Based on Webster's Dictionary:
 - a. Coerce: To compel to a course of action or thought. To dominate or restrain forcibly. To bring about by threat or force.
 - b. Require: To need. To insist upon or demand. To oblige or compel.

4. Texas Attorney General Opinion GA-0949 (June 4, 2012).
 - a. The Attorney General opines that the plain language of the statute does not prohibit school districts from authorizing charitable organizations to solicit donations from employees. Therefore, it appears the opportunity to continue charitable campaigns is secure.
 - b. With regard to promoting such campaigns, the Attorney General cautioned that a school district may not “solicit donations at a meeting where employees’ attendance is compulsory ... if the solicitation of charitable donations is a purpose – even if not the sole purpose – of the meeting.” However, donations may be solicited and even encouraged at meetings or events where attendance is voluntary.
 - c. Additionally, the Attorney General confirmed that charitable donation solicitation materials may be distributed to all district employees as long as such distribution is in accordance with district policy for the distribution of such materials.

J. U.S. Department of Education’s enforcement of website accessibility standards

1. Educational advocate has filed thousands of website accessibility complaints with the U.S. Department of Education’s Office of Civil Rights.
2. Corrective action required by OCR typically is based on the Web Content Accessibility Guidelines 2.0 Level AA.
3. Accessibility requirements also apply to third-party sources linked to school district sites.

V. DIRECTOR EXPOSURE TO LIABILITY

A. Organizational Factors Increasing Liability Risk

1. Lack of oversight – directors and officers of non-profit organizations are not as subject to the market pressures and reporting requirements that influence the behavior of for-profit corporations. They, therefore, may be more complacent about their oversight responsibilities.
2. Incomplete information – non-profit organizations often do not have the resources or may choose not to consult professional accounting and legal advisers and experts; therefore, decision-making by non-profit directors may be hindered by incomplete information.

3. Insufficient time – many non-profit directors are volunteers serving on part-time basis, without compensation, unable to devote a significant amount of time and effort to accomplish appropriate results.

B. Concerns for Charitable Organizations

1. Accountability
2. Demonstrated Goal Achievement
3. Financial Responsibility

C. Uniform Prudent Management of Institutional Funds Act (“UPMIFA”) Texas Property Code §163.000 *et seq.*

1. Applies to all organizations that manage and invest institutional funds exclusively for charitable purposes.
2. Prudent test on endowment spending, taking into account: donor intent; duration of fund; general economic conditions; preservation of the endowment and institution’s purpose.
3. Presumptions on imprudence.
4. Delegation to outside investment managers allowed, with review and supervision.

D. Texas Charitable Immunity and Liability Act - Texas Civil Practice and Remedies Code Chapter 84.

1. Volunteers acting in the course and scope of their duties as an officer, director or trustee have immunity for tort damages.
2. Employee liability for acts and omissions in the course and scope of duties is limited to \$500,000 per person, \$1 million per occurrence for bodily injury or death, and \$100,000 per occurrence for injury to or destruction of to property.
3. Limitations do not apply to: willful or intentional acts; or acts done with conscious indifference or reckless disregard for the safety of others.
4. The organization must maintain liability insurance in the maximum limit amount in order to rely upon these immunity provisions and liability limitations.
5. Exception for motor vehicles to the extent of required insurance.
6. Indemnification allowed in Certificate of Formation and Bylaws.

7. Immunity for Reports of Misconduct. A charitable organization, or an employee, volunteer, or independent contractor of the organization, is immune from liability resulting from a good faith report to a current or prospective employer of an employee's or volunteer's alleged acts of sexual assault, misconduct, sexual harassment or public indecency. A person reporting these offenses cannot obtain immunity by reporting his or her own conduct. Tex. Civ. Prac. & Rem. Code 84.0066.
7. Immunity for Disaster Relief Activities. A charitable organization engaged in services to mitigate the effects of a disaster is immune from liability under Chapter 84 and Chapter 79 of the Texas Civil Practices & Remedies Code. The bill also grants a person immunity from civil liability for an act or omission that occurs in providing disaster assistance at the request of a charitable organization, except when services are provided with an expectation of compensation.

E. Directors' Fiduciary Duty

1. Strong governing boards must be educated as to their duties and obligations.
2. The trend in the law is to apply the same standards to non-profit directors as those applicable to directors of for-profit corporations.
3. Generally, the board of a non-profit organization has a fiduciary duty:
 - a. to manage the organization according to the best interests of the population it is intended to serve and
 - b. to balance economic concerns with the effective performance of the organization's mission.
4. Fiduciary Duty
 - a. Obedience
 - (1) Law compliance and governing documents compliance
 - (2) Acting within scope of authority and within organization's goals
 - (3) No diversion of charitable assets
 - b. Loyalty
 - (1) Extreme measure of candor, unselfishness, good faith
 - (2) No conflicts of interest – duty of loyalty requires directors to act in good faith and in a manner that they reasonably believe

is in the best interests of the organization. Transactions between directors and the entity are not prohibited or restricted as long as the requirements of any applicable conflict of interest laws and regulations are followed as long as the transaction is fair to the organization.

- (3) No self-dealing
 - (4) No improper profit
 - (5) Maintain appropriate confidentiality
 - (6) Do not usurp corporate opportunities
- c. Care
- (1) Reasonable person with ordinary prudence standard
 - (2) Business judgment rule
 - (3) Best interests of corporation
- d. Directors may not divest themselves of their fiduciary duty by contract.