tcc group

What Is Good Governance?

Richard Mittenthal, President and CEO

The recession and its aftermath have caused considerable difficulties for nonprofit organizations across the country. Many have experienced significant reductions in support from some or all sectors: government, private foundations, corporate philanthropies, and individuals. While the prospects for a rapid recovery are dim, most observers and experts point toward individual giving as the sector with the most potential. Courses are given on how to solicit monies from all sectors and fundraisers are encouraged to develop innovative programs to attract and keep donors. At the same time, discussions at many boards quickly zero in on how the organization can build its donor base.

Have the difficult environment and the focus on individual giving resulted in some organizations neglecting their due diligence responsibilities? Are nonprofits more disposed than in the past to accept money from any person or corporation willing to write a check? From the beginnings of organized philanthropy, there have been critics who suggested that organizations should carefully assess whether potential funding from an individual or corporation might conflict with the mission of the organization.

Tainted Money

The issue of what many people call "tainted money" is not a new one. At the beginning of the 20th century, many accused John D. Rockefeller of using his wealth to cleanse the family name, which had been severely damaged following the Ludlow Massacre when Rockefeller employees broke a strike by spraying tents filled with women and children with oil and then igniting them. Rockefeller remarked, "Not even God himself can keep me from giving my money to the University of Chicago."

So, while the issue of tainted money is not necessarily new, one aspect of it that has been discussed less often is the question of whether the board of a 501(c)(3) organization has a responsibility to assess the character of a prospective individual, foundation, or corporate donor to determine whether it is "clean" enough to support the organization; and, secondarily, whether boards should develop formal policies to deal with potentially controversial situations.

Current Practices in Board Accountability and Ethics

This raises the question: why does a nonprofit organization need a board? BoardSource, the recognized expert in the field, lists three main reasons – ***legal, ethical, and practical*** – that shape the foundation for good governance.

Legal Reasons

State laws explicitly indicate that nonprofit corporations need a board to assume the fiduciary role for the organization's wellbeing. These laws designate overall responsibility and liability to the board. In addition to the board's task as a governing body, individual members are bound by legal obligations: *the duties of care, loyalty, and obedience.*

The duty of *care* states that board members should act in good faith with the degree of diligence and skill that an ordinary, prudent person would exercise under similar circumstances. Members should act only for the purpose of advancing the best interests of the organization, be conscientious, exercise honest judgment without bias, and not cause the organization to act unlawfully.

The duty of *loyalty* maintains that board members should act in the manner they reasonably believe to be in the best interest of the organization. Boards should have undivided loyalty to the organization's mission and wellbeing, exercise their powers in the best interest of the organization rather than their own interests or the interests of another entity, and should avoid conflicts of interest.

The duty of *obedience* says that board members should act in a manner consistent with the organization's purpose and ensure that the mission is pursued. The duty could be violated if board members divert corporate resources away from their stated purpose, no matter how worthy the use.

Ethical Reasons

One of the key ethical reasons to build a board is to create a structure that functions to assure the public and all individual stakeholders that the organization is "in good hands." The board assumes the responsibility for the achievements – or lack thereof – within the organization. Its role is to go beyond the legal requirements and ensure that the organization *not only does things right, but does the right thing*.

The board acts as the agent for an organization's constituents. When a donor, client, or customer relies on the organization to use its funds appropriately and provide trustworthy and quality services, the board sees to it that these expectations are met. Oversight is part of the ethical reason, and it is a primary duty for all boards – working closely with management to ensure that goals are achieved and that ethical principles serve as the guidelines for all activities of the organization.

Practical Reasons

The board's role is far more than just control and supervision. At one point, generally in the early years of an organization, board members actually help the organization to get the work done. Often, start-up boards help draft organizational documents, locate supplies and equipment, and look for funding. In some cases, before staff is hired, board members manage the daily affairs and run the programs of an all-volunteer organization. In many nonprofits, as soon as the situation allows, the board hires its first chief executive, delegates the daily affairs to him/her, and provides support and guidance. At that point, the board can devote its time to governing, providing direction, and guaranteeing that the mission of the organization says on course.

So, what are the specific responsibilities of board members of a not-for-profit organization? The most frequently referenced list can be found in the first book in BoardSource's Governance Series: *Ten Basic Responsibilities of Nonprofit Boards* by Richard T. Ingram, the former president of the Association of Governing Boards of Universities and Colleges. The list of responsibilities is as follows:

1. Determine mission and purposes.
2. Select the chief executive.
3. Support and evaluate the chief executive.
4. Ensure effective planning.
5. Monitor and strengthen programs and services.
6. Ensure adequate financial resources.
7. Protect assets and provide financial oversight.
8. Build a competent board.
9. Ensure legal and ethical integrity.
10. Enhance the organization's public standing.

Board Governance Index

So, how are boards doing in fulfilling these responsibilities? Every few years, BoardSource publishes a nonprofit governance index containing baseline data about board practices in the United States. It contains a wealth of useful information on practices from almost 2,000 nonprofit leaders who participate in the survey. It addresses issues regarding board size, diversity, board contributions, committees, and board meeting practices. Here are some of the more interesting findings from the 2010 study.

Boards were graded by both the chief executive and board members on a number of issues. In almost all cases, board members gave themselves higher scores than did the chief executives. According to the report, "when asked to give their boards a letter grade, chief executives and board members generally agree that board performance is not at the top of the class." In terms of an overall grade-point average, chief executives gave their boards a C+, and boards gave themselves a B.

The individual scores for categories including understanding the organization's mission, legal and ethical oversight, board responsibilities, and fundraising were not impressive. Just over half – 58% of chief executives and 56% of board members – said that their boards are well informed about their responsibilities. Boards did receive relatively high scores in areas such as understanding the mission, providing financial, legal and ethical oversight, and board- chief executive relations.

Fundraising is an issue that takes up a good deal of time on most board meeting agendas. It is one of the most, if not *the* most, challenging issues to address. The report states that, on a regular basis, "nonprofit leaders identify fundraising as their boards' greatest weakness and most important priority for board improvement." Overall, 79% of organizations that responded – including public charities, intermediaries, operating foundations, and associations – are engaged in fundraising. It has almost always been the lowest-rated area of responsibility in BoardSource self assessments. Board fundraising received the lowest grade, a D+, from chief executives and a C+ from board members.

Interestingly, board members are more comfortable with fundraising the further removed they are from the donor.

- 87% of board members are comfortable writing letters;
- 79% are comfortable providing names for letters and calls;
- 77% are willing to meet potential donors face-to-face;
- 59% are willing to call potential donors; and
- 57% are willing to ask for money directly.

In general, comfort with fundraising is also declining.

Accountability

When we talk about accountability in the social sector, what do we mean? Most of the discussion focuses on legal and financial compliance.

Two years ago, the Internal Revenue Service changed the main reporting form that nonprofits use to file tax returns. As a result, more nonprofits have put in place accountability practices and policies including codes of ethics, conflict of interest, whistle-blower, and document retention and destruction. The numbers have increased every year to the point where, in 2010:

- 99% of nonprofits kept minutes of all board and committee actions;
- 95% had written conflict of interest policies;
- 87% had board members sign conflict of interest and annual disclosure statements;
- 86% had a whistle-blower policy; and
- 83% had written documentation retention and destruction policies.

There is also much more care given to executive evaluation and compensation. Now, over 70% of organizations have formal, written performance evaluations of the chief executive, collect comparable data when determining compensation, and require a full board approval of the chief executive's compensation.

Doug White, in his excellent book on ethics and governance, *The Nonprofit Challenge: Integrating Ethics into the Purpose and Promise of our Nation's Charities,* references a national nonprofit ethics survey conducted in 2007 that had both good and bad news regarding the way people feel about charities. While many believed that charities on the whole behave more ethically than for-profit organizations or governmental agencies, they also stated that "integrity in the nonprofit section is eroding," and that "misconduct is on the rise – especially financial fraud." Amazingly, people thought that financial fraud was actually higher at nonprofits than at for-profits or in government. White acknowledged the inconsistency but wrote that this can happen in a survey when a question is posed in different ways. "It may be that people want to think good things about charity, but that they are also concerned," he said.

White also addressed the connection to nonprofit boards, stating, "Boards, while very important in shaping the perceptions of employees with regard to ethics, are not taking advantage of their influence to set clear ethics standards for their nonprofit organizations." Where boards have heavy influence, we also see high levels of misconduct.

The larger community places enormous trust in its nonprofit organizations. Behind that trust is the reasonable assumption that the board is representing the community's and donors' best interests. It is the board that gives the organization credibility in the community. People often look at an organization's letterhead to see if they recognize any names, presumably to see who else is associated with it. The board is credible in the community because the trustees are perceived as objective, neutral, honest representatives. If an organization suffers an ethical lapse or and financial problem, the question immediately arises, "Where was the board?"

In the literature on the new, improved accountability, it is difficult to find much, if anything, on the board's role in deciding whether to apply for or accept an unsolicited a grant from a potentially controversial donor. While vetting contributions is not considered a requirement for a board seal of approval, one might argue that boards should pay more attention to the organizations and people who support them.

So, Is There a Problem Here?

The issue is not limited to high profile donors to large cultural institutions and hospitals in New York City. Recently, *The Miami Herald* reported the story of a local donor, Joe Rodriguez, who, over the past five years, has donated tens of thousands of dollars to charities for at-risk and underprivileged children. He has helped keep parks open, bought uniforms for a high school football team, and supported bands across South Florida. He has also provided support to Toys for Tots, police charities, Haiti earthquake[1] relief, the American Cancer Society, and the American Red Cross[2].

So why did this donor make the local news? Because Joe Rodriguez owns strip clubs. Early this year, Rodriguez Charities offered $10,000 — for the second time in two years — to a West Palm Beach school, that has a high percentage of students who live in low-income neighborhoods. The Palm Beach County[3] School District – not technically a nonprofit organization, but a grantee nonetheless – was not previously aware of Rodriguez's occupation. Citing policy, the district board said it would ask Roosevelt's principal to return the money. There is no indication that any other organization or district ever refused his foundation's money.

Opinions ranged widely, from the executive director of the Christian Family Coalition who said that the school district should consider what the decision would teach its students about women and girls, to another resident who said, "I think it's very small-minded. If you ask someone who has cancer if the money to help them is coming from a strip club, I don't think they would care." While he does not condone what the donor does for a living, another supporter said the donation kept 300 to 400 kids off the streets. "One has to look at the broader picture," he said. "This is a business

[1] www.sun-sentinel.com
[2] ibid
[3] ibid

that is legal, even though, in a lot of circles, it isn't fully accepted. But, we're not living in a world where anyone is on a perfect pedestal. You have to ask, 'Does the good outweigh the bad?'

The poster child for many who believe that the source of money is an issue is Philip Morris. Over the years, the company has spent hundreds of millions of dollars on things like hunger relief, domestic violence programs, and support of the fine arts, including some of the nation's leading museums and dance companies, such as New York's Whitney Museum, Guggenheim Museum, and Lincoln Center, (which in the 1980s handed out cigarettes in bags of favors to patrons), the Joffrey Ballet, the Brooklyn Academy of Music, American Ballet Theater, and the Brooklyn Museum.

Critics, including anti-tobacco activists and public health executives, ridiculed the company's effort to rehabilitate itself in the public eye. One opponent said, "They're taking blood money and using it to assuage people's hostility to their company. That money comes off the backs of millions of addicted smokers. It is almost too sickening to comment on."

This is not about the related issue of why the company donated this money or whether it was part of a larger public relations/political strategy, but rather *whether potential grantees thought about the source of the money.*

In my previous life at a foundation, I met a wealthy donor and we became friendly. His two major philanthropic interests were the arts and a large anti-smoking campaign, where he was the major supporter. One of his main cultural interests, a nonprofit where he was a board member and large contributor, was considering applying for a major grant from Philip Morris. He had pledged over $2 million to buy a new building for the organization and told the board that, if they accepted the grant from Philip Morris, he would withdraw the pledge and leave the board. They refused, accepted the money, and he both withdrew his pledge and resigned from the board. So, feelings about this issue were strong and the organization’s board was forced to deal with the conflict.

By and large, the beneficiaries of Philip Morris’ largesse said that they had no qualms about taking the money and they vehemently deny being influenced in any way by its support. That is not to say that there was never a controversy over the company's donations. Case in point: Philip Morris’ support of shelters for battered women. Together with the National Network to End Domestic Violence, Philip Morris created the program Doors of Hope. Beginning with $1 million in 1998, the program expanded, awarding $2.5 million to 180 organizations across the country. Under the program, the National Network reviewed grant applications and then told Philip Morris which organizations to support.

One board member of the National Network recognized the stigma associated with money from Philip Morris, but defended taking the money. "It's very difficult, when you get into the corporate world, to avoid tainted money," she said. "I'm comfortable with it. But we have been criticized for it." Still, she said Philip Morris "provided money that battered women's shelters could not otherwise get."

The Executive Director of one potential grantee, whose board of directors voted not to participate in Philip Morris's domestic violence program, said, "The amount of money Philip Morris could give could not equal the damage it could do," adding that coalition members objected to the company's money "because cigarette companies have been dishonest, lying to the public and marketing to children."[4]

The most common defense for taking money from tobacco companies was the one offered by a representative at the National Network: that taking money from just about any corporation carries some sort of stigma. A spokesman for the National AIDS Fund used that argument to defend his organization's partnership with Philip Morris in a program called Positive Helpings, which provided nourishing food to people with AIDS.

[4] http://prospect.org/article/philip-morris-money

Citing the fact that Philip Morris' (then) Kraft subsidiary produced foods, he said, "Nothing's more benign than Jell-O. When you look at any multinational, you will find critics of something they produce."

I asked a friend who was once a Philip Morris board member whether she knew of a situation where someone refused a grant. She said she once asked the CEO the same question who replied that no organization had ever turned down their money because they only make grants to organizations that apply.

A Contrary View – Should This Be an Issue At All?

One observer discusses the question from both sides and asks: a) does a charity have the moral right to refuse an unrestricted cash gift because of its source and; b) does a charity have a moral obligation to accept every such gift, regardless of its source? In the context of charitable giving, the right to refuse a donation because of its source is confronted by a potential obligation to accept whatever will further the charity's exempt purpose, regardless of its origin. And, is this a question boards should consider?

In an article in the *Nonprofit and Voluntary Sector Quarterly* titled, "Tainted Money and Charity: Do 501(c)(3)s Have the Right to Refuse a Gift?"[5] Donald Morris traces the issue back, first to the Bible and then to Homer. But, the source most often mentioned in his discussion and by other observers is George Bernard Shaw and his play, *Major Barbara*.

The title character is a Major in the Salvation Army in England at the beginning of the 20th Century. In a disagreement with her supervisor over accepting a donation from a whiskey distiller and a matching gift from her father – a munitions manufacturer and self-proclaimed "profiteer in mutilation and murder" – Barbara resigns from the religious organization. In the 1906 preface to the play, Shaw sought to counter London drama critics who interpreted the play as an attack on the Salvation Army. As evidence that the critics were wrong, Shaw quoted an officer in the Salvation Army who asserted the Army "would take money from the Devil himself and be only to glad to get it out of his hands and into God's."

Opposing views of Barbara and the Salvation Army are developed later in the play where her father – and Salvation Army donor – proclaims the "true faith" of a munitions manufacturer is "to give arms to all men who offer an honest price for them." He argues that the profits derived from the sale of arms to all sides in a conflict do not cause war.

Shaw reported that the drama critics had difficulties over "my demonstration of the economic death lock in which the Salvation Army sees itself." He continued, "On the point that the Army ought not to take such money, its justification is obvious. It must take the money because it cannot exist without money and there is no other money to be had. Practically all the spare money in the country consists of a mass of rent, interest, and profit, every penny of which is bound up with crime, drink, prostitution, disease, and all the evil fruits of poverty as inextricably with enterprise, wealth, commercial probity, and national prosperity. Refusing to accept money from anybody except sweet old ladies with independent incomes and gentle and lovely ways of life," Shaw claimed, would not do either because this money may also be traced back to what he called its "industrial source," including "poisonous canned meat and all the rest of it."

Donald Morris then discusses the right of a 501(c)(3) organization to refuse an unrestricted donation. He argues that, if a charity disagrees with a donor on a moral issue, it may see nothing improper in turning away a would-be benefactor. However, in the context of a 501(c)(3) organization, its exempt purpose requires looking beyond the conscience of the individuals making the decisions. Specifically, the question of an organization's moral right to turn away funding occurs in the context of its pursuit of a legally-

[5] Donald Morris, Tainted Money and Charity: Do 501(c)(3)s Have a Right to Refuse a Gift? *Nonprofit and Voluntary Sector Quarterly*, December 2008; vol. 37, 4: pp. 743-755.

sanctioned purpose. He suggests that the organization's agreement with the IRS in seeking tax-exempt status produces a fiduciary responsibility with its stakeholders. These include donors, potential recipients of the organization's goods or services, taxpayers, and the government. Viewed from this perspective, he argues that turning down a gift is comparable to mismanagement and squandering scarce resources.

Morris mentions the case of professional fundraiser Jack Abramoff, who was indicted, and pled guilty to three criminal counts in Washington, D.C. related to corruption of public officials and defrauding American Indian tribes. He also made millions of dollars in charitable contributions. Some politicians attempted to redirect the payments received to nonprofit organizations, but some potential recipients refused to accept the gifts.

Morris also refers to a survey by Guidestar, a research organization, which was conducted following the incident. The survey reported that 39% of respondents believed that charities should not accept contributions from controversial sources. The survey allowed participants to explain how they interpreted "controversial." Under that heading were "sources promoting values opposed to that of the charity, illegal sources, manufactures of tobacco, alcohol and firearms, hate groups, gambling establishments, and nuclear energy and chemical companies."

Morris argues that 501(c)(3) organizations do not have a right on moral grounds to refuse to accept an unrestricted cash gift because of its source, and that charitable organizations have a positive duty – a moral obligation – to accept such donations regardless of the donor, although they may have a legal right or even legal obligation to refuse gifts for other reasons.

Interestingly, Mother Theresa took that position, accepting donations from despots and other questionable sources. She argued that the money was being used to aid the poor of Calcutta and that was all that mattered.

Conclusion

So, two questions now come to mind. First, is the issue of where money comes an important one? Secondly, should boards, as a matter of good governance practice, discuss the issue and, develop a written policy to answer questions that may arise from stakeholders? This is not about intrusive donors or unhealthy restrictions that sometimes accompany grants; it is, pure and simple, about where the money comes from.

The answer to the first question is an unequivocal yes. The source of the money should be important to all nonprofits, but particularly so to those with clear missions involving important health or social issues. Organizations working to improve child health, reduce homelessness, or cure chronic diseases must be concerned that potential donors do not generate their revenue from activities antithetical to the mission. Such organizations should not take money from donors that make and market products that undercut the nonprofits' missions.

The second question also deserves an unequivocal yes. If the board does not deal with complicated issues, they are left to the staff. In this case, where a decision can affect the reputation and standing of the organization in the community, it is clearly a board responsibility.

So, the question is whether to deal with this on an ad hoc basis or whether to develop an explicit policy. An organization could certainly wait until a potentially difficult situation arises and then deal with it. I believe it is probably better discussed and resolved separate from a debate on a single grant or separate from other considerations, such as the financial pressures facing the organization. Whether one draws the line at money from a reputed felon, tobacco company, maker of firearms, or producer of unhealthy food, or whether a line is drawn at all, the issue is important enough to warrant a board policy statement.

The Panel on the Nonprofit Sector, convened in October 2007 by Independent Sector, produced "Principles for Good Governance and Ethical Practice," a guide for charities and foundations. It consists of 33 principles that were reviewed and approved by a group of leaders from across the country. One of these doctrines states: "A charitable organization should adopt clear policies, based on its specific exempt purpose, to determine whether accepting a gift would compromise its ethics, financial circumstances, program focus or other interests." It suggests that nonprofits should develop a gift acceptance policy that would outline the rules and procedures by which an organization will evaluate whether it can accept a contribution even before an offer is actually made and identify circumstances under which a review by legal counsel would be required before accepting a gift.

Many organizations have confronted the issue. Following are three examples – one that worked with its umbrella organization to amend a policy to better relate to local conditions, one that acted in response to a specific contribution, and a third that required a board policy to assess the risk in affiliating with a private corporation.

Médecins Sans Frontières (MSF) **Canada** operates under the Corporate Giving Code of MSF International. Integral to that code is a *no zone,* blacklisting some entire sectors from donating gifts. Most of those excluded — such as tobacco companies and weapons manufacturers — make good strategic sense for a medical humanitarian organization, says the director of fundraising.

However, MSF Canada and its board of directors didn't agree with all those listed on the international *no zone*. And the resulting discussions between MSF International and its Canadian affiliate played an important role in its modified fundraising strategy. Case in point: automatically declining gifts from all extraction companies and businesses that produce luxury items or wine was looked on by the local's board as too stringent. Hoping to develop a policy that worked more specifically to MSF Canada's reality, they revised the international code to suit its national circumstances. After deliberation by the organization's board of directors, their Corporate Giving Policy was loosened in some areas dealing with gift acceptance, providing them more practical guidance for ethical screening.[6]

The Center for Health and Gender Equity (CHANGE) was recently in the news when it returned a sizeable charitable contribution from craigslist Charitable Fund. News around misuse of craigslist for the sexual exploitation of minors led the organization's board to reconsider accepting the gift.

CHANGE commended craigslist for contributing funds to anti-trafficking groups; for including on its website warnings, safety tips, and information to report suspected exploitation of minors and trafficking of women for the purposes of sex; and for cooperating with law enforcement. However, the organization said, "We think craigslist should go the extra mile for women. There are additional steps the company could take to develop a more meaningful response to the serious human rights violations that seem to be facilitated by the site."[7]

Sustainable Harvest International (SHI) developed an evaluation tool to measure the level of risk involved in a potential business relationship, based on best practices and procedures in the field. If the program is evaluated low risk, staff determine whether to move forward and how. If the risk is higher, the decision is brought through the gift acceptance committee, which is comprised of staff and board members.

As these organizations did, I also believe it is an issue worth considering and resolving. If nonprofits can develop whistleblower and document retention policies as well as codes of ethics for their boards, they should be able to find a little time to discuss and create a policy on which contributions – if any – might possibly compromise their ethics and mission. Development of such a policy should become a win-win for both the organization and all its stakeholders.

[6] www.charityvillage.com
[7] www.genderhealth.org