

ISSUES GRANTMAKERS SHOULD CONSIDER BEFORE PLACING A REPRESENTATIVE ON A GRANTEE'S BOARD TO OVERSEE A GRANT PROJECT

As a condition of receiving grant funds, some grantmakers require that a foundation representative serve on the board of a grantee during the course of a project funded by the foundation. In some cases, the grantee may be a start-up nonprofit and the foundation believes that it is able to offer critical technical assistance and management functions to the grantee by placing a representative on the grantee's board. In other cases, the foundation may wish to keep close oversight over a multi-year project that represents a significant grant for the foundation and a substantial undertaking by the grantee.

An example of a provision that may be included in a grant agreement to require foundation representation on the board of a grantee may provide the following requirements:

- As a condition of receiving grant funds, during the entire period of the grant, the foundation is entitled to appoint a voting or non-voting representative to the grantee's board of directors. The representative may, but is not required to, be a foundation employee.
- During the period of the grant, the foundation's designated representative may be removed or replaced only with the foundation's approval.
- The grantee is required to take all necessary action under the grantee's governing documents to permit the foundation to exercise its rights in connection with the foundation's designated representative.

While appreciating a foundation's support for the project, and while recognizing the foundation's legitimate interest, as a stakeholder, in the overall operations and governance of a grantee, a grantee is likely to have several concerns about including a provision about board participation in a grant agreement.

- **Will the presence of a foundation representative have a "chilling effect" on board discussions?** There is a very real extent to which foundation representation on a grantee's board will affect the directors' willingness to discuss freely the broad set of strategic and operational challenges and opportunities facing the grantee, as these may impact some aspect of its relationship and programs with the foundation. The very question, "How are things going with the organization?," provokes a very different, and inevitably less candid,

discussion if a foundation representative is in the room. Discussions on budget allocations, other potential funders or programs, key personnel, and other strategic and management issues could be similarly affected.

The foundation representative could be recused from discussions not related to the foundation grant or foundation-specific discussions, but then the representative would have trouble fulfilling his or her fiduciary duties as a board member with respect to the governance of the grantee.

- **Will the foundation representative be able to fulfill his or her legal and fiduciary duties as a board member?** The foundation representative must be subject to the same legal and fiduciary duties as other members of the grantee's board. This will require the representative to act in the best interest of the grantee, rather than the foundation. This also includes maintaining the confidentiality of board discussions when in the best interest of the grantee. This tension will be particularly difficult to manage if the foundation funded project is a significant part of the grantee's operations.
- **Will the foundation representative be able to manage the conflicts of interest?** In light of the foundation representative's position on the grantee's board and his or her position with the foundation, the representative will be faced with a conflict of interest, in that decisions that might be made in the best interests of the grantee might not accord with the best interests of the foundation.

The tension present in fulfilling the foundation representative's legal and fiduciary duties and managing the conflict of interest is exacerbated in proportion to the degree of closeness of the foundation representative to the actual project being implemented. For example, a foundation representative who serves as a program officer with day-to-day oversight over implementation of the project will bring a different, and perhaps more narrow, perspective to the intersection of the foundation's and the grantee's interests than would a more senior foundation representative who is not directly connected to the management of the actual project.

Moreover, if the project's program officer is the foundation's representative on the grantee's board, the representative would be monitoring the project for the foundation, while simultaneously having ultimate decision-making authority over the project as a member of the grantee's board. In essence, the representative would be overseeing his or her own decisions. The representative would also have an additional conflict of interest because the implementation of the project may have an effect on his or her employee performance evaluation at the foundation. As a result, if a foundation program officer serves as the board representative, he or she will have to balance a triple conflict of interest: the grantee's

interest, the foundation's interest, and his or her personal interest with respect to employment at the Foundation.

- **Whether placing a foundation representative on the board is more appropriate and helpful for a start-up nonprofit, rather than for a “mature” organization.** In some cases, a foundation and a grantee may find that foundation representation on its board may provide important technical and strategic support that is vital to the success and oversight of a grant-funded project. Arguably, this situation may more frequently, and more appropriately, apply to start-up nonprofits, rather than mature organizations. For example, a mature organization may have seasoned and experienced board members, whose skills and expertise are carefully balanced. Under these circumstances, the foundation representative would have to fit into a well-functioning board and would best be chosen by, or with significant input from, the current board. If the foundation is providing significant oversight or assistance through the grant, and through the reporting and feedback required by grant reports, the benefit of and need for input by the foundation at the board level may be significantly reduced.
- **Whether the foundation representative fits within the culture and profile of the grantee's board.** A grantee's board may be composed of directors who are by-and-large principals or very senior in the organizations and endeavors with which they are associated, for example, chairmen, CEOs, managing directors, etc. The grantee may intentionally recruit board members with such profiles, as such individuals bring to their duties a very broad set of experiences and contacts. In addition, the grantee may “markets” its board just this way when it engages in discussions with potential partners, funders and other stakeholders. Thus, if a grantee does invite a foundation representative onto the board, the grantee would most likely prefer that a senior foundation representative be selected, rather than a program officer.

Alternatives

There are a number of alternatives to having a foundation program officer serve as a foundation representative on grantee's board.

- Designate a senior representative from the foundation to serve on the grantee's board.
- The grantee and the foundation agree on an individual not formally associated with either organization to become the foundation representative. This person would be of some prominence and stature, would ensure that the foundation's interests were represented at the board, and would, by virtue of his or her “non-alignment,” be better able to engage in and observe a fully candid discussion of the grantee's opportunities and challenges as they intersect with the foundation without engendering a “chilling effect” on those deliberations.

- Have a foundation representative attend select board meetings, or portions of board meetings, possibly as an advisor/nonvoting observer with full rights of participation, when the foundation funded project is discussed in detail. The representative would still have to be bound by an appropriate confidentiality agreement.
- Have grantee representatives (from its senior staff and board) brief foundation personnel (not only the program officer, but other representatives with expertise on a wide variety of issues – financial, legal, operational). Those meetings could serve as a brain trust or kitchen cabinet for the senior staff and board.
- Have no foundation representative on the grantee’s board, and rely on the grant reporting and oversight requirements afforded to the foundation under the grant agreement to provide input and direction.

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This summary is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.