



# Fiduciary Responsibilities of the Directors of the IEEE Foundation, Incorporated

IEEE Foundation Board of Directors Meeting

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# Agenda

L&C & You: Business Partners

IEEE Foundation Governing Framework

- Governance Framework
- Public Charity Status
- Documentation

Fiduciary Duties of Directors

Liability as a Director

Communications of Directors



## L&C & YOU: BUSINESS PARTNERS

- ▶ ***Assure the legal health of the enterprise by helping the organization (i.e., the client) to anticipate and solve the business problems presented by the various laws and regulations with which we are faced in this complex world***
- IEEE is our sole client
- Share a vision with IEEE leadership on managing risks, resource allocation, and executing strategy
- Strive to be your business partner, key advisor and resource
- Tailor our support to your business needs and objectives
- Strive to promote dialogue and synergies among business leaders in managing risk
- Help the business to reliably achieve its objectives and strategy, while addressing uncertainty and always acting with integrity
- Work to understand the major commercial and legal risks to IEEE's mission and then help YOU take action to mitigate those risks
- Value the use of technology to facilitate faster and more efficient processes
- ▶ Select, engage and supervise outside counsel



## Engaging with Legal and Compliance

- Be proactive and **engage L&C early** so that we are able to help you preemptively anticipate issues before they arise
- We can help you articulate potential risks to the business which, in turn, allows the business to make an informed judgment about how to handle a matter based on the risk
- LC has an open door policy:
- No one should be afraid to raise legal issues
- If bad news isn't elevated to LC because of a fear of reprisal or another negative reaction, then it puts the company in jeopardy
- ***We are your partner – seek us out – ask questions – get guidance***



# IEEE Foundation Governing Framework



# IEEE Foundation, Incorporated New York Corporation and a United States Public Charity

New York Not-for-Profit Law  
and  
United States Internal Revenue Code (IRC) 501(c)(3)



[Certificate of Incorporation](#)



[Bylaws \(2018\)](#)



[Policy and Procedures Manual \(March 2023\)](#)



[Investment Operations Manual \(Nov 2022\)](#)



Operations Manual (Nov 2022)



# IEEE Foundation Governance Framework

## New York Not-for-Profit Corporation Law

- No members, no shareholders
- “Public benefit” corporation

## Section 501(c)(3) and 509(a)(1) of Internal Revenue Code (IRC)

## Certificate of Incorporation

## Bylaws (adopted by the Board)



# What is a not-for-profit?

*New York Not-for-Profit Corporation Law*

*Sec. 102(a)(5): “...exclusively for a purpose or purposes, **not for pecuniary profit or financial gain...[and] no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors, or officers, except to extent permitted.**”*





# What is a public charity?

*Section 501(c)(3) and 509(a)(1) of IRC*

“Organized and operated”

“Exclusively”

“For educational and scientific purposes”

Not more than an insubstantial amount of the IEEE Foundation’s resources (people, money, effort) can be spent on activities “unrelated” to the IEEE Foundation’s educational and scientific mission

Amount of revenue from activity compared to amount of revenue from all activities can be indicator or amount of resources used

“Insubstantial” is not defined but measured in aggregate, i.e., taken together ALL of the IEEE Foundation’s unrelated activities must be “insubstantial”



# What is a public charity (contd.)?

*Section 501(c)(3) and 509(a)(1) of IRC (contd.)*

## “Exclusively” (continued)

- Rule of thumb 5-15% of the IEEE Foundation’s total resources can be spent on unrelated activities
- Judgment call as to whether something is related or unrelated to mission
- If unrelated and all unrelated activities remains insubstantial, then the IEEE Foundation can engage in activity, but must pay taxes
- If unrelated activities in the aggregate are more than insubstantial, then the IEEE Foundation will jeopardize its tax exempt status

Public charities are a type of not-for-profit corporation given special tax advantages and are treated as **overseen by the public**



# IEEE Foundation Governing Framework (contd.)

*Section 501(c)(3) and 509(a)(1) of IRC (contd.)*

## Requirements for Exemption:

- “No part of the net earnings ... inures to the benefit of any private shareholder or individual”

## Transactions must be at fair market value

## Benefits

- Tax-deductibility of gifts to the IEEE Foundation
- Positive public image

## Disclosure

- Importance of Form 990 as Public Disclosure Document



# IEEE Foundation Governing Framework (contd.)

*Section 501(c)(3) and 509(a)(1) of IRC (contd.)*

The IEEE Foundation qualifies as a Publicly Supported Organization

Public Support Test: More than One Third from the Public

- 49.51% in 2019
- 45.85% in 2018
- 48.61% in 2017
- 50.19% in 2016

Insubstantial amount of “lobbying” is permitted (as opposed to advocacy which is unlimited)

501(h) Election: The IEEE Foundation did not engage in any lobbying activities in 2017 - 2022.



# IEEE Foundation Governing Framework (contd.)

*IEEE Foundation Certificate of Incorporation*

## Section 2:

- “...formed not for pecuniary profit or financial gain and exclusively to **further** the scientific and educational purposes of **The Institute of Electrical and Electronics Engineers, Incorporated...**”
- “To engage in scientific and educational activities, directed toward the advancement of the theory and practice of electrical engineering, electronics, radio, and the allied branches of engineering and the related arts and sciences.”
- Engaging in any activities, paying income to, or performing any services for any person or organization **other than IEEE is prohibited** unless it furthers the scientific or educational purposes of IEEE and of this corporation.



# IEEE Foundation Governing Framework (contd.)

## *IEEE Foundation Bylaws*

### Bylaws, Article II:

- “The IEEE Foundation has no members or shareholders”

### Bylaws, Article III:

- Only Members of IEEE can be Directors
  - 1/3 from current or previous IEEE Board
- Board of Directors manages and is the governing body of the IEEE Foundation



# IEEE Foundation Governing Framework (contd.)

## *Mission Statement*

“The IEEE Foundation inspires an engaged community and leverages the generosity of donors to enable IEEE programs that enhance technology access, literacy, and education and supports the IEEE professional community.”



# IEEE Foundation Governing Framework (contd.)

## *Accountability*

The Public

IEEE

New York State  
Attorney General  
and other State  
Attorneys General

United States  
Internal Revenue  
Services (IRS)

Donors directly  
and through State  
Attorneys General





# Fiduciary Duties of Directors



# Fiduciary Duties of Directors

## *General Rules*

Protect financial assets, mission and reputation for the benefit of the IEEE Foundation and the public

- Powers are exercised for the benefit of others
- You act collectively as a Board, not as individuals
- No power as an individual director
- Duties are personal, non-delegable
- Every director has equal and same fiduciary responsibilities

Board retains ultimate responsibility and oversight

Duties of Care, Loyalty and Obedience



# Fiduciary Duties: Care, Loyalty, and Obedience

## *Duty of Care*

Prudent Person Rule: Exercise care and act in good faith and with that degree of diligence, care and skill which an ordinary prudent person would exercise under similar circumstances in a like position (*N-PCL Section 717*)

Business Judgment Rule: Good faith and full disclosure

- You can rely on information, opinions and reports from others, including experts (e.g., law firm, CPA firm, M&A consultants) and staff
- If there is a reason for suspicion, you should make an inquiry



# Fiduciary Duties of Directors (contd.)

## *Duty of Care*

### Care Dos

- Attend meetings regularly - be informed as to minutes and agenda and attachments
- Spend sufficient time and energy to be reasonably familiar with matters requiring board or committee attention
- Review adequate information
- Rely on information from experts
- Monitor delegated activities
- Ask questions at the meetings
- Make your decisions based on your “informed” knowledge and experience
- Maintain a high degree of confidentiality – until public disclosure



# Fiduciary Duties of Directors (contd.)

## *Duty of Care*

New York Prudent Management of Institutional Funds Act provides very specific requirements for managing endowment funds, restricted by donor or law

Not required to keep documentation on various factors considered, but prudent to reflect factors considered when dealing with endowment under Investment Policy

- Primary objective: maximize total return within reasonable and prudent levels of risk with sufficient liquidity to meet distribution needs and preserve capital



# Fiduciary Duties of Directors (contd.)

## *Duty of Care*

Permits delegation for investment decisions, provided Board acts in good faith in:

- Selecting the agent
  - due diligence compared to other managers
- Establishing the scope and terms of the delegation
  - enter into written agreement
- Monitoring the performance and compliance
  - receive and review regular reports on performance



# Fiduciary Duties of Directors (contd.)

*Duty of Care (contd.)*

## Care Don'ts

- Don't delegate duties
- Don't engage in bloc voting
- Don't vote as representative of any constituency when acting as a Director
- Don't request information in the name of IEEE Foundation for personal use



# Fiduciary Duties of Directors (contd.)

## *Duty of Loyalty*

### Loyalty

- An undivided allegiance to the Foundation and IEEE and its mission when using power of position or information about the Foundation or IEEE or related assets

### Loyalty Dos

- Exercise powers in the interest of IEEE as a whole
- Make sure benefit accrues only to the public and the overall organization
- Disclosure potential related party transactions
- Don't undermine Board decisions, regardless of the role you're playing (e.g., IEEE member)





# Fiduciary Duties of Directors (contd.)

*Duty of Loyalty (contd.)*

## Loyalty Don'ts

- Don't act individually
- Don't act in a manner that undermines a decision of the Board of Directors
- Don't seize IEEE or Foundation opportunities for yourself
- Don't act on a related party transaction prior to approval by the independent directors
- Don't engage in a conflict of interest



# Fiduciary Duties of Directors (contd.)

## *Duty of Loyalty – Conflict of Interest*

### What is a Conflict of Interest?

- “any situation in which ... a member of the IEEE Foundation Board of Directors, any Officer or volunteer or other person serving the IEEE Foundation in some capacity is in a position to make decisions or cast votes that **could substantially and directly, or indirectly, affect any such person’s personal, financial or business interests...**” N-PCL Section 715 and IEEE Foundation Operations Manual Section 5.2

Consider each item of business where you are asked to take action and determine whether a conflict of interest with the interests of IEEE or Foundation exists

Recuse yourself and avoid improperly influencing the action being taken



# Fiduciary Duties of Directors (contd.)

## *Duty of Loyalty - Conflict of Interest (contd.)*

Disclose conflict before discussion or presentation to the board or committee and indicate whether you:

- Are recusing yourself from discussion or vote
- Believe you are able to separate those interests from your obligation to act in the best interest of IEEE

Duty of governing body's non-conflicted members to determine existence of conflict

Conflicted person will be removed from the numerator and the denominator for purposes of quorum



# Fiduciary Duties of Directors (cont.)

## *Duty of Obedience*

Directors must be faithful to the mission and purposes of the IEEE Foundation

### Obedience Dos

- Know the purposes of IEEE Foundation as stated in the Certificate of Incorporation
- Be aware of the IEEE Foundation Mission
- Note whether proposed activity is consistent with stated IEEE Foundation purposes and the Legislative Framework
- Uphold decisions of the Board and do not undermine publicly if disagree

### Obedience Don'ts

- Act in a manner that violates law or governing documents (including policies)



# Fiduciary Duties of Directors (contd.)

*Duties of Care, Loyalty and Obedience – Confidentiality*

## Confidentiality

- Derived from Duties of Care, Loyalty and Obedience
- Obligation to keep **Confidential Information** confidential
- What is **Confidential Information**?



# Fiduciary Duties of Directors (contd.)

*Duties of Care, Loyalty and Obedience – Confidentiality/Executive Sessions*

## Executive Sessions

- Discussions are confidential only to those in the session
- Agree on what will be reported out of session, if anything
- Documents considered at executive session retain their classification
- General rule: maintain a high degree of confidentiality until public disclosure



# Liability as a Director



# Director Liability

The IEEE Foundation is liable for actions of authorized individuals and appointed Committees

Directors can be sued by:

- Third parties for violation of U.S. and non-U.S. laws
- New York Attorney General (N-PCL Sec. 720)
- By, or in the right of the IEEE Foundation, through an officer or director
- Internal Revenue Service with loss of tax exemption





## Director Liability (contd.)

### Volunteer Protection Act (VPA)

- Enacted by U.S. Congress in 1997
- Generally, a volunteer is not liable for negligent acts taken or not taken while acting within the scope of his/her volunteer responsibilities
- Excludes tangential acts, such as auto accidents
- Does not override Director liability



# Director Liability (contd.)

## *Indemnification*

### What is indemnification?

- A guarantee against any loss which another might suffer
- Permitted by New York law – mandatory if defense is successful

### Directors are indemnified if:

- Duly authorized
- Acted in good faith
- Not inconsistent with purposes or objectives of the IEEE Foundation
- Believed in the best interest of the IEEE Foundation
- No reasonable cause to believe conduct was unlawful



# IEEE Foundation D&O Liability Coverage

## IEEE Foundation Summary of Insurance Coverage (Administered by the IEEE Corporate Insurance Program)

Total Premium	\$5,139.57
Aggregate Policy Liability Limit	\$3,000,000
Prior and Pending Litigation Date	12/9/1987



# IEEE Insurance (\$51 million)

The IEEE Foundation is an additional named insured on the following policies administered by the IEEE Corporate Insurance Program.

- Commercial General Liability
- Umbrella / Excess Liability
- Business Auto Liability
- Comprehensive Business Crime
- Professional Errors & Omissions Liability
- Global Travel Accident / Medical Expense
- Cyber Liability
- Other insurance policies deemed appropriate from time to time



# Communications of Directors



# Elements of Attorney-Client Privilege

Flows both ways – communication of facts and advice

Presence of a lawyer or cc'ing a lawyer does not protect communication

Can be waived

- Deliberately through a leak or expanded distribution
- Inadvertently by careless disclosure or presence of third party
- Waiver by IEEE

Consequences can result in harm to the Foundation

- Financially
- Strategically
- Reputationally



# Types of Communications with Lawyers

“PRIVILEGED AND  
CONFIDENTIAL –  
ATTORNEY/CLIENT  
COMMUNICATION”

Do Not Forward

Breaking Privilege  
Through E-Mail  
Chain

Geographic  
Limitations

Records Retention



# Sampling of Matters Handled by L&C

## Data Privacy

(managing personally identifiable information)

- GDPR
- New laws (U.S. and abroad)
- Non-compliance, e.g., improper use of IEEE lists, resulting in severe penalties

## OFAC/BIS

(applies to all volunteers, members, staff, offices)

- Education and on-line resources
- Previous cautionary letter due to creation of Sudan SubSection
- Shifting sanctions regime, e.g., Iran

## Trademarks & Copyright

- Developed policies for IP registration
- Infringement through decentralized systems
- Multiple complex processes
- Open Access

## Foreign Taxes

Activities must comply with local non-profit or other obligations

- Austria – tax advice on scope of permissible activities
- India – involuntary tax presence
- Sales and marketing activities may undermine nonprofit status

## Corporate Governance

(compliance within governance hierarchy)

- Ensure contracts expend assets for charitable purposes
- Monitor for activities inconsistent with governance hierarchy
- Potential loss of not-for-profit/charitable status





# Sampling of Matters Handled by L&C (contd.)

## Employee Relations

- Counseling on pending matters
- Upgrade policies and practices; provide training
- Litigious staff and system gaming
- Continual expansion of employer obligations across multiple jurisdictions
- Cross border compliance

## Subpoenas

(documents and witnesses)

- Patent litigants contact IEEE for information
- Established policy to require subpoenas
  - Government interest in conference attendance

## Antitrust

(avoiding anticompetitive commercial or administrative conduct)

- Policy and training
- Monitoring business engagements and internal activities
- Responding to government inquiries
- Standards Association

## Contracting

- NextGen Contracts Implementation
- L&C review of 2,500 contracts per year
- Manage risk while ensuring contracts are processed on a timely basis
  - New contract legal review threshold - \$25K
  - Lack of visibility into contracts signed or with whom
- IEEE indemnification, lack of liability coverage, unfair damages
  - Improper use of IEEE assets



# Sampling of Matters Handled by L&C (contd.)

## Not-for-profit Administration

- Established guidelines for arm's length transactions
- Review proposed transactions to ensure proper use of IEEE assets
- Improper use of assets risks loss of tax exempt status

## Vetting

- (for volunteer leaders, members or funding recipients)
- Ensure IEEE is not engaging with sanctioned parties

## FCPA

- Policies and advice about benefits to foreign governments
- Violation may result in fines and incarceration

## Standards

- Complex processes require constant staff engagement
- Potential misuse or co-option or corporate gain
  - Antitrust risk
- Potential politicization for national interests
  - 802.11ax
  - Patent Policy



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