

Holland & Knight

800 17th Street N.W., Suite 1100 | Washington, DC 20006 | T 202.955.3000 | F 202.955.5564
Holland & Knight LLP | www.hklaw.com

Christopher J. Armstrong

Memorandum

Date: April 2, 2025

To: Jenn Holcomb, Council on Foundations

From: Christopher J. Armstrong

Re: Considerations on preparing for, and responding to, government scrutiny

The tax-exempt sector, including private and community foundations, is likely to face new government scrutiny during the second Trump Administration and from Republican-controlled committees in the 119th Congress. Just over two months into the new Administration, President Trump has issued an executive order calling for “civil compliance investigations” of yet-to-be-named foundations with assets of \$500 million or more (among other tax-exempt entities),¹ the Department of Education has launched antisemitism investigations of 60 colleges and universities,² and cancelled \$400 million in grants and contracts to Columbia University.³ The House Ways and Means Committee has requested that the Internal Revenue revoke the tax-exempt status of one nonprofit,⁴ following a similar request to revoke the status of multiple nonprofits last year.⁵ This scrutiny, and the risks they pose, is likely only beginning.

The Risks Ahead: Congress and the Executive Branch

Congressional investigations can vary widely, ranging from high-intensity investigations at one end of the spectrum (including subpoenas for records such as internal emails or financial documents, congressional hearings, etc) to lower-intensity questionnaires to a number of organizations at the other. Regardless of where a particular congressional investigation sits on that spectrum, it often begins with a voluntary request to a single organization or a group of organizations. These often appear with no warning and are launched with coordinated media. From there, they can often escalate into more intense investigations.

¹ <https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/>

² <https://www.ed.gov/about/news/press-release/us-department-of-educations-office-civil-rights-sends-letters-60-universities-under-investigation-antisemitic-discrimination-and-harassment>

³ <https://www.gsa.gov/about-us/newsroom/news-releases/doj-hhs-ed-and-gsa-announce-initial-cancellation-of-grants-and-contracts-03072025>

⁴ <https://waysandmeans.house.gov/2025/03/24/chairman-smith-requests-revocation-of-stacey-abrams-founded-organizations-tax-exempt-status/>

⁵ <https://waysandmeans.house.gov/2025/03/24/chairman-smith-requests-revocation-of-stacey-abrams-founded-organizations-tax-exempt-status/>

Executive Branch investigations can be more difficult to categorize, given the wide variety of tools available to the White House, departments, and agencies. These can also begin on a broad spectrum of available actions, from a sector-wide questionnaire from agencies of jurisdiction, to Executive Orders, to specific callouts on social media by Administration officials, to more consequential legal action by the Department of Justice.

While the future remains uncertain, it is reasonable to assume foundations will face scrutiny by both Congress and the Administration, and that scrutiny can come in various forms. Regardless of the source of the scrutiny, any of these actions have the potential to create significant public relations, policy, and legal risks for the recipient. This memorandum will provide an overview of important ways to better understand your organization's risk, best practices to mitigate against and prepare for them, and steps an organization can take to respond to scrutiny should it occur.

These include:

- An internal risk audit to determine vulnerabilities and potential topics of future scrutiny.
- A team in place that will be responsible for coordinating strategy, communications, and responses to any inquiry; and
- A plan for “day one” actions – media statements, decision-making, and, counterintuitively, slowing down.

Side note: the importance of legal counsel

This document is not legal advice. Rather, it is an overview of the risks facing private and community foundations in the new political environment, and an aid as organizations consider conducting internal reviews (discussed below). Consideration of those reviews, and execution of any reviews or internal investigations, should be done with the advice of internal or outside counsel. Critically, to the degree possible any internal reviews should be done in a manner that does not create new risk – speak with counsel about conducting any reviews under privilege, as well as the arguably limited application of attorney-client privilege before Congress. While this document provides general considerations, any organization's review will need to be tailored to its particular circumstances, risk profile, size, and other factors.

Importantly, during any internal risk audit, risk mitigation or preparation efforts, or scrutiny response, consider limiting the creation of new records that may be discoverable in the future. To the degree possible, have these conversation and planning efforts in person or virtually. This is not an effort to hide, but a recognition of the threat that emails and other new records may be obtained by those opposed to your organization, may be misconstrued or misunderstood, and may be used against the organization unfairly in the future.

Risk Audits – Determining Potential Vulnerabilities Ahead of Time

Internal reviews can vary widely, ranging from 1) a thorough review of existing policies and communications (including website, public speeches and comments by leadership, and media mentions) to 2) a comprehensive internal investigation by outside counsel that includes

document preservation and review, employee interviews, and other activities. The determination of the scale and scope of an organization's internal review should be made by counsel, and will often be guided by numerous considerations including:

- The prominence and reputation of the organization.
- Known activities / accusations likely to draw attention.
- Potential impact on organization by public scrutiny and media attention.
- Allegations of perceived wrongdoing, controversial actions, etc; and
- Resources available to devote to risk review.

In all cases, it should be conducted by internal or external counsel, with the assistance of individuals who understand the current political environment. An organization's general counsel may organize a purely internal effort at lower cost, or for more complex organizations, or those with known existing risks, outside counsel can be engaged to conduct the review in a way that provides the strongest protections of attorney-client privilege. If non-attorneys participate in the review, it should be clear that they act under the direction of counsel to assist them in providing legal advice to the organization.

In general, those conducting the review will have greater knowledge of the organization, its history, its activity, and its finances than any individuals in Congress or the Executive Branch that are the source of the scrutiny. It is also helpful if the individuals leading the review are able to put on their "opposition hat," not assuming best intentions but seeing the organization through the eyes and judgement of an adversary. This can lead to a better understanding of vulnerabilities and better preparation for scrutiny should it arrive.

Build Your Team

When an organization receives a congressional oversight letter, notice of agency action, or other notice that it is under government scrutiny, it has the potential to create confusion and chaos among employees and stakeholders over who owns strategy, communications, and any future response, which may add additional problems and lead to wasted time and resources. To prevent or at least reduce this, make those decisions now. Any organization at risk of government scrutiny in the near future should create a central team that will lead in this scenario, including:

- Which individual is in charge of overall decision making?
- Who is a member of the small team driving immediate / near-term decision making regarding:
 - Based on the content of the request / nature of the scrutiny, which individuals are going to drive strategy?

- Which individual(s) will speak for the organization (to media, stakeholders, and internally)?
- Who is in charge of legal? If needed, will internal counsel partner with external counsel, and who will make that decision?

Decisions on the team do not have to be permanent; indeed, it will necessarily fluctuate based on the actual scrutiny taking place. But having a default team as a starting place will help avoid confusion at the start of your organization's response.

Planning for Day One

Taking the actions above will go a long way toward preparing for a day government scrutiny arrives. That said, the unique nature of any investigation will require decision-making and responses that are unforeseeable in advance. The following planning for "day one" may help guide action during the first day, when the organization receives a letter launching a congressional investigation, a notice from an agency of jurisdiction, or generally the first sign of public scrutiny:

- Have a media statement prepared: while an organization will not know the nature or source of scrutiny before it arrives, several considerations can be discussed before scrutiny comes, and a draft media statement will help the organization have a base to edit on day one.
 - These include:
 - Tone – is the organization inclined toward aggressive defense ("This inquiry is yet another failed attempt to...") or respectful ("We welcome this letter from Chairwoman X and look forward to clarifying our position toward Y and Z")?
 - Putting your organization in the best light – a short media statement will be your first chance to respond publicly to the scrutiny, and the only one likely to be widely read in press at its launch. Instead of making it entirely about the inquiry, take the opportunity to highlight your work.
 - Keeping it brief – recognizing that facts may come to light that are not currently known, it is better to keep "day one" statements positive but brief. While it is appropriate to provide a high-level statement of the work of the organization, it is risky to provide outright statements of denial. Rather, highlight that the organization is taking the matter seriously and will be responsive. This maintains freedom of action to respond appropriately should additional information be found in the course of your organization's response.
- Gather your team as early as possible: if you have already built your team responsible for strategy, communications, and legal, get everyone in touch (in person, by telephone, or

by videoconference) to begin digesting the scrutiny and taking time to understand what it means for the organization. Failure to do so may lead to the solidification of strong opinions formed in silos – discussions and review in real time may help the creation of consensus among leadership.

- Internal communication to staff: do not let your employees and other stakeholders learn about the matter in the media without hearing from you first, or very soon thereafter. Outside communication whether to the press, on social media, or elsewhere should be limited until the organization's team comes to a consensus. An institution's staff will be critical to any response or other actions related to a government inquiry – it is important that they are able to learn of events and decisions from leadership, and not from the press. Open dialogue and mutual trust are essential in the weeks and months ahead.
- Engaging with your Board: the Board of Directors will be a critical source of information and advice during public scrutiny. They may also be a source of helpful relationships with key policymakers. As soon as possible, the Board should be apprised of any scrutiny, leadership's strategy, and other updates. It is also worthwhile to solicit available relationships that may be helpful in navigating the investigation or government action.
- Communicating with the public: stakeholders are not limited to staff, its Board of Directors, and senior leadership – donors, friendly media, and supportive members of the public are also critical audiences. These are important communities to engage at the earliest opportunity, demonstrating: 1) calm, 2) defense of the organization's mission and actions, and 3) intent to act with transparency and responsiveness. This is not the time to show panic or defensiveness, this is the time to demonstrate confidence that the facts are on your side, and you are handling the scrutiny carefully and effectively.
- Communicating with policymakers and regulators: regardless of whether the source of scrutiny is a congressional committee, agency, or other authority, recognize that it will not be resolved on day one. Therefore, communication should be limited to acknowledgement of the matter and pledge to reply as appropriate. Strong defenses, denials, or other pushback should be limited until your organization has time to examine and make decisions as described above.
- Slow down: as Chinese philosopher Lao Tzu said, "nature does not hurry, yet everything is accomplished." As they say in U.S. Special Forces, "slow is smooth, smooth is fast." Slow down. Panic, or the impulse to respond rapidly to every problem (real or just imagined), will likely lead to mistakes, overreaction, and possibly worse outcomes for the organization. On day one, consider the key tasks of 1) handling media as appropriate, 2) communicating internally and to stakeholders, 3) digesting the request / action / etc internally with the team, and 4) alerting any outside counsel. Little else will need to be solved right away. More time, consideration, and discussion are your friends.

Every organization, every individual in leadership, every congressional committee and government agency, and every issue area are different. The best practices and considerations above will be different depending on each variable. Consideration of them based on individual

April 2, 2025

Page 6

organizations and individual risk assessments may be helpful as the sector moves forward in the risky environment ahead.