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Memorandum

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Confidential

To: Jenn Holcomb, Council on Foundations

From: Christopher J. Armstrong

Re: Guidelines for Internal Reviews

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. While the Administration has already signaled a focus on foundations, the oversight agenda of congressional committees is still being developed. In anticipation of coming scrutiny, organizations can begin efforts to determine and mitigate risk, as well as prepare for possible scrutiny. The purpose of this review is not to force changes to organizational positions, advocacy, or values – it is simply to better understand the risk landscape and make decisions with those facts in mind.

The Importance of Legal Counsel

This document does not constitute legal advice. Rather, it should be used as an overview of the risks facing private and community foundations in the new political environment, and as an aid as organizations consider conducting internal reviews. 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.

Risks Facing Private and Community Foundations in the Current Political Environment

The Trump Administration, as well as congressional Republicans and allied nongovernmental entities, are giving new attention on the tax-exempt sector, including private and community foundations. This attention includes, but is not limited to, President Trump’s January 21, 2025, Executive Order 14173, [Ending Illegal Discrimination and Restoring Merit-Based Opportunity \(“EO”\)](#). While the EO focuses on government and federal contractor diversity, equity, and inclusion (“DEI”) activity, it also calls for the naming of individual entities and potential “civil

compliance investigations” and specifically references “*foundations with assets of 500 million dollars or more.*” It is reasonable to anticipate that negative attention will also focus on the funding of entities perceived as ideological, political activities by foundations, and a range of other issues.

While Executive Branch and congressional investigations are still being formulated, it is appropriate for potential target organizations to begin examining their risks and vulnerabilities in the new political environment. This internal review, or review by outside counsel, can help the organization prepare for potential scrutiny and government action, determine corrective or mitigating actions that may be prudent, and align organizational leadership on an action plan should the need arise. In conducting internal reviews, organizations will need to make individual decisions based on their circumstance, and again, should consult with counsel to ensure reviews are done appropriately and that, to the extent possible, reviews are done under privilege.

Beginning an Internal Risk Review

What kind of internal review? Internal reviews can vary widely, ranging from a thorough review of existing policies and communications with a specific issue in mind to 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 potentially criminal conduct or wrongdoing; and
- Resources available to devote to risk review.

Who conducts internal reviews? The answer of who should conduct the internal review will depend in part on the issues discussed above, but 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.

Starting small: beginning with a low-resource review, organizations can conduct an initial review of potential risk by examining:

- Organizational statements and a thorough review of public-facing materials that may draw attention related to DEI practices, politically sensitive matters such as immigration, and other sensitive topics.
- Public statements by organization leaders in speeches, media, and other forums; and
- A thorough review of mentions of the organization in media, particularly critical mentions in conservative media.

This initial review, with an eye for topics that could be of interest to the Administration or Congress, can help form a foundational understanding of where risk might arise.

Diversity, Equity, and Inclusion Specifically

Within his first two days of taking office, President Donald Trump fulfilled his promise to target DEI programs with a series of executive orders (EO) aimed at curbing what he described as "illegal and immoral discrimination programs." On Jan. 20, 2025, President Trump issued the EO "[Ending Radical and Wasteful Government DEI Programs and Preferencing](#)." The EO eliminated all DEI programs throughout the federal government, including "Chief Diversity Officer" positions, as well as equity-related grants and contracts. The next day – Jan. 21, 2025 – President Trump signed another EO, "[Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#)," revoking the previous administration's EOs that promoted DEI, affirmative action and equal opportunity programs. This EO also eliminated DEI requirements from federal contracting and requires every contractor to "certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."

Potential Far-Reaching Implications for the Private Sector

The EOs specifically take aim at DEI in the public sector, which leaves private-sector employers unsure of how to move forward with their DEI programs. Though the EOs do not explicitly mandate changes in private industry, they encourage changes to DEI practices in the private sphere and suggest a renewed wave of lawsuits by groups that have already taken aim at DEI in the private sector. These EOs are anticipated to affect DEI in the private sector in the following ways:

- Private Entities That Are Federal Contractors Must Eliminate DEI Focus from Their Trainings or Materials

Private entities that are federal contractors, as well as those that serve as subcontractors, will be affected by the EOs. Taken together, the Jan. 20 and 21, 2025, EOs attempt to not only end DEI within the federal government, but also extend such action to any and all private entities that provide any services, irrespective of to what extent (e.g., 1 percent of all of the private company's activities or revenue), either directly to the federal government or to others as a result of receiving government grant(s) (e.g., U.S. Agency for International Development (USAID) contracting or healthcare services to the public). Therefore, federal contractors will need to adjust their practices to comply with the new directives. Specifically, within 60 days of the issuance of the EO, entities that employ federal contractors must:

1. Eliminate DEI-Related Offices and Positions. Federal contractors and their subcontractors who provide DEI training or materials to federal employees or their own employees will be required to suspend these services/practices immediately.
2. Terminate Equity-Related Action Plans, Programs and Contracts. Federal contractors must discontinue any contracts with the federal government related to DEI or equity-based programs. Contractors previously involved in such work will need to reassess their ongoing contracts to ensure compliance with the new directives.
3. Remove DEI-Related Performance Requirements. Federal contractors and their subcontractors must eliminate DEI-specific performance criteria from their employee evaluations and ensure that all employment practices are aligned with merit-based standards.
4. Submit Certifications. Under this order, federal contractors and subcontractors must submit certifications ensuring they are not running DEI programs that constitute illegal discrimination or preferential treatment. Entities that continue to engage in DEI practices in violation of the new rules could be exposed to significant legal risks, including False Claims Act (FCA) liability.

- Potential Investigations into Private Sector DEI Practices

Though the specific mandates of the EOs apply to public employers, federal contractors and their subcontractors, the Jan. 21, 2025, EO also includes language strongly encouraging the private sector to end "DEI Discrimination." It is not clear how this would be enforced in the private sector; the EO tasks the U.S. Attorney General (AG) in coordination with the director of the Office of Management and Budget (OMB) to create a strategic enforcement plan. The plan will include investigations into the private sector, specifically targeting entities that continue to engage in DEI practices deemed discriminatory.

The AG and OMB director's report will contain a proposed strategic enforcement plan identifying, among other items:

1. key sectors of concern within each agency's jurisdiction
2. the most egregious and discriminatory DEI practitioners in each sector of concern
3. a plan of specific steps or measures to deter DEI programs or principles

4. litigation that would be potentially appropriate for federal lawsuits, intervention or statements of interest

The EO further states that "As a part of this plan, each agency shall identify up to nine potential civil compliance investigations of publicly traded corporations, large nonprofit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars."

- Attorney General Internal Memo Outlines Enforcement and Guidance for Federally Funded Institutions

On Feb. 5, 2025, newly sworn-in AG Pam Bondi sent out an internal memorandum (memo) to several divisions of the U.S. Department of Justice (DOJ) outlining the agency's strategy for enforcement. The memo directs the Civil Rights Division and Office of Legal Policy to "submit a report containing recommendations for enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector" to eliminate DEI preferences. It specifically calls for taking steps to discourage DEI initiatives and exploring potential criminal investigations.

Other items include guidance for institutions receiving federal funds, emphasizing compliance with federal civil rights laws. The memo states: "Educational agencies, colleges, and universities that receive federal funds may not treat some students worse than others in part because of race." Additionally, the memo instructs the DOJ and U.S. Department of Education to work together to provide guidance and the Civil Rights Division to "pursue actions to comply with Students for Fair Admissions."

- Private Entities May Continue to Engage in Free Speech Surrounding DEI

The EO is also explicit that it is not intended to restrict First Amendment-protected free speech. This means businesses and individuals may still engage in discussions and educational efforts around this focus of DEI, provided they do not engage in unlawful preferences or discrimination. Entities should continue to engage in discussions and educational efforts with caution to ensure that they comply with the EOs and do not go beyond such protections.

- Private Entities Will Have a Greater Need for Legal Review of Their DEI Policies and Practices

Given the increased scrutiny over private-sector DEI practices – in particular, those involving recruitment and hiring – it will be even more important for private entities to engage outside counsel and consultants to conduct legal audits and legal risk assessments to determine if their policies and practices could be subject to present legal risks or AG and OMB review.

Takeaways on DEI

- Scrutiny of DEI Programs. Entities should run legal audits or risk assessments on their DEI initiatives to determine whether their programs violate the new mandate against

discriminatory practices or otherwise pose a legal risk due to the likely rise in reverse discrimination lawsuits.

- **Civil Compliance Investigations.** Investigations could target private employers, including publicly traded entities and nonprofits, with a focus on high-profile entities with significant DEI programs.
- **Enforcement of Merit-Based Standards.** The government will prioritize enforcement of merit-based hiring and promotion practices, potentially imposing penalties on entities that do not comply with these standards. Entities may focus efforts to foster inclusivity by utilizing merit-based, non-discriminatory approaches that comply with the new legal landscape.

Other Subject Areas to Consider

Public Statements and Communication	<ul style="list-style-type: none"> - Review all website and public-facing materials. - Ensure that any individuals who speak publicly for the organization are aligned with leadership on messaging. - Understand that organization leadership, whether officially speaking for the organization or not, is speaking for the organization in the eyes on its critics.
Grants and Contracts	<ul style="list-style-type: none"> - Review past awards, grants, and contracts through the lens of the current political environment. Are there specific actions that may draw scrutiny? - Are there past awards, grants, or contracts to organizations that are also political targets? - Does the organization have scoring or evaluation methods that give preference for or bias against based on race, gender or sexual orientation?
Whistleblowers / Litigation	<ul style="list-style-type: none"> - Are there current or former “whistleblowers” who have made accusations against the organization?

Conservative Media Review	<ul style="list-style-type: none">- Review all mentions of organization in popular conservative media, which can often be a precursor to congressional or Administration action.
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Like many of the second Trump Administration's EOs, the DEI EO still has a lot of unknowns, and it will take time to determine whether they are carried out, and if so, in what manner. Most importantly, now is not the time for overreaction, corrective activity, or changes to an institution's public posture. There is equal risk both in doing nothing and in overreacting, but beginning with an internal risk review can help put an organization on the best footing to face any challenges that arise in the current political environment.