

Nonprofit Law Alert: Trump Foundation Lawsuit is a Stark Reminder for Not-For-Profit Leaders

On June 14, New York’s Attorney General, Barbara Underwood, announced the filing of a lawsuit against the Donald J. Trump Foundation and its directors. In her press release, the Attorney General stated that “the Trump Foundation was little more than a checkbook for payments from Mr. Trump or his businesses to nonprofits, regardless of their purpose or legality. This is not how private foundations should function and my office intends to hold the Foundation and its directors accountable for its misuse of charitable assets.” You can find the Attorney General’s press release here:

<https://ag.ny.gov/press-release/attorney-general-underwood-announces-lawsuit-against-donald-j-trump-foundation-and-it>

The lawsuit, filed by the State of New York against a sitting U.S. President, is remarkable for that reason alone. However, beyond the attention-grabbing headlines, the Attorney General’s petition also serves as a stark reminder of the duties and obligations of not-for-profit directors and officers, with specific examples of conduct that violates those obligations. The petition is available from the Attorney General at the following link: https://ag.ny.gov/sites/default/files/court_stamped_petition.pdf

Not-for-profit directors and officers owe a fiduciary obligation to the not-for-profit corporation. They are required to act in good faith and with the degree of diligence, care and skill that an ordinarily prudent person in their position would exercise under similar circumstances. In addition, they are required to act with undivided loyalty to the corporation. These requirements are found in Section 717 of the Not-for-Profit Corporation Law.

According to the Attorney General, the Trump Foundation directors breached their fiduciary obligations by (1) failing to hold regular meetings; (2) failing to review the Foundation’s assets, liabilities, revenues, and disbursements; (3) failing to provide oversight of the Foundation or control its activities; and (4) failing to institute and maintain internal controls. Specifically, the Attorney General determined that the Board of Directors of the Foundation had not met since 1999, and was not overseeing the activities of the Foundation in any way. The Board did not set policy or determine the direction or operations of the Foundation. The Foundation had no written criteria for the consideration, approval, or monitoring of grants, or protocols for assuring compliance with its governing documents and charitable mission. The Board played no role in approving the grants that the Foundation made and failed to obtain annual reports concerning its activities and operations. In addition, the Foundation did not adopt a conflict of interest policy and did not have an investment policy, both of which are specifically required by law.

The directors and officers of a foundation serve as trustees of charitable assets and are legally responsible for the proper administration of the charitable assets under their care and control. These requirements are found in Section 8-1.4 of the Estates, Powers and Trusts Law.

According to the Attorney General, the Trump Foundation directors failed to properly administer the Foundation’s charitable assets by (1) diverting charitable assets for improper or unnecessary purposes

and (2) permitting the Foundation to engage in political activity. The Attorney General determined that the Foundation entered into self-dealing transactions that directly benefitted Mr. Trump or entities he controlled, and the Foundation's Board failed to review or approve any of these transactions. The Attorney General also found that the Board of Directors knowingly permitted the Foundation to be co-opted by Mr. Trump's presidential campaign, which caused it to engage in political activity and prohibited related party transactions. In addition to violating state and federal law, these activities violated the Foundation's certificate of incorporation.

The petition filed by the Attorney General alleges that Mr. Trump's wrongful use of the Foundation to benefit his presidential campaign was willful and knowing. In support of this allegation, the Attorney General notes that Mr. Trump repeatedly signed IRS Form 990s in which he attested, under penalty of perjury, that the Foundation did not engage in transactions with interested parties and that it did not carry out political activity. Mr. Trump also signed the Foundation's Certificate of Incorporation, again under penalty of perjury, in which he certified that the Foundation would not use its assets for the benefit of its directors or officers, and that it would not intervene in any political campaign.

The petition also serves as a reminder of the broad enforcement powers the Attorney General has at her disposal. She seeks to dissolve the Trump Foundation under court supervision and obtain restitution of \$2.8 million. The Attorney General also seeks a ten-year ban from future service as a director of a New York not-for-profit for Mr. Trump, and one year for each of the Foundation's other board members, Donald Trump Jr., Ivanka Trump and Eric Trump. In addition, the Attorney General sent referral letters to the Internal Revenue Service and the Federal Election Commission identifying possible violations of federal law for further investigation and legal action by those agencies.

The Attorney General's petition is signed by James Sheehan, the Charities Bureau Chief at the Office of the New York State Attorney General. The specificity of the allegations, along with the recitation of the applicable law, provides a terrific case study on the duties and obligations of not-for-profit directors and officers. I'm certain that law professors and practitioners will be incorporating this material into their training for years to come.

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