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Liability of foundation boards

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Switzerland remains very popular worldwide as a location for foundations. The number of foundations and the volume of the assets of foundations are growing. As the supreme governing body of a foundation, the foundation board is responsible for management of the assets of the foundation. In times of inflation and volatile stock markets, the risk of liability of foundation boards can be huge. This risk of liability affects not just charitable foundations, but also corporate foundations and employee benefits foundations. The foundation board may relieve itself of some of its responsibility through appropriate organisational measures.



Measures to relieve a foundation board of its responsibility:

- **due diligence prior to accepting a foundation board mandate**
- **issuance of organisational regulations with allocation of competencies and tasks**
- **delegation of management tasks to third parties**
- **establishment of suitable measures for internal control and monitoring of the delegated parties**
- **ensuring a regular flow of information between the delegated parties and the entire foundation board**
- **involvement of specialists for specific tasks**
- **issuance of investment regulations defining the investment strategy and the risk capacity of the foundation as well as regular monitoring of the persons entrusted with management of the assets**

Liability of foundation boards



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The foundation board is responsible for all of the decisions of the foundation. In the event that the foundation suffers a loss because the assets of the foundation were not carefully managed, for example, the members of the foundation board could be held liable for their actions. Although members of foundation boards may act on a honorary basis, they cannot escape their responsibility and liability to the foundation. The careful exercise of a foundation board mandate requires, apart from the personal capabilities and performance of the mandate holder, that the foundation has a suitable organisational structure.

General requirements for liability

The general requirements for liability are loss, wrongfulness, fault and causal connection.

A foundation suffers a loss if there is a pecuniary loss that has no connection with the purpose of the foundation as defined in its articles of foundation. In this regard, the loss is defined as a decrease in assets, an increase in liabilities or a loss of profit.

Wrongfulness is given if the foundation board has breached its duty of care in the course of fulfilling its tasks. The degree of care to be exercised by the foundation board arises in each particular case from the individual task assumed and the expertise of the foundation board.

In the event of any loss, the court must assess the business decision made by the foundation board that resulted in the loss. It must consider whether the foundation board made its decision in the interests of the foundation based on adequate internal control, in particular an adequate information and processing procedure, and in good faith.

Basis of liability in the case of charitable foundations

Pursuant to Article 80 et seq. of the Civil Code, a foundation has its own legal personality. It has its own assets that were dedicated to it for a specific purpose. Although subject to state supervision, there is no special basis of liability for charitable foundations. The foundation

board is therefore liable to the foundation in accordance with the aforementioned general provisions concerning liability.

Special basis of liability in the case of employee benefits foundations

In the area of employee benefits foundations, there is a special basis of liability in Article 52 of the Occupational Pensions Act. In the event of any loss, the occupational benefits scheme thus has a direct claim against all persons entrusted with management of the occupational benefits scheme, and hence against the foundation board as well.

No grant of discharge

In contrast to corporate law, where a board of directors can be granted a discharge for its activities by the shareholders, there is no such possibility of a discharge under foundation law. The foundation board can thus not be granted a discharge for its activities and responsibilities.

Honorary status

Pursuant to the case law of the federal Supreme Court, the honorary nature of foundation board mandates does not provide protection against liability. Members of foundation boards acting on an honorary basis must therefore also fulfil their mandate with due care.

What should potential foundation board members consider before accepting a mandate?

Foundation board members are subject to the duties incumbent upon them as soon as the position of governing body is established, i.e., as soon as the foundation board is appointed or de facto acts as a governing body. From this date on, it must actively attend to the affairs of the foundation. If, on this date, circumstances already exist that could lead to a loss, such as a previously poor investment of assets, the newly appointed foundation board is required to act from the beginning of its activity. Potential foundation board members should therefore obtain a sufficiently comprehensive picture of the foundation before they accept the mandate. Before accepting a mandate, the most important areas of the foundation should be examined, in particular its organisation, investments and risk management. With respect to its organisation, there should be a check as to whether the organisation ensures adequate internal control. Without a review of these key areas of the foundation in advance, the foundation board runs the risk of being held responsible for previous issues.

In addition, the annual reports of the foundation for the last five years should be reviewed, particularly for any legal disputes. Legal support should be sought for the review of these documents, which represents a small due diligence.

Delegation of tasks – Partial discharge from liability

The foundation board may delegate all duties that are not non-transferable to a third party. By means of such delegation, the foundation board may relieve itself of some of its responsibilities. In this case, the foundation board is not liable for the actual act or decision of the third party, provided that the foundation board can show that it exercised the necessary care when selecting, giving instructions to and supervising the delegated party.

The delegation of tasks and thus also the limitation of liability of the foundation board is formally valid if the articles of foundation and the organisational regulations or a resolution of the foundation board provides for the ability to delegate these tasks to third parties.

Tasks that may not be transferred are namely:

- the determination of the strategy of the foundation within its purpose
- control of the achievement of objectives
- election of auditors
- appointment and dismissal of persons entrusted with the management and representation of the foundation

In the case of employee benefits foundations, there are additional tasks that may not be delegated such as namely:

- taking measures in the event of gaps in coverage
- determination of reserves and decision on the use of any unallocated funds
- appointment and dismissal of the auditors and the expert for occupational pension plans

Involvement of third-party experts

The foundation board may at least be assisted with the non-transferable tasks by involving third party experts in the decision-making process. The power to make decisions, however, remains with the foundation board.

Distinction from purely preparatory/enforcement action

If the foundation board assigns the preparation or implementation of its resolutions to individual members, this is not considered to be a delegation but rather an organisational measure to more efficiently handle the activities of the foundation board. In this case, the entire foundation board remains liable for the corresponding acts and omissions of this individual member.

Other measures to limit liability

A solid set of organisational regulations ought to create clear conditions for the organisation of the foundation. The tasks and competencies of the members of the foundation board, any delegated parties, committees or management are defined in it. It contains provisions on the flow of information and on the internal checks and balances. These regulations enable the foundation board to fulfil its mandate competently, which is why this serves as a measure to limit liability.

It is thereafter advisable to issue investment regulations to specify the investment strategy, the asset allocation, the asset classes, the reporting and the supervision. The foundation board is required to determine the risk capacity, the willingness to take risk and the target return in the interests of the foundation, and to reassess these from time to time. In so doing, the foundation board must carefully consider the liquidity planning of the foundation. In addition, the investments permitted for employee benefits foundations are defined by law.

Conclusion of directors and officers liability insurance is recommended as an additional measure. It provides some protection to defend against possible legal action or claims against the foundation board.

Practical recommendations

Foundation board members are responsible for the actions of the foundation board from the very first day of their activity.

Therefore, before accepting a foundation board mandate, the important areas of the foundation, particularly the organisation, the investments, the risk management and the past annual reports should be reviewed as part of due diligence.

Regulations should be reassessed from time to time and adapted where necessary. In the case of the organisational regulations, for example, it is necessary to check whether individual tasks and competencies are defined and allocated.

When tasks are delegated to third parties, a regular and timely flow of information to the entire foundation board must be ensured so that the board can exercise its control and intervene in time, if necessary.

Investment regulations should be reviewed due to volatile stock markets, inflation and a possible recession. In so doing, the capacity and willingness of the foundation to take risks should be reassessed, if necessary. Due to the economic situation, an even more precise and more regular monitoring of the investment objectives and principles by the foundation board is advisable.

Asset management – Permitted investments

The Occupational Pension Ordinance (OPO2), which applies to employee benefits foundations, lists the permitted categories of investments and specifies their limitations. In addition to traditional investments in stocks or bonds, alternative investments are also possible although the ordinance only lists these by name and not exhaustively. Within these specified permitted investment categories, the foundation board must carefully select, manage and monitor the investment of assets. In so doing, the foundation board is required to follow the principles of risk distribution, security and diversification. Thus, even if investments do fall into the category of permitted investments, this does not mean that the foundation board has fulfilled its duties of prudent investment per se. Due to their risk, even permitted investments can result in financial loss for the foundation and lead to possible liability of the foundation board if the investment was too speculative. Volatile crypto currencies, for example, could fall into the category of (permitted) alternative investments. However, a distinction must be made between this and the question of whether these were carefully selected and whether the principles of security and risk distribution were followed.

In the view of the author, a moderate investment of 1% to 2% of the assets of the foundation in established cryptocurrencies should be permissible.

Stumbling blocks to investment decision

Management of the assets of the foundation is one of the most important tasks of the foundation board and brings with it a correspondingly high potential for liability. Although the foundation board usually entrusts management of the assets of the foundation to a third party, the foundation board still remains responsible for regularly monitoring the asset manager with regard to the investment objectives and principles and whether the investments selected by the asset manager are even permitted. As a practical matter, this task is often allocated to a member of the foundation board who has the relevant expertise. This is not a delegation, however, but rather a purely internal organisational measure. In such cases, reports are also often provided only to this member of the foundation board or to the chair of the foundation board. This results in stumbling blocks if the flow of information to the entire foundation board is not ensured. Ultimately, the entire foundation board is responsible for ensuring that the foundation monitors the asset manager and makes the necessary decisions e.g., whether the investments selected are permitted by law and regulations, whether these investments are compatible with the investment strategy or whether the investments need to be adapted to changed conditions. Especially with volatile stock markets and shorter stock market cycles, an orderly flow of information to the entire foundation board is essential so that the board can fulfil its duties as mandate holder and make investment decisions in the interests of the foundation.