

Philanthropy Northwest Community Foundation Convening



Current Financial and Legal Topics for Community Foundations

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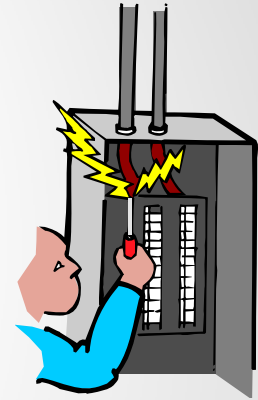
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Overview

I. Danger Areas for Donor Advised Funds



II. Fiscal Sponsorship



III. Form 990



I. Danger Areas for Donor Advised Funds

Donor Advised Funds

- Although they existed in name before 2006; the 2006 Pension Protection Act codified a definition:
 - Separately identified by named donor(s)
 - **Owned** and **controlled** by sponsoring organization
 - Donor or donor advisors reasonably expects to have advisory privileges over distributions or investments of amounts held in the DAF



Managing Donor Expectations

- The donor has reasonable expectation of “advisory” privileges
- Note in addition to the word advisory, the definition uses the word “privileges” not “rights”
- Sponsoring organizations should start with clarity in their charitable solicitation
 - Who owns and controls a DAF – The sponsoring organization
 - What are reasonable advisory privileges
 - What are prohibited acts
 - What are grey areas and what is the sponsor's policies in these areas

Proper Donor Acknowledgement

- Donor letter must be obtained contemporaneously (before they file their income tax return) and have all required disclosures
- Clearly state what was contributed and describe (but not value) any donated assets other than cash
- If non-cash donated items are not kept and utilized by the organization, the donor should be made aware of the donee's policies
- The donor letter should clearly indicate the contribution is to a DAF and note any restrictions on the contribution

Friends of Fiji Case

- Donor contributed \$2.5 million to DAF at Friends of Fiji
- Unrestricted gift; DAF agreement gave control to Friends of Fiji
- Friends of Fiji failed to follow Donor's advice
- Donor alleged that Friends of Fiji used \$600,000 of his gift to pay salaries of 2 directors and to cover legal fees in fight with donor

Friends of Fiji Case (cont'd)

- Nevada Supreme Court, 2011:
 - Friends of Fiji did not attempt in any way to satisfy Donor's charitable goals
 - But Donor gave up all rights in funds and had no right to control DAF
 - No damages to Donor; no return of gift

Documentation of Controls



- DAF Agreements
 - Be clear about ownership and control
 - Be clear about what advisory privileges are allowed
- Properly “advising” out of a DAF
 - What is allowed legally and by the sponsor’s policies
 - Some sponsors provide “advisor cards” in place of “pledge cards”
- Sponsoring organizations should properly document control over distributions from a DAF
 - Advice is considered and affirmatively approved or rejected on merits

Prohibited Benefits from Donor Advised Funds

- Distributions from a DAF may not result in a “more than incidental benefit” to:
 - DAF Donor
 - DAF Advisor
 - Related person

Prohibited Benefits from Donor Advised Funds

- Examples of a “more than incidental benefit” from DAF distribution:
 - Tickets to events (charity auctions, gala dinners, golf tournaments, etc.)
 - Auction items
 - Travel tours
 - Membership fees



Prohibited Benefits from Donor Advised Funds

- “Bifurcated Gifts”
- E.g., table at charity event for \$2,000: \$800 fair market value/\$1200 gift
- Can DAF pay \$1200 gift if Donor pays \$800?
- IRS Ruling for private foundations: bifurcated gifts prohibited



Prohibited Benefits from Donor Advised Funds

- Payment of personal pledges – language is key:
 - “I will advise” – YES
 - “I promise to give” - NO
- A charitable pledge is an enforceable debt obligation; paying it from the DAF is like paying off Donor's bank loan from the DAF
- Difficulty of knowing when there's a binding pledge

Prohibited Benefits from Donor Advised Funds

- Consequences of a “more than incidental benefit”
 - Penalties on Donor/Advisor: 125% of benefit
 - Penalties on DAF manager who knowingly agrees
 - Public disclosure issues

Prohibited Benefits from Donor Advised Funds

- Importance of communications with donors
- Donor/Advisor should represent in the grant request that there is no benefit that is more than incidental and no satisfaction of a personal pledge
- Grantee organization should certify that there is no benefit to Donor/Advisor or fulfillment of pledge

Scholarship Funds

- Prohibition against DAF grants to individuals
- Scholarship funds must be configured to be outside DAF rules



Scholarship Funds

- Sponsoring organization must appoint all members of the Selection Committee
- Donor and related parties must not control the Selection Committee, directly or indirectly
- Donor may be a member of the Selection Committee, if Donor's advice is given solely as a member of the Committee
- Grants must be awarded on an objective and nondiscriminatory basis under a procedure approved in advance by the sponsoring organization's board

Fundraising Into DAFs

- DAFs are starting to act more like Guilds
- Multiple donors to one fund
- One or a small group of advisors
- When does a DAF cease to be a DAF? Either because:
 - It has one named purpose or beneficiary and become an “other similar fund” or
 - The fund is not separately identified by reference to the contributions of a single donor or identifiable group of donors

DAF Sponsors and Fundraising

- Sponsors should consider policies around fundraising into a DAF
 - Use of the sponsoring organization's exempt status and registration with the Secretary of State Charitable Solicitations registration
 - Who is responsible for issuing donor acknowledgement letters including any quid pro quo acknowledgment
 - Contracting with vendors and facilities for fundraising events

DAFs: Looking Ahead

- IRS regulations implementing 2006 tax law changes
- Future legislation
 - Payout requirements for DAFs?
 - Changes to charitable contribution deductions?
 - Allowing use of DAFs to meet private foundation minimum distribution requirements
- Changing landscape/voices:
 - Fidelity Charitable Fund is largest charity in U.S.
 - Council on Foundations 2.0



II. Fiscal Sponsorship

Fiscal Sponsorship

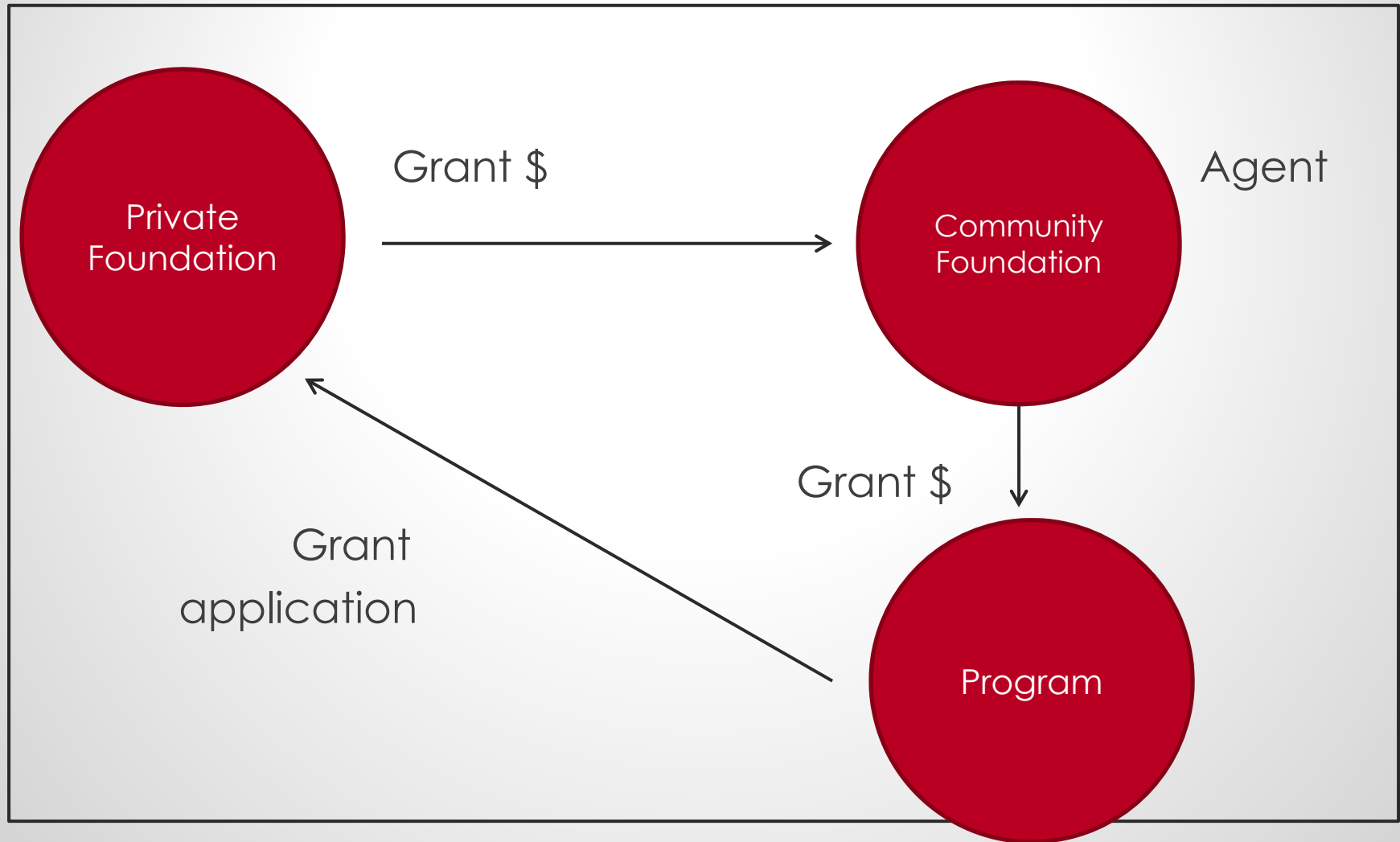
- What is it?
- Fiscal ~~Agency~~
- Sponsor controls and oversees funding/program
- Not a “pass-through” or “conduit”

Fiscal Sponsorship

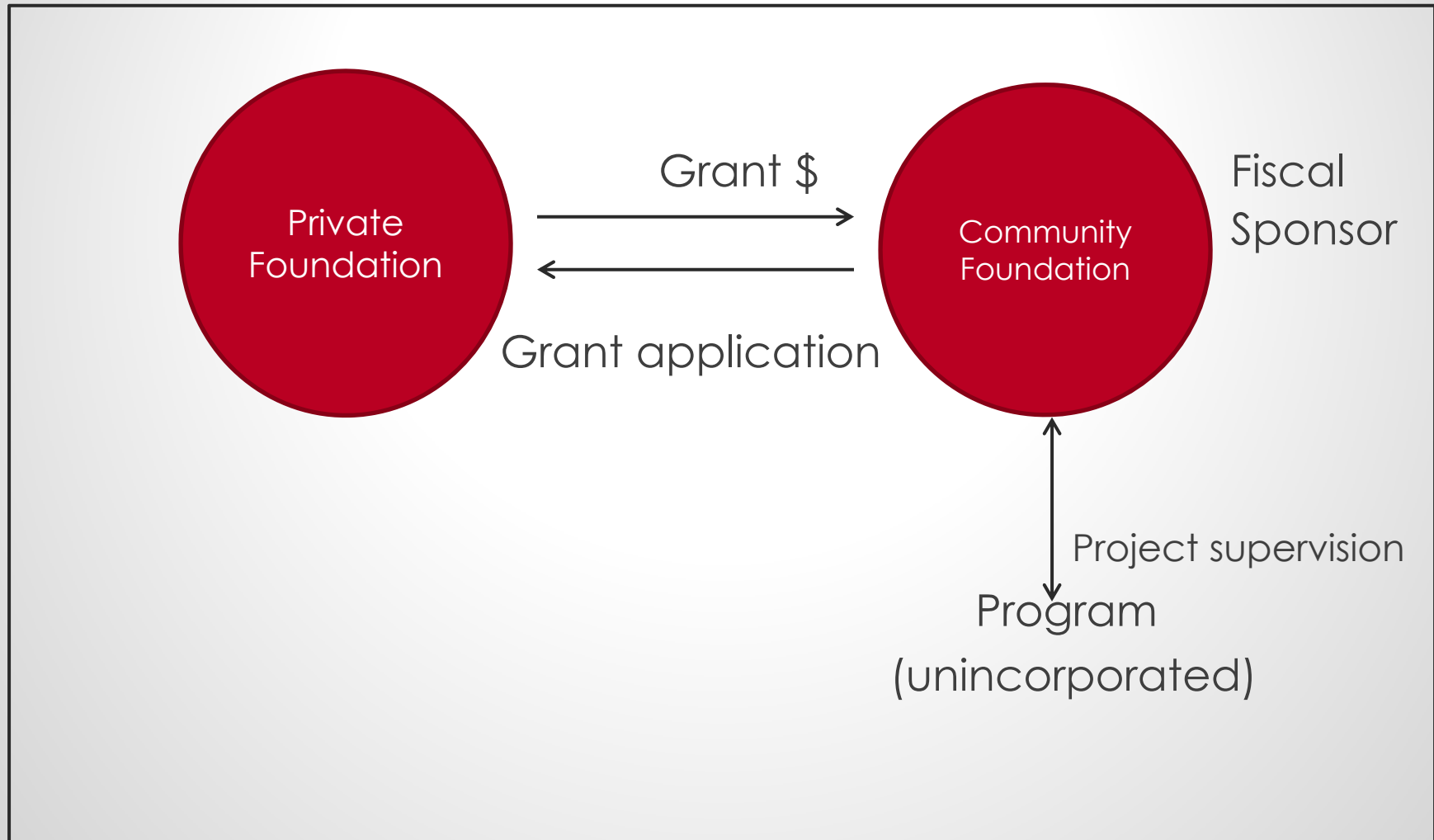
- Increasing importance
 - Automatic revocations of exemptions for failure to file Form 990
 - Increasing compliance burden/complexity of maintaining 501(c)(3) status
 - Avoid proliferation of small nonprofits



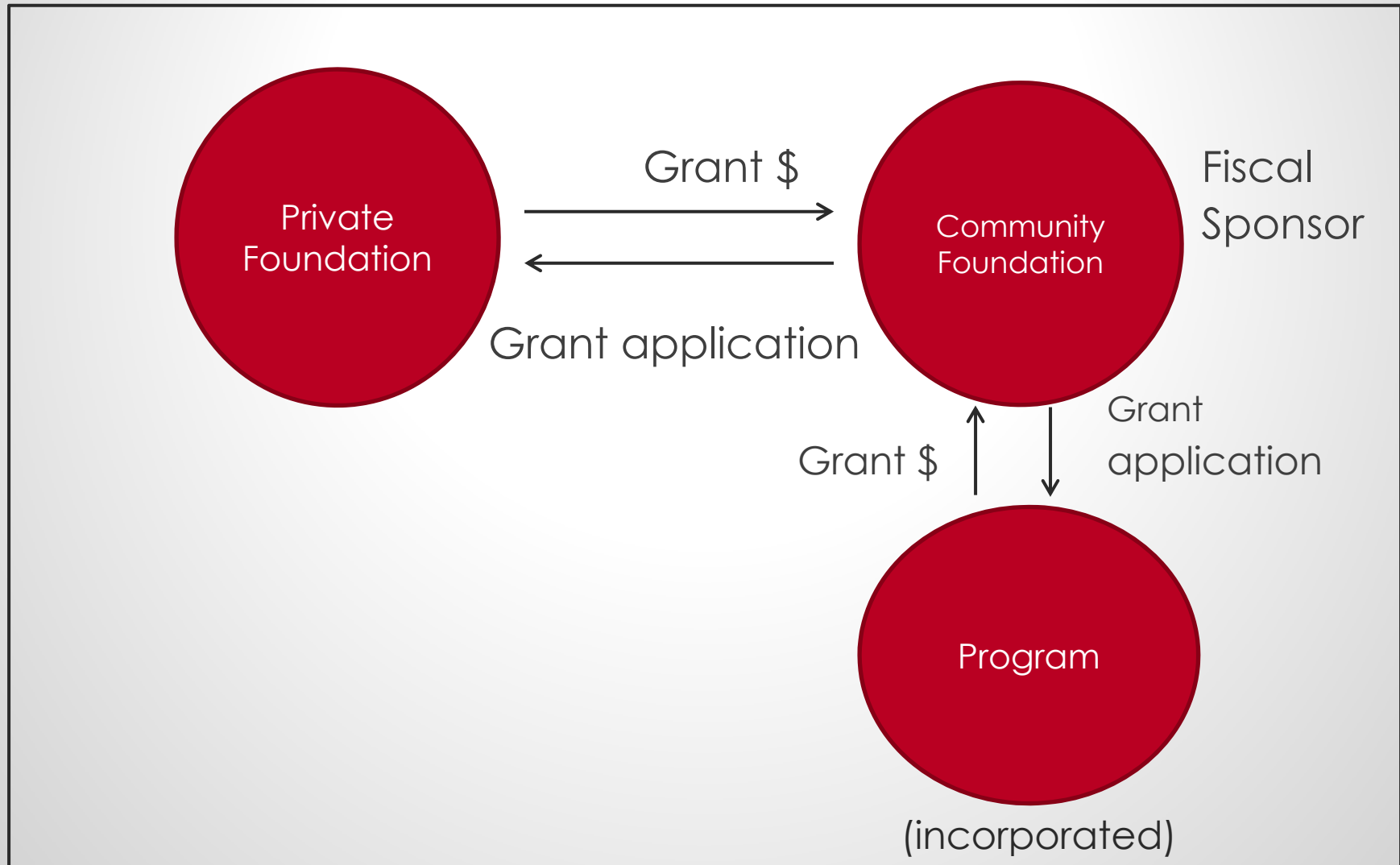
Fiscal Agency: The Wrong Way



Fiscal Sponsorship: The Right Way—Project Model



Fiscal Sponsorship: The Right Way—Re-Grant Model



Incubator – What is the need?

- 1.5 Million Non-Profits in the US
 - ~990K are 501(c)(3)
 - ~350K file a 990 (annual budget of >\$200K PY)
 - 82% (<1M annual budget)
 - 63% (or 350K NGO) (<250K annual budget)
 - With a \$1M budget if 30% is spent on non-program expenses
 - **\$30K x 350 organizations = \$10.5M**

Duplicating efforts, wasting limited resources

■ **Common Systems:**

- Technology: Websites, Databases, etc.,
- Marketing/PR,
- Legal,
- Accounting,
- Human Resources,
- Fundraising, Event Planning, Volunteer Management,
- Board Development,
- Compliance Issues: IRS 990s, Secretary of State's Charitable Solicitation Registrations

Opportunity

- Act as Fiscal Sponsor “with benefits”
- Two tracks

“One & Done” Track

- Incubator provides infrastructure support
- Project raises money for goal
- Accomplish goal
- Terminate

Path to Public Charity

- Incubator provides infrastructure support
- Implement governance
- Prove case
- Build capacity
- Launch

III. Review of the Form 990

Board Review of Form 990

- Areas to focus on:
 - Page 1 – Two year comparison and board approved mission
 - Page 2 – Program Service Accomplishments
 - Page 6 – Governance
 - Pages 7 and 9 – Management, Compensation and Contractors
 - Page 10 – Functional Expenses – Graded by watchdog groups
 - Schedule A – Public Support Percentage

Thank you

