#523

**Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER)**

Report to
the Mississippi Legislature

# A Review of Allegations Concerning Operations of the Mississippi University for Women Foundation, Inc.

The Mississippi University for Women Foundation was incorporated in 1965 as a nonprofit corporation under the laws of Mississippi for the sole purpose of securing private endowment funds to aid in development of the university's educational and research programs. PEER received complaints concerning operations of the foundation and concluded the following:

- The foundation is not in violation of the Internal Revenue Code or IHL bylaws by allowing university staff to serve on the foundation's board of directors and serve as the President of the Foundation.
- With respect to transparency of operations, while the foundation has made recent improvements regarding transparency through publication of an annual report and creation of a website, it should make additional information publicly available regarding its operations in order to ensure accountability to its donors and the general public.
- While circumstantial evidence surrounding the foundation's approval and execution of a line of credit could create an appearance of impropriety, the MUW Foundation did not violate federal or state laws prohibiting private benefit or conflict of interest in obtaining a line of credit from a bank that employed a member of the foundation's board of directors.
- The foundation did not violate restrictions on lobbying contained in the Internal Revenue Code because firms performing marketing and public relations work for the university did not attempt to influence legislation currently under consideration.
- While the foundation provides a portion of its unrestricted funds to the university for general assistance, these funds should not be considered a "slush fund" because they are not completely unregulated or used for illicit purposes. However, the foundation has been lax in its exercise of controls over these funds.
- Although no evidence shows that the foundation has used funds from specific restricted or endowed accounts for purposes not compliant with donor intent, the foundation pledged funds in the restricted and endowed accounts as collateral for a line of credit. By pledging these funds as collateral, the foundation imperiled restricted and endowed funds and risked breaching its fiduciary duty. Further, the foundation used $1.4 million from these accounts to cover a deficit in unrestricted funds for an extended period. The deficit resulted from allowing unrestricted fund expenditures to exceed unrestricted fund revenues for seven of the last eight fiscal years.

**August 11, 2009**

## PEER: The Mississippi Legislature's Oversight Agency

The Mississippi Legislature created the Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER Committee) by statute in 1973. A joint committee, the PEER Committee is composed of seven members of the House of Representatives appointed by the Speaker and seven members of the Senate appointed by the Lieutenant Governor. Appointments are made for four-year terms with one Senator and one Representative appointed from each of the U. S. Congressional Districts. Committee officers are elected by the membership with officers alternating annually between the two houses. All Committee actions by statute require a majority vote of four Representatives and four Senators voting in the affirmative.

Mississippi's constitution gives the Legislature broad power to conduct examinations and investigations. PEER is authorized by law to review any public entity, including contractors supported in whole or in part by public funds, and to address any issues that may require legislative action. PEER has statutory access to all state and local records and has subpoena power to compel testimony or the production of documents.

PEER provides a variety of services to the Legislature, including program evaluations, economy and efficiency reviews, financial audits, limited scope evaluations, fiscal notes, special investigations, briefings to individual legislators, testimony, and other governmental research and assistance. The Committee identifies inefficiency or ineffectiveness or a failure to accomplish legislative objectives, and makes recommendations for redefinition, redirection, redistribution and/or restructuring of Mississippi government. As directed by and subject to the prior approval of the PEER Committee, the Committee's professional staff executes audit and evaluation projects obtaining information and developing options for consideration by the Committee. The PEER Committee releases reports to the Legislature, Governor, Lieutenant Governor, and the agency examined.

The Committee assigns top priority to written requests from individual legislators and legislative committees. The Committee also considers PEER staff proposals and written requests from state officials and others.

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The Mississippi Legislature

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August 11, 2009

Honorable Haley Barbour, Governor
Honorable Phil Bryant, Lieutenant Governor
Honorable Billy McCoy, Speaker of the House
Members of the Mississippi State Legislature

On August 11, 2009, the PEER Committee authorized release of the report entitled **A Review of Allegations Concerning Operations of the Mississippi University for Women Foundation, Inc.**

Representative Harvey Moss, Chair

**This report does not recommend increased funding or additional staff.**

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# A Review of Allegations Concerning Operations of the Mississippi University for Women Foundation, Inc.

## Executive Summary

### Introduction

In response to three alumnae's complaints, the PEER Committee reviewed the Mississippi University for Women Foundation, Inc. (hereinafter referred to as the foundation). PEER conducted the review pursuant to the authority granted by MISS. CODE ANN. Section 5-3-51 et seq. (1972).

While the MUW Foundation is not a state agency or a unit of local government, PEER's authority extends beyond such entities. MISS. CODE ANN. Section 5-3-57 (b) (1972) provides PEER with authority "to investigate any and all salaries, fees, obligations, loans, contracts, or other agreements or other fiscal function or activity of any official or employee thereof (including independent contractors where necessary)." Because the MUW Foundation is an independent contractor of the Mississippi University for Women, which is a state agency of government, PEER clearly has authority to review the foundation's operations.

While most universities, including MUW, have development offices for the purpose of raising support funds from the general public, most public universities seek the support of "private" foundations in order to gain greater flexibility and confidentiality in the solicitation and expenditure of funds than that afforded by working within the constraints of the public sector.

The purpose of this review was to analyze the MUW Foundation's compliance with applicable state and federal laws, rules, regulations, and best practices through an investigation of the following specific allegations that the foundation:

- has possibly violated the Internal Revenue Code and IHL bylaws by including university officials as non-voting members of its board of directors and placing them in leadership positions on the foundation staff;

- operates under a policy of secrecy resulting in a lack of transparency;
- has created a “slush fund” for the university’s President using unrestricted funds;
- in obtaining a line of credit in 2005 for the benefit of the university, possibly violated federal and state laws prohibiting private benefit and conflict of interest and possibly violated its fiduciary responsibilities;
- possibly violated the Internal Revenue Code’s restrictions on lobbying by making payments to the university to employ a company to perform marketing services; and,
- has possibly violated donor intent in its handling of restricted donations.

This review focuses on the period of state fiscal years 2004 through 2008 unless otherwise noted.

## Questions and Answers Regarding Operations of the MUW Foundation

**Why do public universities seek to establish private development foundations and who is responsible for their regulation and oversight?**

***The primary reason that public universities seek to establish development foundations as separate private legal entities is to achieve greater flexibility and confidentiality in the solicitation and expenditure of donated funds than that afforded by operating within the legal and policy constraints of the public sector.***

As 501 (c) (3) tax-exempt non-private foundations, public university development foundations must operate in accordance with governing provisions of the federal Internal Revenue Code. University development foundations operating in Mississippi must also comply with the state’s nonprofit corporation law.

The Board of Trustees of State Institutions of Higher Learning and university presidents are responsible for establishing appropriate contracts, rules, and regulations to ensure that the foundations, like the universities that they support, serve the public interest and operate in compliance with applicable federal and state laws. Foundation boards of directors are responsible for the management, direction, and function of the foundations.

The Mississippi University for Women Foundation was incorporated in 1965 for the sole purpose of securing private endowment funds to be used and applied for educational purposes. The President of MUW has the discretion to decide whether to engage the services of a foundation and to set the terms and conditions of the university's relationship with such an entity. Under the terms of the operating agreement, the foundation is to coordinate all fundraising for the university and the university is to provide personnel, offices, utilities and other support needed by the foundation.

As of June 30, 2008, the value of the MUW Foundation's net assets had grown to $33.6 million. The foundation received over $4 million in contributions in both FY 2007 and FY 2008. The foundation's expenditures totaled approximately $2.2 million in FY 2006 and FY 2007 and increased to $2.7 million in FY 2008.

**Has the foundation violated the Internal Revenue Code and IHL bylaws by including university officials as non-voting board members and placing them in leadership positions on the foundation staff?**

***No. Neither the Internal Revenue Code nor IHL bylaws prohibit these practices. In fact, it is a common practice for the President of a public university to serve on the board of directors of its development foundation and for the Vice President for Institutional Advancement of a public university to serve as the foundation's chief executive. It is also not uncommon for the University's Vice President for Institutional Advancement to serve on the foundation's board of directors.***

The Internal Revenue Code does not address the relationship between a public university and its development foundation. While IHL's bylaws state that the relationship between the state's institutions of higher learning and their foundations must be based on "a recognition of and respect for the private and independent nature of the foundations," the bylaws specifically provide for senior administrators of the institutions serving on foundations' boards in a non-voting capacity.

IHL stresses the "independent nature of foundations" in its bylaws because by doing so it hopes to insulate the foundations from potential threats to their ability to maintain the confidentiality of donor and possibly other records. Despite the efforts of public university development foundations to maintain the confidentiality of their records by asserting their independence, in recent years some state supreme courts have ruled that all public university development foundation records, including donor records, are public.

A survey of public university development foundations conducted in 1995 reported that the majority of respondents include the university's president on their foundation's board and designate the Vice President for Institutional Advancement as the foundation's chief executive officer.

The MUW Foundation is a relatively small foundation whose staff and operational support are provided entirely by the university, making it difficult to distinguish between the staff work of one versus the other.

**Does the MUW Foundation operate under a policy of secrecy, resulting in a lack of transparency?**

***In certain aspects of its operation, the foundation has a legitimate need for "secrecy"--i. e., confidentiality. With respect to transparency of its operations, in recent years the foundation has made improvements by publishing an annual report and developing a website. However, PEER identified several areas in which the foundation's transparency is weakened by the absence of certain key documents (e.g., a strategic plan, complete minutes) and written policies (e.g., an expenditure policy) and by less than full disclosure of certain public information (e.g., the value of public support provided by the university) and information that should be made public but currently is not (e.g., the university's operating agreement with the foundation, the foundation's budget, and report on expenditure of unrestricted funds).***

One of the MUW alumnae's complaints regarding the MUW Foundation was that they questioned the "lack of transparency" within the foundation. They described "an ever-increasing wall of silence" with regard to the foundation's fundraising, investments, and expenditures. They stated that alumnae could not gather information about the foundation because of "the Foundation's policy of strict secrecy."

The MUW Foundation's operating agreement with the university contains adequate language governing the confidentiality of donor records and the foundation's confidentiality agreement contains necessary language to inform members of the board of directors and its staff as to their duty to maintain the confidentiality of donor information.

According to the Panel on the Nonprofit Sector, strengthening the public trust, which is essential to the success of any development foundation, depends on the extent to which the organization operates transparently. With the exception of confidential donor records, best practices in the operation of public university development foundations advocate complete openness, including providing the general public with information about the foundation's operations, governance, finances, programs, and activities.

While the foundation has made recent improvements regarding transparency through publication of an annual report and creation of a website, the foundation is missing certain key internal documents and documentation necessary to ensure transparency and accountability. For example, the foundation has not developed a strategic plan or a written policy governing the general expenditure of its funds or the specific expenditure of its unrestricted funds. Further, the foundation's minutes, which are the official record of its activities, are incomplete and lacking in supporting documentation. Also, the foundation has obligated itself to fund relatively high-cost service providers for the university without requiring a written contract for the services.

**Has the foundation used unrestricted funds to create a "slush fund" for the university's president?**

***While the foundation does provide a portion of its unrestricted funds to the university for general assistance, these funds should not be considered a "slush fund" because they are not completely unregulated or used for illicit purposes. However, the foundation has been lax in its exercise of budgetary and other approval controls over the expenditure of these funds and has not developed a written policy governing the expenditure of its unrestricted funds, as recommended by best practices. Further, the foundation used cash from restricted and endowed funds to cover a $1.4 million deficit in unrestricted funds that resulted from allowing unrestricted fund expenditures to exceed unrestricted fund revenues for seven of the past eight fiscal years.***

The foundation must use restricted funds (either temporarily restricted or endowed) for the purposes specified by the donor. Unrestricted funds are not restricted as to their use by the foundation--i. e., the foundation may use such funds for any purpose supporting its mission of providing funds for the educational support of the university.

The foundation's controls over its unrestricted funds include an annual budget and requirements for prior approval of the expenditure of non-budgeted unrestricted funds. Because the foundation has not consistently adhered to these controls, it spent more in unrestricted funds than it collected in seven of the last eight fiscal years. The foundation was able to continue expending more unrestricted funds than it collected year after year by using cash from its restricted and endowed funds to cover the negative cash balance in unrestricted funds that resulted from unrestricted expenditures.

**In obtaining a line of credit in 2005 for the benefit of the university, did the MUW Foundation violate federal or state laws prohibiting private benefit and conflict of interest and did the foundation violate its fiduciary responsibilities?**

***While the circumstantial evidence surrounding the foundation's approval and execution of the line of credit could create an appearance of impropriety, no evidence exists that the MUW Foundation violated federal or state laws prohibiting private benefit or conflict of interest in obtaining a line of credit from a bank that employed a member of the foundation's board of directors. With respect to its fiduciary responsibilities, the foundation imperiled restricted and endowed funds and risked breaching its fiduciary duty by pledging these funds as collateral for the line of credit.***

The foundation obtained a line of credit for the university in 2005 in order to provide a cash flow to the university for the repair of numerous university buildings damaged by a tornado in 2002. The university asked the foundation to obtain the line of credit because the university's cash flow needs for the repair project could not be met through the federal and state emergency management agencies' reimbursement processes.

A foundation board member was an executive officer of the bank at the time that the foundation decided to move its general business from another bank to the bank employing the board member and several months after the move of the foundation's general banking business, said bank issued the line of credit to the foundation. The foundation did not violate the prohibition against private benefit under the United States Tax Code because the compensation (i. e., interest rate) paid to the bank was not excessive and the bank is presumably not a "disqualified person." The foundation did not violate the prohibition against conflict of interest transactions under MISS. CODE ANN. Section 79-11-269 (1972) because the foundation's board of directors was apprised of the material facts of the line of credit transaction, as well as the director's interest in the bank, before approving the line of credit.

However, the foundation's board of directors imperiled restricted and endowed funds and risked breaching its fiduciary duty by pledging these funds as collateral for the line of credit obtained by the foundation for the benefit of the university. Further, the foundation paid $437,000 in interest to the financial institution on the line of credit, which reduced the amount of support given directly to the university by the foundation.

**Did the MUW Foundation violate the Internal Revenue Code's restrictions on lobbying by making payments to the university to employ a company to perform marketing services?**

***The MUW Foundation did not violate restrictions on lobbying contained in the Internal Revenue Code because the work performed by the marketing firm and another firm hired to perform public relations work for the university did not attempt to influence legislation currently under consideration by a legislative body. Further, while the foundation reported lobbying expenses on its Form 990, the amount of these reported expenses did not exceed the limits established in the Internal Revenue Code for a 501(c) (3) organization.***

The Internal Revenue Code defines lobbying as a direct or indirect attempt to influence specific legislation currently being considered by a public body. The code places limits on the amount that a 501 (c) (3) organization can expend on such activities, based on the organization's total expenditures.

The complainants believed that because the marketing firm's work concerning a name change for MUW would influence possible future legislative action necessary to effect a name change, the activities of this firm could constitute lobbying. Because the firm was not performing work to influence specific legislation or official actions currently being considered by a public body, its activities did not fall within the Internal Revenue Code's definition of "lobbying."

### Has the foundation violated donor intent in handling restricted funds?

***Although no evidence shows that the foundation has used funds from specific restricted or endowed accounts for purposes not compliant with donor intent, the foundation pledged funds in the restricted and endowed accounts as collateral for a line of credit. Further, the foundation used $1.4 million from these accounts to cover the deficit in unrestricted funds for an extended period.***

In testing for compliance with donor intent regarding individual restricted and endowed accounts, the foundation's independent CPA firm tested 86% of contributions (in terms of dollars) for the year ending June 30, 2008, and found no violations of donor intent.

## Recommendations

1. According to the Association of Governing Boards of Universities and Colleges:

   > *On many campuses, institutional personnel are used to staff the foundation. To preserve the foundation's independent nature, an arms-length relationship should exist between the foundation and the institution regarding the services the institution provides. Consequently, the foundation either should pay cash for the services provided or recognize these services as payments-in-kind.*

   Pursuant to recognizing the services provided to the university by the foundation as "payments-in-kind," the foundation should clearly differentiate between foundation work and university work and require its staff to maintain a daily record (preferably a computer-based record) of the time spent on each.

   The value of this time, as well as all other support provided by the university, including the value of space, utilities, equipment, and other materials provided to the foundation, should be reported to the Internal Revenue Service as required on line 21 of the Support Schedule (Part IV-A) on the foundation's annual Form 990.

2. IHL should adopt a policy requiring university staff who provide work for university foundations and affiliated entities to maintain a record of the time spent on such work.

3. The foundation should include in its annual report a description of the programs and activities that it has in place to achieve the results reported in the annual report.

4. The foundation should develop a document retention policy that includes the storage and retrievability of foundation minutes and supporting documents. The foundation should explicitly make the President of the Foundation the official custodian of its records.

5. To ensure the authenticity of its record of board meetings, an officer of the board of directors should sign all final adopted board minutes.

6. The Chair of the Foundation's Board of Directors should ensure that the standing committees meet annually as required by the bylaws and keep an official written record of every meeting.

7. As a precondition to paying expenses for personal and professional services rendered on behalf of MUW, the foundation should require that the university enter into a written contract setting out responsibilities and compensation.

8. The foundation should implement a strategic planning process to address its current and future support of the Mississippi University for Women. The process should incorporate clear missions and goals for the foundation's support of the university and contain clear performance measures to evaluate the effectiveness of the strategic plan in meeting the purposes of the foundation.

9. Pursuant to IRS recommendations, the MUW Foundation should develop a whistleblower policy and a code of ethics and make them available on its website.

10. In order to improve its transparency and accountability, the foundation should make the following documents and information available on its website:

    - a copy of its strategic plan;
    - reports on its success in meeting the objectives laid out in the plan, including reports on the foundation's investment performance and asset allocation;
    - copies of its IRS Form 990 for the most recent three to five fiscal years;
    - its audited financial statements for the most recent three to five fiscal years;
    - a detailed record of its expenditure of unrestricted funds for the past fiscal year,

including a detailed accounting of the expenditures for university assistance (reported expenditures should clearly tie to objectives contained in the foundation's strategic plan);

- a copy of its operating agreement with the university (IHL bylaws state that this is a public document);
- copies of all other policies developed in accordance with these recommendations; and,
- a more accurate description of its relationship to the university. For example, the foundation should include a statement explicitly stating that the Foundation's Board of Directors includes the University President and Vice President for Institutional Advancement as non-voting ex-officio members and explaining that the university provides, at no cost to the foundation, all staff, office space, utilities, equipment and supplies.

11. The IHL Board of Trustees should adopt a policy requiring university foundations and affiliated entities to be transparent in their operations (with the exception of donor records) as a condition of their continued affiliation with a public institution of higher learning in Mississippi.

    Such university foundations and affiliated entities should, at a minimum, make the following information publicly available:

    - copies of their IRS Form 990s and audited financial statements for the past five fiscal years;
    - copies of their operating agreements with the university;
    - strategic plans;
    - performance data for all programs;
    - policies (including a policy governing the expenditure of unrestricted funds); and,
    - reports of budgeted and actual expenditures for the most recent fiscal year, including a breakdown of unrestricted fund expenditures.

    By July 1, 2010, all universities should enter into agreements with affiliated organizations that ensure compliance with these disclosure requirements.

12. The foundation should develop a clear policy governing the expenditure of unrestricted funds, including the percentage of such funds that it might want to make available to the university president for legal, but discretionary, purposes.

13. Throughout the year, the board should monitor its revenues and expenditures and make appropriate adjustments when revenues fall short of projections.
14. The board's Executive Committee should immediately cease approving non-budgeted expenditures above the limits established in its bylaws. In every case in which the request for a non-budgeted expenditure exceeds the limit established in the bylaws, the request should be acted on by the full board.
15. Beginning immediately, during each fiscal year the foundation should limit expenditures from unrestricted funds to the amount of unrestricted fund revenues received. The foundation should continue with plans for a fundraising campaign in FY 2010 to address the deficit.
16. Foundation personnel should perform a monthly reconciliation of the foundation's cash balances, documenting available balances by fund—i. e., unrestricted, restricted, and endowed. Foundation personnel should report this information to the full board on a monthly basis.
17. The foundation should revise its "Annual Statement Concerning Conflict of Interest" as completed by the foundation's board of directors to include the percentage of direct or indirect interest in any affiliated company that the director lists on the form.
18. The foundation's board of directors should expand its conflict of interest policy to include all staff who perform work for the foundation.
19. The foundation should remove from consideration the potential use of quasi-endowment funds to pay unrestricted fund expenses or serve as a reserve fund for unrestricted funds.
20. In keeping with the requirements of FASB 116, the foundation should not use restricted or endowed funds as collateral for loans, lines of credit, or other debt instruments without obtaining written permission from the donor for revised use of such funds. Also the foundation should not use restricted or endowed funds for an extended period of time to cover a deficit in unrestricted funds.

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# A Review of Allegations Concerning Operations of the Mississippi University for Women Foundation, Inc.

## Introduction

### Authority

In response to three MUW alumnae's complaints, the PEER Committee reviewed the Mississippi University for Women Foundation, Inc. (hereinafter referred to as the foundation). PEER conducted the review pursuant to the authority granted by MISS. CODE ANN. Section 5-3-51 et seq. (1972).

While the MUW Foundation is not a state agency or a unit of local government, PEER's authority extends beyond such entities. Specifically, MISS. CODE ANN. Section 5-3-57 (b) (1972) provides PEER with authority:

> *(b) To conduct, in any manner and at any time deemed appropriate, a review of the budget, files, financial statements, records, documents or other papers, as deemed necessary by the committee, of any agency; to make selected review of any funds expended and programs previously projected by such agency; to investigate any and all salaries, fees, obligations, loans, contracts, or other agreements or other fiscal function or activity of any official or employee thereof* ***(including independent contractors where necessary****); and to do any and all things necessary and incidental to the purposes specifically set forth in this section.* **[PEER emphasis added]**

As an independent contractor of the Mississippi University for Women, which is a state agency,[1] the foundation clearly falls under the authority of the aforementioned provision. Further, MUW's written operating agreement with its foundation requires the university to provide, "at no additional cost to the foundation," all personnel, offices, utilities, and other support to the foundation necessary for it to perform its duties under the

[1] See *Bruner v. Univ. of Southern Miss.*, 501 So.2d 1113 (Miss. 1987).

agreement. As a result of the terms of this agreement, all of the MUW Foundation staff are salaried public employees of MUW who work in the publicly owned and operated buildings of MUW.

## Problem Statement

While most universities, including MUW, have development offices for the purpose of raising support funds from the general public, most public universities seek the support of "private" foundations in order to gain greater flexibility and confidentiality in the solicitation and expenditure of funds than that afforded by working within the constraints of the public sector.

However, it is this same private sector flexibility that has the potential for abuse and mismanagement of foundation resources if left unconstrained by failure to adopt reasonable rules and regulations for the solicitation and expenditure of funds raised through the foundation. Typical examples of unrestrained "flexibility" might include lavish spending beyond any definition of what is prudent and transactions that may not technically violate state and federal laws prohibiting conflict-of-interest and self-dealing, but may bring into question the motivations and priorities of foundation directors and staff.

The abuse of flexibility is compounded in states where university foundations have successfully hidden their transactions behind a veil of secrecy, arguing that because they are private entities, they are not subject to state open records laws. While as of 2004 several states (such as West Virginia, Maryland, and Indiana) continued to "protect" university foundations from public scrutiny and accountability, several others (e. g., California, Michigan, and Florida) required the majority of records of university foundations to be public (excluding donor records), either through explicit legislation or case law. Court decisions in South Carolina, Kentucky, and Ohio have made all records of their public university development foundations public, including donor records.

As noted in *College and University Foundations: Serving America's Public Higher Education,* by Joseph F. Phelan and Associates (1997)[2]:

> *An institutionally related foundation is of great potential benefit to a public college or university. But as warm, sunny, and dry weather is viewed as a great asset by the office of tourism, the same conditions cause great concern for the state fire*

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[2] Joseph F. Phelan and Associates, *College and University Foundations: Serving America's Public Higher Education* (Washington, D. C.: Association of Governing Boards of Universities and Colleges, 1997).

*marshal. The creation of a foundation brings with it the potential for conflagrations. Recent court actions in Ohio, West Virginia, Michigan, Indiana, and South Carolina have--regardless of the outcomes--placed college and university foundations in an unfavorable light through charges of mismanagement, violation of 'right-to know' legislation and 'sunshine' laws, and the misappropriation of gift revenues.*

This review of the MUW Foundation is based on the premise that public university foundations can serve a legitimate purpose if created and operated within the bounds of applicable state and federal laws, rules, and regulations and within the constraints of best practices that advocate openness and adherence to sound rules and regulations for the solicitation and expenditure of funds.

## Scope and Purpose

The purpose of this review was to analyze the MUW Foundation's compliance with applicable state and federal laws, rules, regulations, and best practices through an investigation of the following specific allegations that the foundation:

- has possibly violated the Internal Revenue Code and IHL bylaws by including university officials as non-voting members of its board of directors and placing them in leadership positions on the foundation staff;

- operates under a policy of secrecy resulting in a lack of transparency;

- has created a "slush fund" for the university's President using unrestricted funds;

- in obtaining a line of credit in 2005 for the benefit of the university, possibly violated federal and state laws prohibiting private benefit and conflict of interest and possibly violated its fiduciary responsibilities;

- possibly violated the Internal Revenue Code's restrictions on lobbying by making payments to the university to employ a company to perform marketing services; and,

- has possibly violated donor intent in its handling of restricted donations.

This review focuses on the period of state fiscal years 2004 through 2008 unless otherwise noted.

## Scope Limitation

It should be noted that PEER's review of allegations concerning the foundation's financial activities does not constitute an audit of the foundation's financial records or a formal fraud audit. An independent certified public accounting firm performs an annual financial audit of the foundation on a state fiscal year basis.

## Method

In conducting this evaluation, PEER reviewed:

- state laws governing nonprofit corporations;
- sections of the U. S. Internal Revenue Code applicable to the MUW Foundation and related rulings;
- case law and common law addressing the fiduciary responsibilities of a corporation;
- policies of the Mississippi Board of Trustees of State Institutions of Higher Learning governing the establishment and operation of university foundations and affiliated entities;
- the MUW Foundation's Charter of Incorporation, bylaws, and written operating agreement with MUW;
- the MUW Foundation's policies and procedures, including fiscal controls and accounting systems;
- content of the MUW website;
- records of the MUW Foundation, including reports of actual and budgeted revenues and expenditures, audit reports, copies of the foundation's Internal Revenue Service Form 990 (Return of Organization Exempt from Income Tax under Section 501[c], 527, or 4947[a][1] of the Internal Revenue Code), board minutes for FY 2004 through FY 2009, and annual reports for FY 2007 and FY 2008;
- reviews of public university foundations conducted by oversight agencies in other states; and,
- the literature on best practices for operation of a public university foundation.

With respect to the literature on best practices, PEER relied heavily on publications of the Association of Governing Boards of Universities and Colleges and the Panel on the Nonprofit Sector. The Appendix, page 95, contains information on these organizations, their membership, and their publications.

# Chapter 1: Why do public universities seek to establish private development foundations and who is responsible for their regulation and oversight?

**The primary reason that public universities seek to establish development foundations as separate private legal entities is to achieve greater flexibility and confidentiality in the solicitation and expenditure of donated funds than that afforded by operating within the legal and policy constraints of the public sector.**

**Foundation boards of directors are responsible for the management, direction, and function of the foundations.**

In creating these institutionally affiliated entities, university governing boards (in Mississippi, the Board of Trustees of State Institutions of Higher Learning) and university presidents are responsible for establishing appropriate contracts, rules, and regulations to ensure that the development foundations, like the universities that they support, serve the public interest and operate in compliance with applicable federal and state laws. Foundation boards of directors are responsible for the management, direction, and function of the foundations.

In answering the above question, PEER sought the answers to several related, more specific questions:

- Why do public universities seek to establish private development foundations?
- What federal and state laws govern creation and operation of public university development foundations?
- What is the role of the IHL Board in regulating activities of public university development foundations and affiliated entities?
- What is the role of MUW in establishing and regulating the foundation's activities?
- What is the organizational structure of the Mississippi University for Women Foundation?
- What is the financial background of the Mississippi University for Women Foundation?

The following sections address each of these questions.

## Why do public universities seek to establish private development foundations?

***Public universities seek to establish private development foundations to provide additional revenues to support the primary missions of the institutions. Private foundations afford the university greater flexibility and confidentiality in the solicitation and expenditure of funds than that afforded by operating within the legal and policy constraints of the public sector.***

According to *College and University Foundations: Serving America's Public Higher Education*:

> *Today's public colleges and universities face a severely changed financial environment, making raising funds from private resources an essential activity. To meet that pressing need, foundations carry out the institution's primary development activities. . . .*

But why are foundations charged with the responsibility for soliciting, receiving, accepting and holding, administering, investing, and disbursing funds from private resources rather than the university performing these functions directly through its development office? It is not because of differences in their ability to accept charitable contributions that are tax-deductible to the donor, since a public university automatically qualifies under TITLE 26, Subtitle A, Chapter 1, Subchapter B, PART VI, § 170 (c)(2)(B) of the United States Tax Code as an organization that qualifies to receive tax deductible contributions. Rather, the primary reason that public universities seek to establish development foundations to raise and expend funds from private resources is to avoid some of the constraints of operating within the public sector.

**Whereas Mississippi law prohibits state agencies, which include public universities, from using appropriated funds to purchase land or construct buildings without obtaining specific authority from the Legislature, a private foundation is not subject to these constraints.**

For example, according to *College and University Foundations: Serving America's Public Higher Education*, the Kansas University Endowment Association was created in 1891 in order to accommodate a land transaction (involving the university's desire to use one of its cash gifts to purchase a parcel of land offered to the university at half of its assessed value) that the university could not execute under the state's constitution. To cite another example, Mississippi state law prohibits state agencies, which include public universities, from using appropriated funds to purchase land or construct buildings without obtaining specific authority from the Legislature, whereas a private foundation is not subject to these constraints.

*College and University Foundations: Serving America's Public Higher Education* also notes that foundations give the institutions that they support greater flexibility in the types of gifts that they can accept. For example, institutions generally do not seek or accept gift annuities or closely held stock because of prohibitions in law, policy, or past practice, whereas foundations do accept these categories of donations.

This justification for creating university development foundations in order to attain greater flexibility in the solicitation and expenditure of donations is echoed in the following excerpt from the bylaws of Mississippi's Board of Trustees of State Institutions of Higher Learning § 301.0806:

> *The Board of Trustees recognizes the role university foundations and other similar affiliated entities throughout the nation have in providing additional financial support for their institutions so they can achieve a level of excellence not possible through state funding and tuition alone. . . .The Board of Trustees acknowledges that the private, independent nature of foundations and similar affiliated entities provides flexibility to the institutions of The Mississippi State Institutions of Higher Learning in fiscal management and responsiveness.*

As discussed in more detail on page 26 and in the following sections, while foundations are legally independent entities, foundations such as the MUW Foundation are highly interdependent with the universities that they support.

**Foundations such as the MUW Foundation are highly interdependent with the universities that they support.**

In addition to providing greater latitude for soliciting and expending donations, other reasons for the establishment of institutionally related foundations include the following, as outlined by the South Carolina Audit Council in its 1989 report *A Review of the Relationship Between USC and its Foundations and USC Discretionary Spending*:

- to protect donor identity (in states such as Mississippi without a specific exemption protecting the confidentiality of donor records in its public records laws, these records would likely become public if maintained by a public university);

- to honor donor restrictions on gifts (state laws may prohibit public universities from honoring certain donor restrictions);

- to accommodate donors who do not want to give to a state entity because of a negative perception of the ability of the public sector to put donated funds to their highest and best use;

- to enlist the aid of prominent university supporters in soliciting funds for the university by making the supporters members of the foundation's board of directors;

- to address the fear of a reduction in state appropriations if private funds were given directly to the university;

- to free the university from the time that must be spent deciding on whether to accept restricted gifts to the university (restricted gifts made to a foundation are approved by the foundation's board rather than by the university);

- to allow for the acceptance of gifts with an indemnification clause (while public universities in South Carolina cannot accept gifts with a clause requiring the university to pay for any damage or injury resulting from the gift, foundations can accept such gifts); and,

- to avoid time-consuming state procedures. (According to the University of South Carolina, if time-consuming state procedures always had to be followed, the university could not compete effectively with private universities that do not operate under the same constraints for contracts and grants.)

## What federal and state laws govern creation and operation of public university development foundations?

***As 501(c)(3) tax-exempt non-private foundations, public university development foundations must operate in accordance with governing provisions of the federal Internal Revenue Code. University development foundations operating in Mississippi must also comply with the state's nonprofit corporation law.***

### IRC Rules and Regulations Governing Operation of a 501 (c) (3) Non-Private Foundation

TITLE 26, Subtitle A, CHAPTER 1, Subchapter F, PART I, § 501 (c) (3) of the United States Tax Code describes religious, scientific, literary, educational and other charitable organizations exempt from federal income tax. The MUW Foundation is a 501 (c) (3) tax-exempt organization. Every 501 (c) (3) organization is a private foundation, unless it falls into one of the categories specifically excluded from the definition of that term. The MUW Foundation does not have private foundation status because it is "an organization operated for the benefit of a college or university owned or operated by a governmental unit" under 26 USC 170 (b) (1) (A) (iv).

**501 (c) (3) organizations must adhere to prohibitions against private benefit and restrictions on lobbying activities specified in the Internal Revenue Code or risk incurring taxes and penalties.**

501 (c) (3) organizations must adhere to the following prohibitions against private benefit and restrictions on lobbying activities specified in the Internal Revenue Code or risk incurring taxes and penalties. The organization must not be organized or operated for the benefit of private interests and no part of a Section 501 (c) (3) organization's net earnings may inure to the benefit of any private shareholder or individual. If the organization engages in an excess benefit transaction with a person having substantial influence over the organization, an excise tax may be imposed on the person and any organization managers agreeing to the transaction. Also, as discussed on page 83, Section 501 (c) (3) organizations are restricted in how much political and legislative (lobbying) activities they may conduct.

In addition, according to TITLE 26, Subtitle A, CHAPTER 1, Subchapter F, PART III, § 513 (a), even though an organization is recognized as tax exempt, it still may be liable for tax on any unrelated business income. Unrelated business income is income from a trade or business, regularly carried on, that is not substantially related to the charitable, educational, or other purpose that is the basis of the organization's exemption. However, according to the IRS, the Internal Revenue Code contains a number of modifications, exclusions, and exceptions to unrelated business income--e. g., any trade or business carried on by a 501 (c) (3) organization for the convenience of its members (e. g., the selling of items through a vending machine).

## Rules and Regulations Governing Operation of Nonprofit Corporations Under the State's Nonprofit Corporation Law

Most university-affiliated foundations in Mississippi are set up as nonprofit corporations under Mississippi law. Nonprofit corporations are organized under the laws of the state of Mississippi. MISS. CODE ANN. Section 79-11-101 et seq. (1972) establishes procedures for their incorporation, operation, and defines foundation's legal duties. Foundations must have a governing board of directors, as do for-profit corporations. (See MISS. CODE ANN. Section 79-11-231 [1972].)

Not-for-profit corporations are non-share corporations, meaning they do not distribute ownership to individuals in the form of shares. While these corporations have no shareholders, they generally have members. Members, as defined in MISS. CODE ANN. Section 79-11-127 (v) (1972), function as shareholders, because they attend annual meetings and vote on matters placed before them.

Nonprofit corporations cannot make distributions of assets, therefore dividends cannot be made to members or others except under limited conditions. (See MISS. CODE ANN. Section 79-11-293 [1972].) This ensures that the assets of the corporation are used entirely to benefit and advance the purposes for which they were created.

## What is the role of the IHL Board in regulating activities of public university development foundations and affiliated entities?

***The IHL Board is responsible for ensuring that the public interest is served by any individual or organization established to support one of the state's public universities and has developed bylaws that specifically address the activities of public university foundations and affiliated entities. These bylaws govern the relationship of the state's public universities with their supporting foundations/affiliated entities and establish operational requirements for such entities.***

### General Authority of the IHL Board

*The IHL Board of Trustees is responsible for the management and control of the state's public institutions of higher learning, appoints the institutional executive officer of each university, and contracts with university faculty and staff.*

As provided in MISSISSIPPI CONSTITUTION, Article 8, Section 213-A, Mississippi's eight state institutions of higher learning are under the "management and control" of the Board of Trustees of State Institutions of Higher Learning (IHL Board). The IHL Board's twelve members (four members from each of the state's three Supreme Court districts) are appointed by the Governor with the advice and consent of the Senate.

The IHL Board appoints the Commissioner of Higher Education as well as the institutional executive officer (i. e., president or chancellor) of each of the state's institutions of higher learning. The board also contracts with faculty and staff members of the state's institutions of higher learning.

## IHL Board's Authority Relative to Public University Foundations and Affiliated Entities

*The IHL Board of Trustees is responsible for ensuring that the public interest is being served by development foundations that support the state's public universities. The board makes university institutional executive officers responsible for ensuring their supporting foundation's compliance with applicable federal and state laws and IHL's bylaws governing the organization and operation of university foundations.*

**The IHL Board has adopted a section in its bylaws specifically addressing the activities of university foundations and affiliated entities.**

The IHL Board's bylaws acknowledge that the purpose of university development foundations (such as the MUW Foundation), research foundations, athletic foundations, alumni associations and all other similar entities affiliated with any of the state's eight public universities is to "engage in raising funds and other activities consistent with the mission and priorities of the institutions."

The bylaws state that under the board's authority to manage and control the state's institutions of higher learning:

> *. . .the Board of Trustees has responsibility for ensuring the public interest is served by any individual or organization established to support an institution of The Mississippi State Institutions of Higher Learning. While the Board of Trustees cannot control or direct individuals or private organizations, it has the full authority to control the activities of its agents and agencies in their relationships with such individuals or organizations.*

Pursuant to this responsibility and authority, the Board adopted Section 301.0806 of its bylaws specifically to address the activities of university foundations and affiliated entities. The "Public Confidence" section of Section 301.0806 of the IHL Board's bylaws states, in part:

> *The Board of Trustees recognizes that it cannot and should not have direct control over institutionally affiliated foundations/entities. These foundations/affiliated entities must be governed separately to protect their private, independent status.*[3] *However, because the Board of Trustees is responsible for ensuring the integrity and reputation of the university system and its institutions and programs, it must be assured that any affiliated entity/foundation will adhere to ethical standards appropriate to such organizations in order to assure the public that it is conducting its mission with honesty and integrity.*

[3] See page 26 for a discussion of foundation independence.

This section of the IHL Board bylaws lists specific requirements (see Exhibit 1, below) that the institutional executive officer of each institution should ensure that each of its foundations and affiliated entities ascribes to in order to "enhance public confidence in the foundation/entity."

**The IHL Board's bylaws require each institution to enter into formal, public, written operating agreements with its affiliated foundations/entities in order to ensure that the relationship between the institution and its affiliated entities is clearly defined and consistent with the foundation/entity's mission.**

Section 301.0806 of the IHL Board's bylaws also requires each institution to enter into formal, public, written operating agreements with its affiliated foundations/entities in order to ensure that the relationship between the institution and its affiliated entities is clearly defined and consistent with the foundation/entity's mission to assist and benefit the institution and the institution's obligation to "hold, manage, and use public property and resources to benefit the public interest." The bylaws require the operating agreements to be reviewed for approval by the IHL Board at least every five years. Exhibit 2 on page 14 lists the specific items that must be included in the operating agreements between the institutions and their affiliated foundations/entities.

Also, Section 301.0806 of the bylaws states that foundations and affiliated entities are expected to have mission statements consistent with the mission and priorities of the institution that they serve, as well as policies, plans, and budgets to achieve their missions.

**Exhibit 1: IHL Board Requirements for University Development Foundations, Research Foundations, Athletic Foundations, Alumni Associations, and Similarly Affiliated Entities**

| |
|---|
| In order to enhance public confidence in the foundation/entity, the Institutional Executive Officer should ensure that all university foundations and affiliated entities ascribe to the following requirements: |
| • **Compliance with state and federal law** applicable to such organizations; |
| • **Maintenance of financial and accounting records** in accordance with Generally Accepted Accounting Principles. These records shall be audited annually by a Certified Public Accounting firm and the records shall be maintained separately from the records of the affiliated institution; |
| • **Submission of the annual audited financial statements** by November 1 (to allow compliance with Governmental Accounting Standards Board [GASB] 39) along with a list of foundation/entity officers, directors, or trustees, through their institution's chief executive officer, to the Commissioner of Higher Education; |

| |
|---|
| • **No form of compensation may be paid or provided to an Institutional Executive Officer** by any university foundation or affiliated entity **without prior approval** of the Board of Trustees of State Institutions of Higher Learning. The request for approval shall come through the Commissioner to the IHL Board; and, |
| • **Encourage formal communications between members of the Board of Trustees and directors of the various foundations/entities**, to include periodic meetings between Board members, the Chief Executive Officer of the foundations'/entities' Board of Directors, the Commissioner and the Institutional Executive Officers. |

NOTE: Emphasis [**bold type**] added by PEER.

SOURCE: Section 301.0806, *Bylaws of the Board of Trustees, Institutions of Higher Learning, State of Mississippi*, Amended through January 15, 2009.

**Exhibit 2: IHL Board's Requirements for Institutions to Include in Operating Agreements with Foundations and Affiliated Entities**

| |
|---|
| 1. The services and benefits the institution and affiliated entity provide each other and any payments made, including whether institutional assets are managed by the affiliated entity; |
| 2. How gifts, grants, and endowments are accepted and accounted for; |
| 3. That gifts made to an institution of The Mississippi State Institutions of Higher Learning be accounted for and ownership maintained by that institution; that gifts made to an institutionally affiliated entity be accounted for and ownership maintained by that entity; |
| 4. That the affiliated entity has a conflict-of-interest policy; |
| 5. That no form of additional compensation for an Institutional Executive Officer will be underwritten or increased by an affiliated foundation/entity without prior approval of the Board of Trustees of State Institutions of Higher Learning. The request for approval shall come through the Commissioner to the IHL Board; |
| 6. That institutional input will be sought from the Institutional Executive Officer before defining the major needs and priorities for foundation/affiliated entity consideration; and, |
| 7. That other requirements stated or implied by this policy have been followed. |

SOURCE: Section 301.0806, Bylaws of the Board of Trustees Institutions of Higher Learning, State of Mississippi, Amended through January 15, 2009.

## What is the role of MUW in establishing and regulating the foundation's activities?

***The President of MUW has the discretion to decide whether to engage the services of a foundation and to set the terms and conditions of the university's relationship with such an entity. The foundation was incorporated to secure private endowment funds to be used and applied for educational purposes. Under the terms of the operating agreement, the foundation is to coordinate all fundraising for the university and the university is to provide personnel, offices, utilities, and other support needed by the foundation.***

### Incorporation of the MUW Foundation

*The Mississippi University for Women Foundation was incorporated in 1965 for the sole purpose of securing private endowment funds to be used and applied for educational purposes.*

In 1965, the MUW President at that time was one of three "official representatives" of the then-unincorporated association called "The Mississippi State College for Women Foundation" who applied for and obtained from the Secretary of State a charter to incorporate the foundation as a nonprofit corporation in the State of Mississippi. The stated domicile of the foundation was, and continues to be, the Administration Building on the campus of MUW in Columbus, Mississippi.

*The foundation's charter of incorporation defines educational purposes to include research and defines the activities of the foundation to include the improvement of both educational facilities and activities, including supplying salary supplements for faculty.*

As set forth in its Charter of Incorporation, the sole object and purpose of the MUW Foundation is to aid in the development of MUW by establishing and administering endowment funds that "shall be used and applied for educational purposes only." Exhibit 3 on page 16 presents additional language contained in the charter that further clarifies the meaning of "educational purposes."

**In the event of dissolution of the foundation, its property and assets, after payment of obligations, become property of the IHL Board for the use and benefit of MUW.**

According to Article VI, Subsection (f), "All the assets and earnings shall be used exclusively for the purposes herein set out." Also, according to Article VI, Subsection (g) of the Charter of Incorporation, the granting of all funds for such purposes "shall be initiated and carried out only upon the recommendation of the President of the Mississippi State College for Women." In the event of dissolution of the foundation, its property and assets, after payment of obligations, become property of the IHL Board for the use and benefit of MUW.

**Exhibit 3: Language in the MUW Foundation's Charter of Incorporation Regarding "Educational Purposes"**

| Section of the Charter | Language Clarifying "Educational Purposes" |
|---|---|
| VI (b) | "for such specific types of education or research as may be approved by" the university |
| VI (d) | "for educational, cultural or literary purposes, including but not limited to scholarship funds, endowment funds, research funds, and fellowship funds" |
| VI (e) | "aiding, supplementing, improving and enlarging the educational facilities and activities of" the university "including, but not limited to supplying or supplementing such salaries of professors and specialists as may be needed to provide and maintain a highly competent faculty, to acquire and operate specialized laboratory equipment, to erect buildings, to supplement building construction funds, to establish scholarships, to pay expenses, fees, or honoraria for visiting lecturers" |

SOURCE: Charter of Incorporation of the Mississippi State College for Women Foundation

## Terms of MUW's Operating Agreement with the MUW Foundation

*Under the terms of its operating agreement with the university, the foundation is to coordinate all fundraising for the university (including the solicitation, management, and administration of said funds) and the university is to provide all personnel, offices, utilities, and other support needed by the foundation.*

**The stated purpose of the foundation is to "solicit, invest, manage, administer and recognize private gifts which support the educational, research and service missions of the University."**

As set forth in MUW's operating agreement with the MUW Foundation dated October 13, 2005[4] and signed by the MUW President and the Chairman of the MUW Foundation, Inc., "the Foundation is to be administered and operated exclusively for the benefit of the University." The stated purpose of the foundation is to "solicit, invest, manage, administer and recognize private gifts which support the educational, research and service missions of the University." The operating agreement further states that the President of the University believes that "it is in the best interest of the University for all fund raising to be coordinated through the Foundation to increase efficiency and to expand the current sources of support for the University." The operating agreement grants the MUW President the authority to approve other services that the foundation may provide to the university.

Under the terms of the operating agreement, MUW's President sets the direction of the foundation's fundraising efforts by communicating the university's major needs, priorities, and long-term plans, laying out "goal-specific fund-raising activities, campaigns and

[4] The current President of MUW began her term of office in 2002.

development initiatives," and providing input as to the means and methods by which the foundation will conduct its fundraising programs. For purposes of ensuring communications among the primary parties responsible for operations of the foundation, the operating agreement calls for periodic meetings between the IHL Board, the Chairman of the MUW Foundation Board, and the President of MUW.

**While the operating agreement authorizes the foundation to direct the services of a professional staff, the personnel assigned to work for the foundation remain under "the full supervision and control of the University" and for all purposes are considered employees of the university.**

Also, under the terms of the agreement, MUW provides, at no cost to the foundation, all necessary personnel, offices, utilities, and other necessary and appropriate support for the foundation offices; however, while the operating agreement authorizes the foundation to direct the services of a professional staff, the personnel assigned to work for the foundation remain under "the full supervision and control of the University" and for all purposes are considered employees of the university.

For presumed purposes of oversight and accountability, the university requires the foundation to make available to it regular reports of fund balances and expenditures, as well as annual audited financial statements.

## What is the organizational structure of the Mississippi University for Women Foundation?

***The MUW Foundation is governed by a board of directors and its day-to-day management is carried out by the university's Vice President for Institutional Advancement (who is required by the foundation's bylaws to serve as President of the Foundation).***

### MUW Foundation Board of Directors

*Oversight of the MUW Foundation is vested in a thirty-six-member Board of Directors that includes MUW's President and Vice President for Institutional Advancement, who serve as non-voting ex officio members.*

The foundation's bylaws provide for not less than twenty or more than forty directors, elected by the foundation's Board of Directors. During FY 2009, there were thirty-six directors serving on the foundation's board.

**The foundation's bylaws require the majority of directors serving on the foundation's board to be MUW alumni.**

Also, the foundation's bylaws require the majority of directors serving on the foundation's board to be MUW alumni. Members specified in the bylaws include the Past Chairman of the Board, the current President of the alumni association contractually affiliated with the university, and two non-voting ex-officio members: the university's President and the university's Vice President for Institutional Advancement. Officers consist of the Chairman, the immediate past Chairman, the Vice-Chairman, the President of the Foundation, the Secretary and the Treasurer. Members serve three-year terms and elected officers are chosen at the board's annual spring meeting to serve a two-year term.

### *Duties and Responsibilities of the MUW Foundation Board of Directors*

The MUW Foundation's Board of Directors is charged with the management, direction, and function of the foundation consistent with its Articles of Incorporation and Bylaws. The board's chair has general charge of the affairs of the foundation. The foundation's bylaws require it generally to meet three times per year, in the fall, winter and spring.

### *Standing Committees of the MUW Foundation Board*

The foundation's bylaws provide for the following five standing committees: Executive, Development, Finance, Investment, and Nominating. The bylaws require the standing committees to meet at least once per year. The Executive Committee, which is chaired by the Chair of the Foundation Board of Directors, is responsible for handling routine matters of the foundation between scheduled meetings and has limited authority to approve some non-budgeted expenditures without prior authorization of the board of directors. The President of the University and the University's Vice President for Institutional Advancement/Foundation President serve as non-voting ex-officio members of the Executive Committee. The nominating committee nominates all directors and officers of the board.

Exhibit 4, page 19, gives more information on the membership and duties of the foundation's standing committees.

### *Ad Hoc Committees of the MUW Foundation Board*

The foundation's bylaws grant the Chairman of the Board the authority to appoint ad hoc committees to handle specific issues that are outside of the mandate of the board's five standing committees. Examples of ad hoc committees formed by foundation chairpersons include a special committee on bylaws and another on scholarships.

## Role of the President of the MUW Foundation/MUW Vice President for Institutional Advancement

*Day-to-day management of the foundation is carried out by the university's Vice President for Institutional Advancement.*

This individual is hired by and reports directly to the university's President. As President of the MUW Foundation, this individual reports to the Chair of the

**Exhibit 4: Membership and Duties of Standing Committees of the MUW Foundation Board of Directors**

| Standing Committee | Membership* | Duties |
|---|---|---|
| *Executive* | Seven to ten members comprised of the Chairman of the Board of Directors (who serves as Chairman of the Executive Committee), Vice Chairman of the Board of Directors, Secretary, Treasurer, immediate past Chairman of the Board of Directors, not more than three additional directors of the foundation, and two non-voting ex-officio members: the President of the University and the President of the Foundation | Handles routine matters of the foundation between the scheduled meetings of the Board of Directors; has authority to approve some expenditures without prior authorization of the Board of Directors (refer to discussion on page 63) |
| *Development* | At least nine members, chaired by the Vice Chairman of the Board of Directors | Assists the foundation in seeking and securing private support, including annual, major, and deferred gifts |
| *Finance* | Seven members, chaired by the Treasurer of the Foundation Board of Directors | Presents to the Executive Committee the budget for foundation operation as prepared by the President of the Foundation; considers any budget amendment requests prior to presentation to the Executive Committee; recommends the employment of an audit firm; reviews financial audits and decides upon the acceptance of any extraordinary or unusual gifts; reviews and recommends changes and improvements, when needed, to the foundation's business operations |
| *Investment* | Seven members, committee chair appointed by Chair of the Board of Directors, Treasurer of the Foundation Board of Directors serves as an additional non-voting ex-officio member | Develops an investment policy; reviews investments and recommends needed policy changes on a continuing basis; recommends the agents or trustees to handle the investment of the foundation's assets |
| *Nominating* | Five members, chaired by immediate past-Chairman of the Board of Directors and also composed of four other members of the Board of Directors | Identifies, contacts, and nominates directors and officers of the Board of Directors |

*The Chairman of the Board of Directors appoints all committee members and serves as a voting member of all standing committees with the exception of the Nominating Committee, on which committee the Chairman does not serve.

SOURCE: Mississippi University for Women Foundation Bylaws dated May 29, 2008.

Foundation Board of Directors and is responsible for directing the day-to-day management of the foundation, including the development of its annual budget. As MUW's

Vice President for Institutional Advancement, this individual is responsible for directing the development, public affairs, and alumni affairs activities of the university's Office for Institutional Advancement.

## What is the financial background of the Mississippi University for Women Foundation?

***As of June 30, 2008, the value of the MUW Foundation's net assets had grown to $33.6 million. The foundation received over $4 million in contributions in both FY 2007 and FY 2008. The foundation's expenditures totaled approximately $2.2 million in FY 2006 and FY 2007 and increased to $2.7 million in FY 2008.***

### Foundation Assets

*As of June 30, 2008, the value of the MUW Foundation's net assets had grown to $33.6 million, 98% of which were restricted as to their use by the donor and only 2% were unrestricted and therefore available for discretionary uses by the foundation, pursuant to its mission.*

As shown in Exhibit 5 on page 21, for the year ended June 30, 2008, the MUW Foundation had total net assets of $33,598,986, the majority of which (98%) were restricted (refer to discussion of the foundation's fiduciary responsibilities with regard to restricted assets on page 79), with only 2% unrestricted.

### Foundation Revenues and Support

*The foundation's primary sources of revenue are contributions, followed by earnings from investments. In FY 2008, contributions to the foundation totaled $4.9 million, an $877,907 increase from the previous fiscal year, and earnings on investments totaled $729,301.*

As shown in Exhibit 6 on page 22, in FY 2008, the foundation's primary source of revenues was contributions (approximately $4.9 million), followed by earnings from investments ($729,301).

**With two exceptions in FY 2002 and FY 2005, contributions to the MUW Foundation increased steadily from FY 2001 to the FY 2008 level of $4.9 million.**

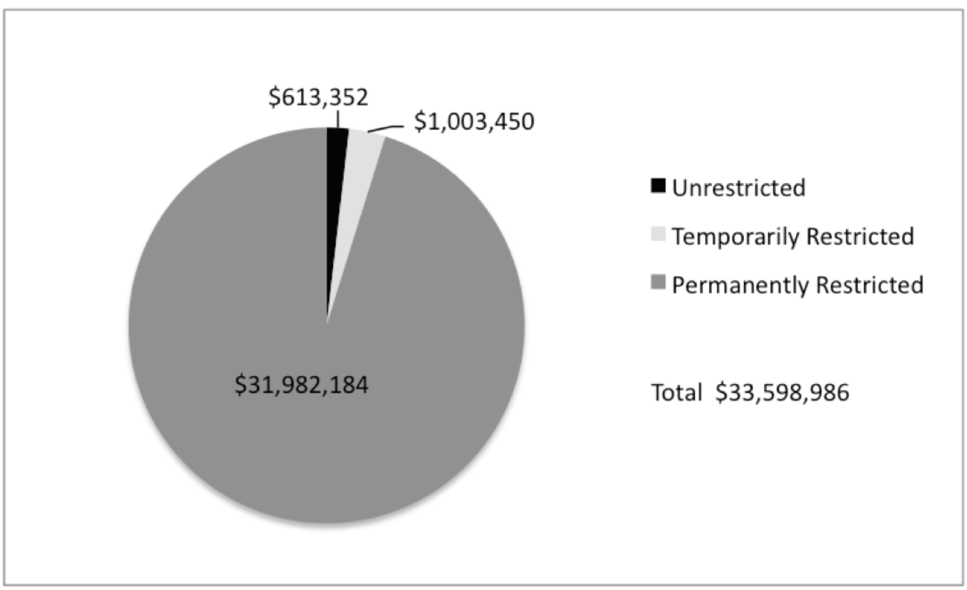
Exhibit 7 on page 23 shows the foundation's revenues from contributions and earned income over the period of FY 2001 through FY 2008. With two exceptions in FY 2002 and FY 2005, contributions to the MUW Foundation increased steadily to the FY 2008 level of $4.9 million. It should be noted that the relatively high total contribution levels in FY 2007 and FY 2008 include two large contributions from individual donors: a nearly $2 million donation in FY 2007 and a $3.26 million donation in FY 2008. As also shown in the exhibit, the foundation's earned income has remained fairly constant over the period, averaging around $500,000 over the eight-year period.

## Foundation Expenses

*In FY 2008, the foundation's expenditures totaled $2.7 million, the majority of which were for program services such as scholarships, restricted fund support for specific university programs, and general assistance to the university.*

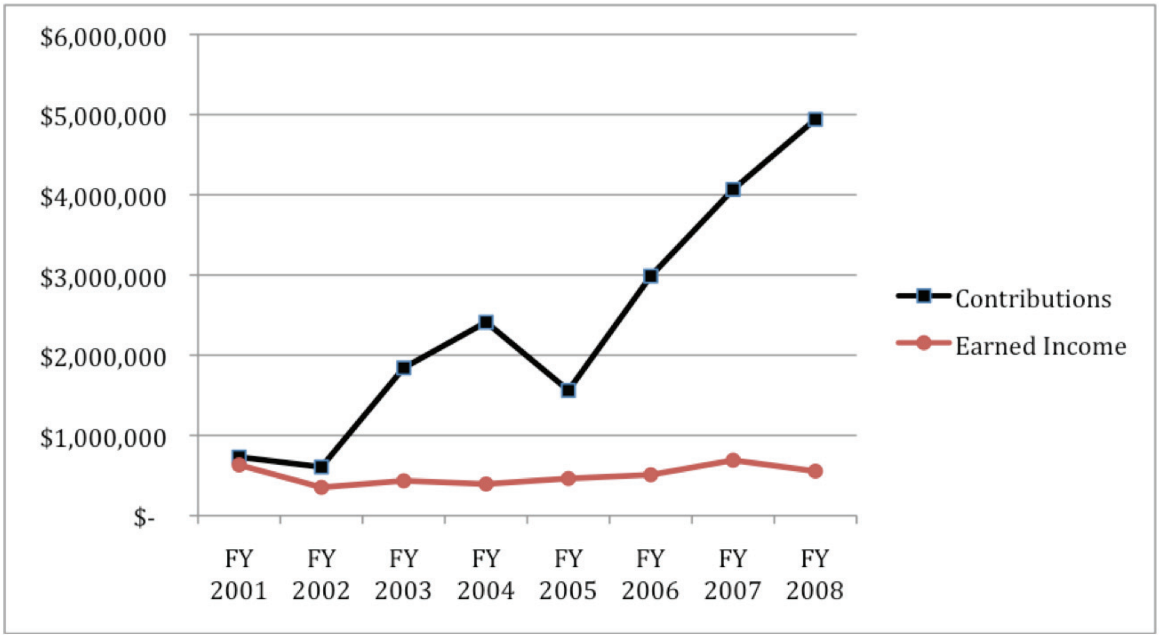
In FY 2008, the foundation's expenditures totaled $2.7 million, the majority of which were for program services such as scholarships, restricted fund support for specific university programs, and general assistance to the university. This level of expenditures marked an increase from the previous two fiscal years during which expenditures were approximately $2.2 million. The foundation's expenditures for support services in FY 2008 totaled $256,724.

**Exhibit 5: Breakdown of MUW Foundation Net Assets, by Level of Restriction, as of Fiscal Year Ended June 30, 2008**




SOURCE: Audited Financial Statements of MUW Foundation for Year Ended June 30, 2008.

## Exhibit 6: MUW Foundation Revenues from Contributions and Earned Income for FY 2001 through FY 2008, by Fiscal Year




Note: The relatively high levels of contributions in FY 2007 and FY 2008 include two large contributions from individual donors: a nearly $2 million donation in FY 2007 and a $3.26 million donation in FY 2008.

SOURCE: MUW Foundation statements of budgeted and actual expenditures for FY 2004 through FY 2008.

**The foundation's administrative and operating expenditures remained fairly constant from FY 2001 to FY 2008, while expenditures on scholarships and university assistance grew to $1.4 million and $1 million, respectively.**

The MUW Foundation's expenditures increased from $1.1 million in FY 2001 to $2.7 million in FY 2008. Exhibit 8 on page 24 shows MUW Foundation expenditures by major category. As the exhibit shows, the foundation's administrative and operating expenditures remained fairly constant over this period, while expenditures on scholarships and university assistance (also referred to as MUW assistance) grew to $1.4 million and $1 million, respectively.

The growth in university assistance coincides with the hiring of the university's current president in FY 2002. It should be noted that shortly after the new president assumed her position at MUW, the campus was heavily damaged by a tornado (see discussion on page 74).

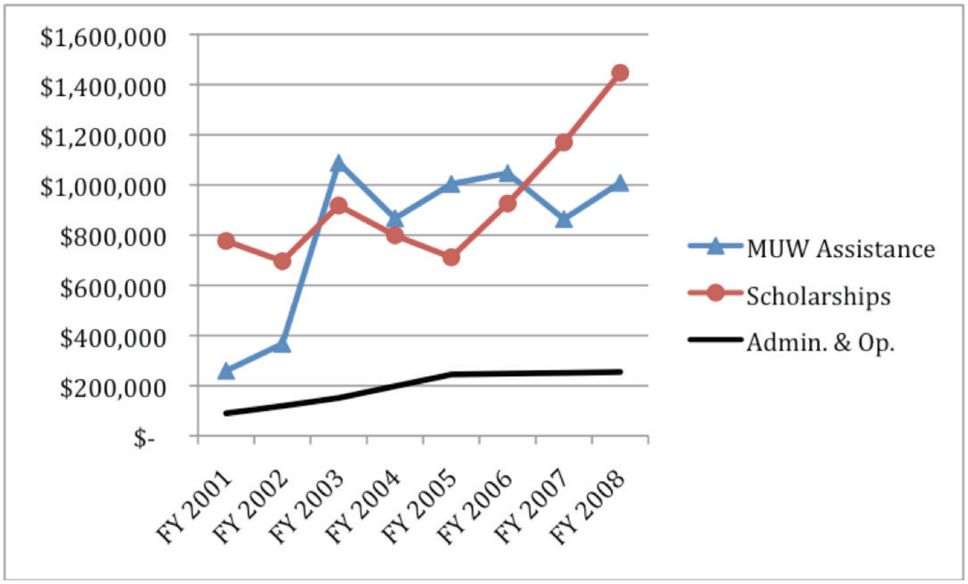
**Exhibit 7: Revenues, Support, and Expenditures of the MUW Foundation as of Fiscal Years Ended June 30, 2006, through June 30, 2008**

| | Year Ended 6/30/06 | Year Ended 6/30/07 | Year Ended 6/30/08 |
|---|---|---|---|
| **Revenues and Support** | | | |
| Contributions | $3,020,835 | $4,109,703 | $4,987,610 |
| Earnings from investments | 509,129 | 690,309 | 729,301 |
| Unrealized appreciation of assets | 1,089,874 | 3,088,213 | (1,510,298) |
| Realized loss on sale of investments | - | (214) | (5,316) |
| Realized gain on sale of real property | 4,628 | - | - |
| Gain on sale of depreciable assets | - | 1,970 | - |
| Other income | 268,283 | 282,016 | 143,688 |
| **Total Revenue** | $4,892,749 | $8,171,997 | $4,344,985 |
| | | | |
| **Expenses** | | | |
| Support Services: | | | |
| Management and General Activities | $119,661 | $148,024 | $166,950 |
| Fundraising | 152,409 | 97,018 | 88,099 |
| Depreciation | 9,600 | 5,700 | 1,675 |
| **Total Support Expenses** | $281,670 | $250,742 | $256,724 |
| Program Services | 1,939,736 | 2,033,668 | 2,460,648 |
| **Total Expenses** | $2,221,406 | $2,284,410 | $2,717,372 |

SOURCE: Audited Financial Statements of MUW Foundation for FY 2008 and FY 2007

As shown in Exhibit 8 on page 24, over the period of FY 2001 through FY 2008, the MUW Foundation's support of scholarships and faculty chair assistance grew from approximately $800,000 to over $1.4 million. As of June 30, 2009, the MUW Foundation provided funding for 307 scholarships, four faculty chairs, three lectureships, and twenty academic programs.

**Exhibit 8: MUW Foundation Expenditures, by Major Category and Fiscal Year, for FY 2001 through FY 2008**




SOURCE: MUW Foundation statements of budgeted and actual expenditures for FY 2004 through FY 2008.

The sections that follow focus on the results of PEER's investigation of the specific allegations concerning the operation of the MUW Foundation.

# Chapter 2: Has the foundation violated the Internal Revenue Code and IHL bylaws by including university officials as non-voting board members and placing them in leadership positions on the foundation staff?

**No. Neither the Internal Revenue Code nor IHL bylaws prohibit these practices. In fact, it is a common practice for the President of a public university to serve on the board of directors of its development foundation and for the Vice President for Institutional Advancement of a public university to serve as the foundation's chief executive. It is also not uncommon for the University's Vice President for Institutional Advancement to serve on the foundation's board of directors.**

In answering the above question, PEER sought the answers to several related, more specific questions:

- What does the Internal Revenue Code say about the relationship between a public university and its development foundation?
- What do IHL bylaws say about the relationship between a public university and its development foundation?
- Why does IHL stress the "independent nature of foundations" in its bylaws?
- What is the range of relationships between public universities and their development foundations?
- What is the relationship between the MUW Foundation and the Mississippi University for Women?

The following sections address each of these questions.

## What does the Internal Revenue Code say about the relationship between a public university and its development foundation?

***The Internal Revenue Code does not address the relationship between a public university and its development foundation.***

Although the IRC does not address the relationship between a public university and its development foundation, it addresses annual reporting requirements for such organizations (including the requirement that the foundation report the value of public support that it receives from the university), establishes rules governing their expenditures (including restrictions on lobbying expenditures), and sets forth rules prohibiting private benefit.

## What do IHL bylaws say about the relationship between a public university and its development foundation?

***While IHL's bylaws state that the relationship between the state's institutions of higher learning and their foundations must be based on "a recognition of and respect for the private and independent nature of the foundations," the bylaws specifically provide for senior administrators of the institutions serving on foundation boards in a non-voting capacity.***

Section 301.0806 of the bylaws of the Board of Trustees of the State Institutions of Higher Learning provides, in part:

> *The relationship between the institutions of The Mississippi State Institutions of Higher Learning and the foundations/entities supporting those institutions must be based on the private and independent nature of the foundation/entities. . . .To ensure the independence of the affiliated entities, no employee of The Mississippi State Institutions of Higher Learning shall hold a voting position on an institutionally affiliated entity board. . . .Senior administrators of the institution should only participate on the affiliated entity's board in an ex-officio capacity.*

In accordance with IHL bylaws, Article III Section 4 of the MUW Foundation's bylaws adopted May 29, 2008, provides that "Non-voting, ex-officio Directors will include the President of the University and the Vice President for Institutional Advancement."

## Why does IHL stress the "independent nature of foundations" in its bylaws?

***IHL stresses the "independent nature of foundations" in its bylaws because by doing so it hopes to insulate the foundations from potential threats to their ability to maintain the confidentiality of donor and possibly other records. Despite the efforts of public university development foundations to maintain the confidentiality of their records by asserting their independence, in recent years some state supreme courts have ruled that all public university development foundation records, including donor records, are public.***

As discussed on pages 7 through 9, the primary reasons that public universities seek to establish private development foundations are to avoid some of the constraints of operating within the public sector (e. g., state restrictions on purchasing and property acquisition) and to protect the identity of donors.

The argument that university development foundations are "independent" of the universities that they support has historically been important to maintaining the confidentiality of donor records. In most states, donor records maintained by a public university would become public records under the state's public records laws; therefore, it was historically the case that these records were protected from public scrutiny by maintaining them in a private foundation. To further protect the confidentiality of donor records no matter where they are held, some states have inserted a clause in their public records laws exempting private donor records.

**To further protect the confidentiality of donor records no matter where they are held, some states have inserted a clause in their public records laws exempting private donor records.**

However, as noted in *College and University Foundations: Serving America's Public Higher Education*, the argument for independence and "the assumption that an institutionally related foundation is not subject to state disclosure laws and can protect the confidentiality of its donor records has been challenged" successfully in recent court cases. Further, "the legal trend in state court systems is toward treating institutionally related foundations as public bodies and toward applying state open-records laws to the records of these organizations." As described on page 2, examples of states that have made the records (including donor records) of their public university development foundation public through court decisions include Kentucky, South Carolina, and Ohio. In the South Carolina case, the Supreme Court ruled that the foundation fell within the state's definition of a public body based on the following portion of that law: "The FOIA defines 'public body' as. . .any organization, corporation, or agency supported in whole or in part by public funds or expending public funds"(401 SE2d 161). The Mississippi Supreme Court has not ruled on this issue.

## What is the range of relationships between public universities and their development foundations?

***A survey of public university development foundations conducted in 1995 reported that the majority of respondents include the university's president on their foundation's board and designate the Vice President for Institutional Advancement as the foundation's chief executive officer.***

In 1995, the Association of Governing Boards of Universities and Colleges (AGB), in cooperation with the Council for Advancement and Support of Education (CASE), surveyed public college and university foundations (both two-year and four-year) to gather information on foundation boards. According to survey responses, it is very common for university presidents to sit on the boards of their foundations. It is also common for the foundation's chief executive to serve in a dual capacity as the university's development officer. While less common, almost one quarter of survey respondents reported that their Chief of Development also serves on the foundation's board.

The survey yielded the following responses to the following specific questions:

- *Does the foundation chief executive also serve in a dual capacity as development officer employed by the institution or system?*

  66.8% of the four-year institutions responded affirmatively and 86.1% of those respondents reported that the person holds dual titles--one for the foundation and one for the university.

- *Is the institution's or system's chief executive an ex officio member of the foundation's board?*

  86% of the four-year institutions responded affirmatively, with 48% reporting that the chief executive was a voting member of the board and 38% reporting that the chief executive was not a voting member.

- *Which other university or system executives sit on the foundation's board ex officio?* 24% of respondents reported that their chief of development sits on the board.

## What is the relationship between the MUW Foundation and the Mississippi University for Women?

***The MUW Foundation is a relatively small foundation whose staff and operational support are provided entirely by the university, making it difficult to distinguish between the staff work of one versus the other. Because of its close relationship with the university, the foundation falls on the "Institution Controlled" end of the continuum of "Types of Public University Development Foundations," most closely matching the description of a Level II type of foundation.***

*Foundations range from small, institution-controlled foundations with no staff independent from the university and with limited responsibilities (e.g., responsibility for funds management but not fundraising) to large, primarily self-supporting, more independent foundations that provide a full range of services, including all aspects of fundraising and resource management.*

As noted in *College and University Foundations: Serving America's Public Higher Education* and illustrated in Exhibit 9 on page 29, a continuum of public university foundation types exists, ranging from Level I passive foundations, which are "institution controlled" and primarily engaged in managing resources and not in active fundraising, to Level IV active foundations, which are independent, self-sustaining, board-driven, and engaged in all aspects of fundraising and resource management.

**Exhibit 9: Continuum for Identifying Foundation Type**

| Level IV | Level III | Level II | Level I |
|---|---|---|---|
| **Active** | **Active** | **Active** | **Passive** |
| Independent | Semi-autonomous | Institution Controlled | Institution Controlled |
| Board Driven | Board/Staff Driven | Staff Driven | Volunteer Driven |
| Self Sustaining | Budget Assisted | Budget Provided | Budget Provided |
| | | | |
| **Fund-raising** | **Fund-raising** | **Fund-raising** | |
| Major gifts | Annual Fund | Annual Fund | |
| Planned gifts | Major Gifts | Major Gifts | |
| Bequests | Planned Gifts | | |
| | Endowment | | |
| | Bequests | | |
| | | | |
| **Resource Management** | **Resource Management** | **Resource Management** | **Resource Management** |
| Endowments | Endowment | Endowment | Endowment |
| Gifts & Grants | Gifts & Grants | Gifts & Grants | Timed Gifts |
| Real Estate | Real Estate | Donor Relations | Real Estate |
| Cash Flow | Intel. Property | | Capital Assets |
| Grant Making | Mission Focused | | |
| Project Selecting | Long-Range Planning | | |
| Donor Managing | Strategic Planning | | |
| Gift Stewarding | Campaign Positioned | | |
| Influence Leveraging | Donor Managing | | |
| | Gift Stewarding | | |

SOURCE: *College and University Foundations: Serving America's Public Higher Education*, Joseph F. Phelan & Associates, Figure 4, p. 25.

*The MUW Foundation most closely aligns with a Level II foundation.*

Based on its enabling documents, current bylaws and operating agreements, the MUW Foundation most closely aligns with a Level II foundation. In fact, the following description of a Level II foundation contained in *College and University Foundations: Serving America's Public Higher Education* seems to match precisely the relationship between the MUW Foundation and the university:

> *Level II foundations essentially are extensions of the host institutions - their budgets and personnel are funded by, for the most part, institution resources. Boards tend to be large and focused on resource management. Fund-raising generally is conducted*

*by professional staff, often in the institution's development office*[5].

*While the MUW Foundation is a separate legal entity from the university and portions of the foundation's operating agreement describe it as being independent of the university, in actuality it is not completely independent from the university.*

The "Relationship of the Parties" section of the operating agreement between MUW and the MUW Foundation, Inc., would lead one to believe that the foundation and the university are completely independent:

> *The Foundation is a not-for-profit corporation, organized under the laws of the State of Mississippi. In accordance with its Articles of Incorporation, the Foundation is to be administered and operated exclusively for the benefit of the University. However, the Foundation is not a subsidiary or affiliate of the University and is not directly or indirectly controlled by the University. The independent Board of Directors of the Foundation is entitled to make all decisions regarding the business and affairs of the Foundation. Moreover, the assets of the Foundation are the exclusive property of the Foundation and do not belong to the University. The resources of the Foundation are committed and disbursed at the discretion of the Foundation's Board of Directors in accordance with donor directions and with Foundation policy developed and updated as needed in cooperation with the University.*

PEER believes that describing the foundation as completely independent of the university when this is not the case could create unnecessary suspicion and mistrust among alumni and the general public as to the role that university officials and staff play with respect to the foundation.

*Other portions of the foundation's operating agreement provide evidence of the foundation's lack of independence from the university.*

The last sentence of the "Relationship of the Parties" section of the operating agreement (i. e., the development and updating of foundation policy "in cooperation with the University") begins to chip away at the stated "independence" of the relationship. Further evidence of the lack of complete independence can be found throughout the remainder of the operating agreement. For

[5] It should be noted that it is not unusual for a university to provide all of the staff for its development foundation. A survey of public college and university foundations conducted in the winter of 1995 by the Association of Governing Boards of Universities and Colleges in cooperation with the Council for Advancement and Support of Education revealed that 39.8% of the respondents affiliated with four-year colleges and universities said that their foundation does not pay any of its full-time staff.

example, the "Foundation Services" section of the agreement requires the foundation to "consult and coordinate with the University regarding the Foundation's means and methods for conducting" its programs. This section also requires the foundation to conduct goal-specific fundraising activities, campaigns, and development initiatives (collectively the "Programs") "as specifically requested by the University." Part H of this section states that the foundation shall provide services to the university "subject to the approval by the President of the University."

**Describing the foundation as completely independent of the university when this is not the case could create unnecessary suspicion and mistrust among alumni and the general public as to the role that university officials and staff play with respect to the foundation.**

In consideration for the services provided to the university by the foundation, the agreement requires the university to provide "at no additional cost to the Foundation" all personnel, offices, utilities, and other support as needed by the foundation to perform the duties specified in the agreement. The agreement also states that "all such personnel shall be under the full supervision and control of the University and shall for all purposes be considered employees of the University."

With regard to the "determination of needs for solicitation of private funds," the operating agreement requires the foundation to look to the university for a determination of specific needs and programs. The agreement further states that the President of the University is responsible for planning for these specific needs and programs.

Under the "Communications" section of the agreement, the President of the University is responsible for communicating to the foundation the priorities and long-term plans of the university.

*Bylaws of the foundation provide further evidence that the foundation is not completely independent from the university.*

Other evidence that bolsters the argument that the foundation and the university are not completely independent includes the fact that under the foundation's bylaws, the university's President and Vice President for Institutional Advancement serve as ex-officio non-voting members of the Foundation's Board of Directors. Also under the bylaws, the University's Vice President for Institutional Advancement (appointed by the university President) is the President of the Foundation. In this capacity, this person oversees the daily operations of the foundation. While this individual reports to the Foundation Board of Directors with respect to the foundation's business, the Foundation Board generally only meets three times per year. Further, the university pays the salary of this individual who works in university offices under the direct supervision of the university president.

*Although the foundation's president now contends that the foundation is not responsible for fundraising, foundation documents and its expenditures contradict this assertion.*

Finally, the identity of the university and the foundation are so intertwined that it is not clear when employees of the university's Office of Development are performing work for the university versus work for the foundation. When PEER asked the University's Vice President for Institutional Advancement/Foundation President where to draw the line between the two, he stated that "fundraising" is work of the university, while managing and investing the funds raised is the work of the foundation.

**The foundation's own audited financial statements list "fundraising" as a recurring major item of expenditure, totaling $88,099 in FY 2008, the most recent fiscal year available.**

The contention that the MUW Foundation is not responsible for fundraising directly contradicts every legal document affecting its establishment and operation, from IHL's bylaws regarding the establishment of university foundations and affiliated entities, to the foundation's charter of incorporation, bylaws, and operating agreement with the university.

Further, the foundation's own audited financial statements list "fundraising" as a recurring major item of expenditure (refer to page 23), totaling $88,099 in FY 2008, the most recent fiscal year available. The foundation's minutes list numerous examples of fundraising events, activities and projects funded by the foundation, including the annual Welty Gala, telefund campaign (which included the purchase of a $70,377 calling system from an outside vendor and the hiring of student workers to solicit contributions through the system), Visions magazine, various fund solicitation brochures, dinners at the President's home, and alumni teas.

When asked about the contradictions between the President of the Foundation's assertion that the foundation's role begins after funds have been raised and the foundation's reported expenditures on fundraising as well as the overwhelming evidence that the foundation's role includes fundraising as a primary responsibility, the President of the Foundation stated that he was exploring with the foundation's legal counsel the possibility of legally changing the role of the foundation to exclude primary responsibility for fundraising.

*The foundation's staff and operational support are provided entirely by the university, making it difficult to distinguish between the work of the foundation and the work of the university.*

When specifically asked about the value of public support that the foundation receives from the university, the foundation responded that it spent approximately $1,512.48 in FY 2008 on operating, maintaining, and securing the university office space used for foundation work. The foundation did not provide an estimate of the cost of university equipment and supplies used in support of foundation work. With respect to staffing resources, the foundation responded that while university personnel do not maintain a formal timekeeping system to document the amount of time that they spend on foundation work, based on estimates of the time spent by four employees of the university's Office of Development and the university's Vice President for Institutional Advancement on foundation work, the university provided approximately $167,282 in staff support (salaries and fringe benefits) to the foundation in FY 2008.

This estimate does not include any time spent on foundation work for the following two employees of the Office of Development: the Director of Annual Giving and the Director of Planned Giving. Other lists of foundation employees included on the foundation's website and in its minutes include more than the five foundation staff for whom the foundation provided time estimates.

Specifically, the "Our Staff" section of the foundation's website lists the following seven employees:

FOUNDATION

President, MUW Foundation

Foundation Accountant

OFFICE OF DEVELOPMENT

Director of Annual Giving

Executive Director of Development

Research Assistant

Financial Services Assistant

Development Officer

**The lack of clarity regarding the amount of support that the university provides to the foundation impacts the foundation's ability to report accurately the value of public support that it receives from the university, a required item on the IRS Form 990.**

Also, a document included as part of the October 19, 2006, minutes of the Foundation Board of Directors titled "Mississippi University for Women Foundation Staff Contact List" lists the following eight individuals: Vice President for Institutional Advancement, Executive Director of Development, Director of Planned Giving, Director of Sponsored Programs and Grant Writer, Director of Annual Giving, Foundation Accountant, Financial Services Assistant and Administrative Assistant to the Vice President for Institutional Advancement. Further, at meetings of the Foundation Board of Directors and Board Standing Committees, university Office of Development staff have been listed in the minutes as "Foundation staff members" in attendance or, more generally, as "staff members" present.

The lack of clarity regarding the amount of support that the university provides to the foundation impacts the foundation's ability to report accurately the value of public support that it receives from the university, a required item on the IRS Form 990 (refer to discussion on page 32).

# Chapter 3: Does the MUW Foundation operate under a policy of secrecy, resulting in a lack of transparency?

**In certain aspects of its operation, the foundation has a legitimate need for "secrecy"--i. e., confidentiality. With respect to transparency of its operations, in recent years the foundation has made improvements by publishing an annual report and developing a website. However, PEER identified several areas in which the foundation's transparency is weakened by the absence of certain key documents (e.g., a strategic plan, complete minutes) and written policies (e.g., an expenditure policy) and by less than full disclosure of certain public information (e.g., the value of public support provided by the university) and information that should be made public but currently is not (e.g., the university's operating agreement with the foundation, the foundation's budget, and report on expenditure of unrestricted funds).**

One of the MUW alumnae's complaints regarding the MUW Foundation was that they questioned the "lack of transparency" within the foundation. They described "an ever-increasing wall of silence" with regard to the foundation's fundraising, investments, and expenditures. They stated that alumnae could not gather information about the foundation because of "the Foundation's policy of strict secrecy."

In answering the above question regarding transparency, PEER sought the answers to several related, more specific questions:

- What are the best practices regarding the confidentiality of donor records?
- Does the foundation have adequate policies and procedures in place for maintaining the confidentiality of donor records?
- What are the best practices regarding transparency in the operation of public university development foundations?
- Does the MUW Foundation follow best practices related to transparency?
- Does the foundation have key internal documents and documentation to ensure transparency and accountability to both the general public and external reviewers such as PEER?

The following sections address each of these questions.

## What are the best practices regarding the confidentiality of donor records?

***Best practices require development foundations to maintain confidentiality of donor records when this expectation exists among donors and to inform donors of the security measures in place to protect personal information. Best practices also require members of the foundation's board of directors and any staff having access to confidential records to sign a confidentiality agreement specifying under what circumstances foundation records must be kept confidential.***

While no legal requirements govern the confidentiality of donor information and there is actually a competing legal argument (i. e., that all donations made in support of a public institution should be made public) that has been successfully argued in several states (refer to discussion on page 27), there is an expectation among donors to a charitable organization such as the MUW Foundation that requests for anonymity in making a donation will be honored and that any personal information acquired through the funds solicitation and donation process will be kept confidential.

**There is an expectation among donors to a charitable organization such as the MUW Foundation that requests for anonymity in making a donation will be honored and that any personal information acquired through the funds solicitation and donation process will be kept confidential.**

In fact, the argument in support of maintaining the confidentiality of donor records is a primary argument behind the creation of "independent" university development foundations. As noted in *College and University Foundations: Serving America's Public Higher Education*, "it is only through the autonomy of the independent foundation that donors' rights can be ensured." According to the Panel on the Nonprofit Sector, a nonprofit organization such as the foundation should inform its donors of the security measures that it has in place to protect their personal information.

While many university development foundations publish donor names in an annual report by dollar range of the gift, anonymous donors are noted as "anonymous" within each relevant gift category.

The Council for Advancement and Support of Education (CASE), of which the MUW Foundation is a member, is the "premier professional organization for educational advancement professionals." CASE advances and supports educational institutions by providing knowledge, standards, advocacy, and training designed to strengthen the combined efforts of alumni relations, communications, fundraising, marketing, and allied professionals. CASE has developed a Management Checklist for Institutionally Related Foundations, intended for use by foundation executives and board members in conducting internal self-assessments.

The Management Checklist includes two recommendations if an institutionally related foundation decides to employ a confidentiality agreement. The checklist provides that foundations should be "in compliance with applicable state “sunshine” and “freedom of information” laws concerning public meetings and public records,[6] including provisions for protecting the privacy and confidentiality of certain records. Also, the confidentiality agreement should protect donor privacy and confidential donor information.

## Does the foundation have adequate policies and procedures in place for maintaining the confidentiality of donor records?

***Yes. The foundation’s operating agreement with the university contains adequate language governing the confidentiality of donor records and the foundation’s confidentiality agreement contains necessary language to inform members of the board of directors and its staff as to their duty to maintain the confidentiality of donor information.***

Section 6 of the operating agreement between MUW and the foundation specifically addresses “confidential records.” This section states:

> *Certain donor and fund information maintained in furtherance of the Foundation’s fundraising activities is recognized to be the property of the Foundation and as such is confidential whether in paper or electronic format. The parties acknowledge that the Foundation’s electronic donor records, including, but not limited to related biographical, pledge, and gift records, are the exclusive property of the Foundation, regardless of the server or computer on which the records reside. To the extent information shared with the University may be protected from disclosure, the University will take all necessary action to protect such information under available statutory exceptions if disclosure would result in a breach of confidence by the Foundation or public disclosure of private information. In particular, the University will actively pursue the protection of the identity of donors and any information the Foundation may collect about said donors and shall establish and enforce policies that support the Foundation’s ability to respect the privacy and confidentiality of donor records.*

The foundation requires all members of its Board of Directors to sign a confidentiality agreement as a condition of membership. The agreement prohibits

[6] The Mississippi Public Records Act of 1983, codified as MISS. CODE ANN. § 25-61-1 et seq., provides that it is the duty of each public body to make public records available for inspection by any person, unless the act provides otherwise. Because public university foundations and affiliated entities do not meet the definition of public bodies under the act (i. e., any entity created by the Constitution or by law, executive order, ordinance, or resolution), the act does not apply to them--i. e., they have no duty under the act to make their records public.

directors from disclosing any information acquired through their membership on the board without specific written authorization from the board and directs the directors to use such information solely for their service to the foundation. The agreement does provide the following exception to the disclosure restrictions: "except as required by my activities or during the performance of my duties."

## What are the best practices regarding transparency in the operation of public university development foundations?

***According to the Panel on the Nonprofit Sector, strengthening the public trust, which is essential to the success of any development foundation, depends on the extent to which the organization operates transparently. With the exception of confidential donor records, best practices in the operation of public university development foundations advocate complete openness, including providing the general public with information about the foundation's operations, governance, finances, programs, and activities.***

### Openness and the Public Trust

Aside from the need for maintaining the confidentiality of donor records, there is a strong argument for making the operations of a public university development foundation as transparent as the university that it supports. To quote *College and University Foundations: Serving America's Public Higher Education*:

> *A foundation never should be used to circumvent public scrutiny. A foundation's greatest asset is public trust, an asset best protected by policies that ensure openness and accountability. However, the need for public scrutiny must be balanced with protection against the invasion of privacy. Foundations always must guard against the misuse of confidential personal information. . . .The prudent path for a college or university foundation, therefore, is to keep private resources apart and to protect private--but often essential--information about its donors, but not deny the public access to general operating and financial information simply because of the foundation's independence from the public institution and the state.*

Other relevant quotes from *College and University Foundations: Serving America's Public Higher Education* in support of a policy of transparency in the operation of public university development foundations include the following:

> *When asked, foundation officials should be open and accountable. Better yet, they should be open and accountable without being asked.*

> *Foundations should distribute information widely and often, including gift reports, endowment reports, investment performance summaries, and audit summaries.*
>
> *. . .to help ensure a foundation's success. . .it should not appear secretive and defensive.*

## The Public's Access to Information

The Panel on the Nonprofit Sector, which identified best practices applicable to all charitable organizations and foundations, echoes Phelan's argument for transparency as essential to the public trust:

> *Public trust is essential to a viable nonprofit sector. Because federal and state laws provide tax exemption and other privileges unavailable to for-profit entities, and because Americans contribute their resources and time to nonprofit organizations, government officials and the public have a right to expect these organizations to conduct themselves in an ethical manner. Strengthening this trust depends on the extent to which charities and foundations operate transparently, prevent fraud and the enrichment of insiders and other abuses, and serve the purposes for which they have been created.*

### *IRS Form 990 and Annual Report*

The Panel on the Nonprofit Sector takes Phelan's argument for the essential elements of transparency a step further in its specificity:

> *A charitable organization should make information about its operations, including its governance, finances, programs and activities, widely available to the public. Charitable organizations also should consider making information available on the methods that they use to evaluate the outcomes of their work and sharing the results of those evaluations.*

**Beyond the filing of its IRS Form 990, a 501 (c) (3) organization's first steps toward transparency should include an annual report and a website.**

The panel further elaborated that a charitable organization's annual return with the IRS (in the case of the MUW Foundation, its Form 990) is a primary source of information about the organization's finances, governance, operations, and programs for federal regulators and the general public. The panel noted that filing an accurate and complete annual information return with the IRS is a legal requirement. The panel also noted that charitable organizations can "demonstrate their commitment to accountability and transparency by offering additional information about what they do and how they operate."

The panel suggested that a good first step in this regard is to provide an annual report "that lists the organization's board and staff members, describes its mission, shares information on program activities, and details financial information including, at a minimum, its total income, expenses, and ending net assets."

***Website***

The panel notes that "another source of transparency and accountability and a key method for communicating about the organization's work is a website." According to the panel:

> *A website should feature the same information recommended for annual reports, with links directly to or instructions on how to request the organization's most recent IRS Form 990 return and other financial statements. Useful websites often provide such essential information as the organization's vision and mission statements; lists of board and staff members; statement of values and code of ethics; and policies on conflicts of interest, whistleblower protection and travel policy.*

The panel also notes that "to the extent evaluation or information on outcomes is available, some version of it should be included in annual reports, websites and other forms of communication."

## Other Best Practices for 501 (c) (3) Organizations

**Best practices for 501 (c) (3) organizations regarding transparency include making publicly available its code of ethics and a whistleblower policy.**

According to the IRS's publication titled *Good Governance Practices for 501 (c) (3) Organizations*, the IRS reviews a 501 (c) (3) organization's application for exemption and annual information returns to determine whether the organization has implemented policies relating to executive compensation, conflicts of interest, investments, fundraising, documenting governance decisions, document retention and destruction, and whistleblower claims. According to the publication:

> *The public expects a charity to abide by ethical standards that promote the public good. The organization's governing body bears the ultimate responsibility for setting ethical standards and ensuring they permeate the organization and inform its practices.*

### *Code of Ethics*

The IRS encourages a 501 (c) (3) board of trustees to consider adopting and regularly evaluating a code of ethics that describes behavior it wants to encourage and discourage. A code of ethics serves to communicate and further a strong culture of legal compliance and ethical integrity to all persons associated with the organization.

CASE has developed a Statement of Ethics and also endorses Independent Sector's *Statement of Values and Code of Ethics for Nonprofit and Philanthropic Organizations*. Independent Sector is "a leadership forum for charities, foundations, and corporate giving programs." CASE's Statement of Ethics provides the following:

> *Institutional advancement professionals, by virtue of their responsibilities within the academic community, represent their colleges, universities, and schools to the larger society. They have, therefore, a special duty to exemplify the best qualities of their institutions and to observe the highest standards of personal and professional conduct.*
>
> *In so doing, they promote the merits of their institutions, and of education generally, without disparaging other colleges and schools.*
>
> *Their words and actions embody respect for truth, fairness, free inquiry, and the opinions of others.*
>
> *They respect all individuals without regard to race, color, sex, sexual orientation, marital status, creed, ethnic or national identity, handicap, or age.*
>
> *They uphold the professional reputation of other advancement officers and give credit for ideas, words, or images originated by others.*
>
> *They safeguard privacy rights and confidential information.*
>
> *They do not grant or accept favors for personal gain, nor do they solicit or accept favors for their institutions where a higher public interest would be violated.*
>
> *They avoid actual or apparent conflicts of interest and, if in doubt, seek guidance from appropriate authorities.*
>
> *They follow the letter and spirit of laws and regulations affecting institutional advancement.*
>
> *They observe these standards and others that apply to their professions and actively encourage colleagues to join them in supporting the highest standards of conduct.*

### *Whistleblower Policy*

The IRS encourages boards to adopt an effective whistleblower policy for handling employee complaints and to establish procedures for employees to report in confidence any suspected financial impropriety or misuse of the charity's resources. The IRS will also review an organization to determine whether insiders or others associated with the organization have materially diverted organizational assets. As of 2008, IRS Form 990 asks whether the organization became aware during the year of a material diversion of its assets and whether an organization has a written whistleblower policy.

## Does the MUW Foundation follow best practices related to transparency?

***While the foundation has made recent improvements regarding transparency through publication of an annual report and creation of a website, the foundation could and should make additional information publicly available regarding its operations in order to ensure accountability to its donors and the general public.***

While the foundation has made recent notable improvements in moving toward greater transparency with the publication of its first annual report in 2007 and the creation of a website in 2008, PEER notes the following deficiencies in these and other mechanisms for making information on the foundation publicly available.

### Reporting on IRS Form 990

*A charitable organization's annual return with the IRS (Form 990), which is a public document, is a primary source of information about the organization's finances, governance, operations and programs for federal regulators and the general public. The MUW Foundation does not report the value of support that it receives from MUW on its IRS Form 990, even though this is a required item on the form.*

Because it reports in Part IV of Schedule A of IRS Form 990 that the MUW Foundation is not a private foundation because it is "an organization operated for the benefit of a college or university owned or operated by a governmental unit" (line 10 of the form), the foundation should complete the Support Schedule in Part IV-A of the form, as the form instructs. Line 21 of the Support Schedule requires the foundation to use the cash method of accounting to report for the four most recently completed fiscal years "the value of services or facilities furnished to the organization by a governmental unit without charge." The form further notes that the reporting organization should "not include the value of services or facilities generally furnished to the public without charge."

The MUW Foundation provided PEER with copies of its completed Form 990 as submitted to the IRS for fiscal years 2003 through 2006. The foundation did not provide any information in Line 21 of the Part IV-A support schedule on any of its completed forms.

**The foundation is not making an accurate report to the IRS or the general public regarding the value of support that the foundation receives from the university.**

When asked by PEER for the value of support (e. g., office space, office equipment, staff salaries, fringe benefits) that the foundation receives from the university, the foundation reported that it was budgeted to receive approximately $168,794 in support from the university (for staff and a partial estimate of office space only) in FY 2008 (see discussion on page 32). While PEER has concerns about the accuracy of the reported number of individuals providing work for the foundation and hence the value of personal service benefits provided to the foundation by the university, as well as the foundation's failure to account for the value of other support provided such as equipment and supplies, these estimates demonstrate that by leaving Line 21 of the Part IV-A Support Schedule blank on its annual Form 990s, the foundation is not making an accurate report to the IRS or the general public.

As noted by the Panel on the Nonprofit Sector, because the IRS Form 990 is a primary source of information about a charitable organization's finances, governance, operations and programs for federal regulators and the general public, filing an accurate and complete form is not only critical to the organization's accountability and transparency, but it is a legal requirement of the IRS. Failure to meet this requirement could jeopardize a charitable organization's tax-exempt status.

## Annual Report

*The MUW Foundation's Annual Report, which is a key tool in providing transparency and accountability to the general public, generally follows the best practices identified by the Panel on the Nonprofit Sector. The foundation could improve its annual report by including a more detailed description of its program activities--i. e., what programs and activities it has in place to achieve the reported results.*

In conformance with the best practices identified by the Panel on the Nonprofit Sector, the foundation's annual report contains the following:

- a list of the MUW Foundation's Board of Directors, including both officers and directors;
- a list of the staff of the MUW Foundation and the Office of Development;
- a brief reference to the foundation's mission in the Chairman's Letter of Appreciation ("the Foundation successfully continues to further its mission in fostering, encouraging and promoting the educational purpose of the university"); and,

- a copy of the foundation's audited financial statements (including prior year summarized comparative information) and supporting notes.

The foundation's annual report also includes a section called "stories of giving" that highlights the gifts of individual donors and the significance of their gifts to the university and a "donor recognition" section, which lists the names of all donors (other than those who are designated as "anonymous"), by gift category (based on the dollar amount of the gift).

Finally, the annual report contains a section called "financial highlights" that presents the following information graphically for the past five fiscal years: total philanthropic support, number of donors, endowment value, number of gifts, and total assets.

The one area addressed in the Panel on the Nonprofit Sector's best practices that is not covered in the foundation's annual report is a description of its program activities--i. e., what programs and activities it has in place to achieve the reported results. This is where the foundation could explain its major responsibilities (e. g., funds solicitation, investments management, gift management and distribution), who is responsible for carrying out these responsibilities, how the activities are carried out, and how success is measured in each area of responsibility.

## Website

*The MUW Foundation's website, another key tool in providing transparency and accountability to the general public, contains some of the "best practice" items identified by the Panel on the Nonprofit Sector. However, it is missing several important items, such as a copy of or link to the foundation's IRS Form 990s, audited financial statements, and conflict of interest policy. Also, the website is missing several important documents because they do not exist, such as a whistleblower policy, expenditure policy, and code of ethics. Additionally, some information presented on the website is misleading.*

The foundation's website, which was created in 2008, contains the following information recommended by the Panel on the Nonprofit Sector:

- a list of members of the Foundation Board of Directors, including a list of its officers;
- a list of foundation and Office of Development staff;
- the "financial highlights" graphics presented in the foundation's annual report;
- a copy of the foundation's investment policy and check request form; and,

- the foundation's mission statement (see discussion of problems with this statement on page 46).

In addition to the items recommended by the Panel on the Nonprofit Sector, the foundation's website includes a description of ways to support MUW through scholarships; planned giving, annual giving, and naming opportunities; as well as numerous detailed supporting links, such as a "gift calculator" and options for making a gift online.

### *Items Missing from the Website*

**The foundation's website does not contain a statement of its conflict of interest policy or a link to its audited financial statements, nor does it have a direct link to its most recent Form 990s.**

The website does not contain a statement of the foundation's conflict of interest policy or a link to its audited financial statements. Nor does it have a direct link to its most recent Form 990s or instructions on how to request the foundation's Form 990. In fact, the foundation's board of directors discussed the making of its Form 990 "public" at its meeting of May 29, 2008, but took no action despite the fact that the IRS Form 990 is a public document, as prominently acknowledged on the form itself ("Open to Public Inspection"). The primary argument against making the foundation's Form 990 public was that "foundations overall do not look very good on 990s."

From the standpoint of organizational accountability and transparency, it is disturbing that the foundation's board of directors took no action to make its Form 990 publicly available, apparently because of a concern that the facts presented on the form might be perceived in a negative light. It would have been a preferable course of action for the foundation to have addressed its concerns by providing a link to the form on its website and including any explanatory comments that it deemed necessary to a proper understanding of the foundation's Form 990 along with the link.

**Other information that the foundation could make available on its website would include its annual budget, an annual report on expenditures of its unrestricted funds, and a copy of its operating agreement with MUW.**

Some information is missing from the foundation's website because it does not exist. For example, as noted on page 48, the foundation has not developed a strategic plan, a document retention policy (see discussion on page 53), general expenditure policies (which would include policies on allowable travel expenditures), or policies for the expenditure of unrestricted funds. Also, the foundation does not have a policy on whistleblower protection, as recommended by the Internal Revenue Service (see page 42) or performance indicators (i. e., evaluation information or information on outcomes) for all of its programs, as recommended by the Panel on the Nonprofit Sector.

Other information that the foundation could make available on its website would include its annual budget, an annual report on expenditures of its unrestricted funds, and a copy of its operating agreement with MUW. The foundation could also make available on its website a copy of its 501 (c) (3) exemption letter from the Internal Revenue Service, but it would first have to request a copy from the IRS, since the staff was unable to locate a copy when PEER requested it. In the area of performance indicators, the foundation handles its investments through the contractual services of a professional investments manager. This company issues periodic detailed reports to the foundation's board of directors. These reports include information that the foundation could present on its website, such as pie charts showing asset allocation and tables showing composite investment performance.

### *Misleading Information on the Website*

Several statements included on the foundation's website could be described as misleading. For example, while the foundation does include a mission statement as recommended by the Panel on the Nonprofit Sector, the statement contains some misleading information, as PEER has highlighted in the following excerpt:

> *OUR MISSION*
>
> *. . .**Under the leadership of its independent Board of Directors**, the MUW Foundation receives gifts on behalf of the university, solicits donations, manages assets, and distributes monies in accordance with prescribed procedures.*

**The mission statement on the foundation's website gives the misleading impression that the MUW Foundation's Board of Directors and the foundation are completely independent from the university.**

The information highlighted in bold type is misleading because it gives the impression that the MUW Foundation's Board of Directors and the foundation are completely independent from the university, which they are not (see discussion beginning on page 26). A more accurate description of the relationship between the university and the foundation (such as explaining that the university's President and the Vice President for Institutional Advancement serve as non-voting ex officio members of the board) would help avert unnecessary suspicion and criticism among alumni who know the relationship to be different from that described in the mission statement. Also, the website should explain that university staff provide all staff support to the foundation at no cost to the foundation.

Further, statements contained on the foundation's website lead donors to believe that their donations will be used for educational support and scholarships for needy students. For example, the links to both "Scholarships" and "Annual Giving" on the foundation's website provide the following information, quoted below in its entirety:

> *With more than 80% of MUW student [sic] requiring financial aid to make an education possible, MUW relies on alumni and friend support to help the University grow and maintain our national image as a private school education at a public school price.*
>
> *Your annual gift provides opportunity for today's MUW students! Click on a student at left to learn more about the impact of scholarship aid.*

These statements imply that a donation to the foundation will provide scholarships for needy students.

While the following information presented on the website under the question "What is the Annual Fund?" explains that some donations are used to provide the university with "funding for items and programs that are not covered by state allocations and tuition fees," it is misleading in its description that historically, the largest portion of these contributions is used for scholarships:

> *The Annual Fund provides unrestricted funds for Mississippi University for Women.* ***Historically, the largest portion of each year's Annual Fund contributions is used for scholarships for MUW students with financial need.*** *The Annual Fund also provides funding for items and programs that are not covered by state allocations and tuition fees. The Annual Fund differs from endowed funds because it provides MUW with immediate 'spendable' income.*

**Although the foundation's website states that historically, the largest portion of annual fund contributions is used for scholarships, according to PEER's review of the foundation's expenditure of unrestricted funds for FY 2001 through FY 2008, assistance to MUW exceeded scholarship assistance in five of those eight years.**

As shown in Exhibit 10, on page 48, in PEER's review of the foundation's expenditure of unrestricted funds for the eight-year period of FY 2001 through FY 2008, assistance to MUW exceeded scholarship assistance in five of the years reviewed--by a significant amount in FY 2003, FY 2005, and FY 2006.

Also, by linking the statement about providing "funding for items and programs that are not covered by state allocations and tuition and fees" with the statement about providing scholarships for needy students, the implication is that donations are used to address educational needs purposes. Possibly because of such statements, when donors learn that their donations are being used for controversial items such as an expensive study of a name change for the university (refer to discussion on page 85), even though such a study may be in the best interests of the future of the university, donors could feel misled that and they were not told that their donations might be used for this purpose.

### Exhibit 10: MUW Foundation Actual Unrestricted Fund Revenues and Expenditures for FY 2001 through FY 2008

| | FY 2001 | FY 2002 | FY 2003 | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|---|---|---|---|---|---|---|---|---|
| **Total Revenues** | $ 272,445 | $ 220,826 | $1,431,452 | $ 426,379 | $ 483,345 | $ 644,712 | $ 886,842 | $ 330,878 |
| **Expenditures:** | | | | | | | | |
| Scholarships | $ 300,000 | $ 300,000 | $ 300,000 | $ 300,000 | $ 65,250 | $ 146,381 | $ 300,000 | $ 300,000 |
| MUW Assist. | $ 29,947 | $ 14,127 | $ 785,492 | $ 232,121 | $ 373,592 | $ 579,835 | $ 396,617 | $ 305,679 |
| Admin. & Op. | $ 89,628 | $ 118,904 | $ 150,906 | $ 197,795 | $ 244,273 | $ 248,058 | $ 213,246 | $ 220,644 |
| **Total Expend.** | $ 419,575 | $ 433,031 | $1,236,398 | $ 729,916 | $ 683,115 | $ 974,274 | $ 909,863 | $ 826,323 |
| | | | | | | | | |
| **Difference** | $ (147,130) | $ (212,205) | $ 195,054 | $ (303,537) | $ (199,770) | $ (329,562) | $ (23,021) | $ (495,445) |

SOURCE: MUW Foundation statements of budgeted and actual expenditures for FY 2004 through FY 2008.

Also, by not having the key internal documents and documentation discussed in the following section of this report, the foundation limits its accountability and transparency to both the general public and external reviewers such as PEER.

## Does the foundation have key internal documents and documentation to ensure transparency and accountability to both the general public and external reviewers such as PEER?

***The MUW Foundation is missing certain key internal documents and documentation necessary to ensure transparency and accountability. For example, the foundation has not developed a strategic plan or a written policy governing the general expenditure of its funds or the specific expenditure of its unrestricted funds. Further, the foundation's minutes, which are the official record of its activities, are incomplete and lacking in supporting documentation. Also, the foundation has obligated itself to fund relatively high-cost service providers for the university without requiring a written contract for the services.***

### Lack of a Strategic Plan

*While the MUW Foundation has occasionally adopted general goals in its minutes, it has not adopted a formal strategic plan. Further, because many of its goals have not been operationalized (in terms of measurable objectives and time frames), the foundation is not able to assess and report on its success in meeting such goals.*

As discussed on page 13, Section 301.0806 of the IHL Board's bylaws lay out the expectation that the foundations and affiliated entities supporting Mississippi public institutions of higher learning will have plans to help them to achieve their missions.

**The foundation has acknowledged the need for a strategic plan, having formally stated the goal of developing one in October 2006. However, nearly three years after stating the intent of developing a strategic plan, the foundation still has not done so.**

A strategic plan is important to the success of an organization because it helps the organization to ensure that its financial, human, and material resources are used appropriately to further its mission. A strategic plan helps an organization to oversee its own operations and to hold itself accountable. A governing board should use its strategic plan to gauge and improve its own performance. Further, in the case of a nonprofit corporation such as the MUW Foundation, the entity should make its strategic plan available on its website as an additional tool for making itself accountable to the public.

According to the Association of Governing Boards of Universities and Colleges, the board of directors of a university development foundation should help to create a long-range plan (three to five years) for the organization, which is a set of performance goals based on history and past accomplishments, current conditions, and the outlook for the future. Examples of the type of information that foundation staff should be communicating to the governing board for consideration in the development of its long-range plan include the following:

- which of the university's fund-raising priorities were well received by donors and prospects (and which were not);
- what new initiatives are being recommended by prospects;
- whether the institution's mission and objectives are helping to expand the number of prospects and new donors; and,
- whether current donors are being persuaded to increase their level of support.

A foundation's long-range plan provides a context for annual strategic plans, which are developed principally by foundation staff and reviewed and approved by the board. All parties should be involved with pursuing and implementing annual objectives and long-range goals. The annual strategic plan contains the strategies for pursuing goals. These strategies are developed by staff with board review, input, and approval. The strategies should cover all foundation activities.

The foundation has acknowledged the need for a strategic plan, having formally stated the goal of developing one in October 2006. However, nearly three years after stating the intent of developing a strategic plan, the foundation still has not done so.

According to Phelan, the development of a strategic plan generally begins with the work of a foundation board's Development Committee, also sometimes referred to as a planning and development committee. While foundation staff was only able to locate three sets of minutes for its

Development Committee for the period of FY 2004 through year to date in FY 2009 (see discussion on page 51), these minutes did not contain any information concerning the development of a strategic plan.

**When asked for a copy of the foundation's strategic plan, the foundation's president stated that all of the foundation's strategic planning is included in the board minutes rather than in a separate planning document. Possibly due to poor official documentation for meetings of the MUW Foundation Board of Directors, the minutes do not contain sufficient detail to constitute a strategic plan.**

Without a more formal record of the committee's work, it is difficult to know whether the committee is doing any planning work for the foundation. When asked for a copy of the foundation's strategic plan, the foundation's president stated that all of the foundation's strategic planning is included in the board minutes rather than in a separate planning document. Possibly due to poor official documentation for meetings of the MUW Foundation Board of Directors (refer to discussion on page 54), the minutes do not contain sufficient detail to constitute a strategic plan.

For example, the minutes of the January 23, 2004, meeting of the Foundation Board of Directors state that the previous President of the Foundation "presented the Board with a draft copy of the MUW Foundation's Capital Campaign Plan," but a copy of the plan was not made part of the official record of the Foundation Board of Directors.

Other minutes occasionally mention broad goals of a board chair, such as the following documented in the minutes of the October 19, 2006, meeting of the Foundation Board of Directors:

- *Increase endowment to $25 million by July 2008*
- *Revise and implement the capital campaign plan*
- *Employ a "corporate board" philosophy*
- *Enhance public relations*
- *Provide Board education*
- *Increase Board members' knowledge of finance*
- *100% giving by board members*

While the Board of Directors voted unanimously to adopt the Chairman's goals, the foundation never developed a strategic plan for attaining the goals, which would first require the foundation to translate the goals into measurable objectives, with specific steps and timelines for achieving them.

The Chairman repeated these goals at the February 23, 2007, meeting of the Board of Directors, adding remarks that the endowed fund value topped $25 million in December 2006 and forty of the forty-seven members and emeriti members of the Foundation Board of Directors had contributed in the current fiscal year.

Minutes of the October 18, 2007, meeting of the Foundation Board of Directors report:

*Chairman _______[7] revisited the goals he brought forward in previous meetings and presented an update on his goals. He encouraged all Board members to make a gift to the Foundation to meet the goal of 100 percent giving participation by the Board. He added spending policy improvements and enhancing investments as two new goals.*

*At the September 25, 2008 meeting of the Foundation Board of Directors, Chairman _______ discussed goals which included the Foundation's Endowment reaching $30 million. No additional goals were recommended by members of the board.*

## Lack of Policies Governing Expenditures

*The MUW Foundation has not developed policies governing the types of expenditures that are allowable and those that are not allowable.*

In order to ensure compliance with applicable requirements of the Internal Revenue Code and to gain the trust of donors that their contributions will be put to their highest and best use in support of the university, many foundations develop and make publicly available general expenditure policies and policies specific to the expenditure of unrestricted funds.

**The foundation has not developed a policy regarding how it plans to utilize its unrestricted funds.**

While the MUW Foundation has detailed accounting policies and procedures governing the execution and recording of its expenditures, it has not developed policies governing the types of expenditures that are allowable and not allowable. Also, it has not developed a policy regarding how it plans to utilize its unrestricted funds.

## Incomplete Minutes

*Governing laws and best practices with respect to the keeping of minutes by a university development foundation require that minutes be kept as a permanent record of all meetings of its members.*

### *Requirements in State Law*

State law provides the following requirements regarding the keeping of minutes by a corporation. MISS. CODE ANN. Section 79-11-283 (1) (1972) states:

> *A corporation shall keep as permanent records minutes of all meetings of its members and board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors as authorized by Section 79-11-265.*

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[7] PEER has omitted names from direct quotations of the foundation's minutes.

MISS. CODE ANN. Section 79-11-283 (5) (d) (1972) states:

> *A corporation shall keep a copy of the following records at its principal office: The minutes of all meetings of members and records of all actions approved by the members for the past three (3) years.*

In accordance with these legal requirements, the MUW Foundation's bylaws state "Minutes shall be kept of all the meetings of the Board of Directors, and shall become a part of the permanent record of the Foundation." The foundation's bylaws further state "The Secretary shall record or cause to be recorded the minutes of each meeting of the board of directors and the executive committee."

### *Federal Guidelines*

The Internal Revenue Service encourages governing bodies and authorized sub-committees to take steps to ensure that minutes of their meetings and actions taken by written action or outside of meetings are contemporaneously documented. IRS Form 990 asks whether an organization contemporaneously documents meetings or written actions undertaken during the year by its governing body and each committee with authority to act on behalf of the governing body.

Also, the IRS encourages charities to adopt a written policy establishing standards for document integrity, retention, and destruction that should include guidelines for handling electronic files and cover backup procedures, archiving of documents, and regular check-ups of the reliability of the system--i. e., a formal document retention policy. IRS Form 990 inquires as to whether an organization has a written document retention and destruction policy.

### *Best Practices*

Organization Management, Inc., an association management company that offers professional management and administrative services to international, national, regional, and state associations and societies, issued a best practices brochure titled "Non-Profit Legal Guide to Meeting Minutes." According to the guide, minutes are prima facie evidence of the proceedings that transpire at a meeting and are admissible as evidence in court. Thus the maintenance of minutes is important to have a written record of actions of the board, prove what action is taken by the board according to proper procedures, and to prove a meeting was valid.

Board and key committee minutes should be carefully drafted, because poorly or hastily written minutes may be harmful to an organization in the event of litigation or government investigation. Although minutes may be short and merely reflect motions that were passed, detail can be very useful. Minutes should summarize or cite reports and other information provided to the board and include appropriate attachments, describe alternatives considered by the board in reaching major decisions, and try to follow the same format or style of minutes for each meeting.

**The maintenance of minutes is important to have a written record of actions of the board, prove what action is taken by the board according to proper procedures, and to prove a meeting was valid.**

Standard practice among nonprofits is for minutes to be prepared after the meeting and then have the minutes approved by the board at a subsequent meeting. Voting to approve minutes does not amount to approving or ratifying the actions taken at a meeting, but is an acknowledgment that the minutes accurately reflect what transpired. According to Organization Management, Inc., although minutes may be signed, it is not necessary. PEER disagrees with this assertion and, instead, finds that a signature is a necessary element to meeting minutes, because a signature validates the authenticity of the minutes and the meeting content.

Meeting minutes should include some general basics, such as: (1) the date, time, and place of the meeting; (2) the fact that proper notice was given for the meeting, or that notice was waived by the participants; (3) whether the meeting is a special meeting or a regular meeting; (4) the names of all attendees; (5) whether or not a quorum is present; (6) departures and re-entries of attendees; (7) actions taken; and (8) upon request, directors who vote in the negative or abstain on motions, a brief summary of reports given or reference to an attached written report.

Further, best practices identified by the Panel on the Nonprofit Sector recommend that nonprofit organizations develop a formal document retention policy that includes the following critical components:

- a formal procedure for monitoring compliance with the policy;

- addresses the length of time that documents must be retained, as well as when it is required to destroy specific types of documents;

- addresses paper and electronic documents, files, and e-mails; and,

- specifies that document destruction must be immediately halted if an official investigation of the foundation is underway or anticipated.

*The minutes of the Foundation Board of Directors are not in one central location and they are not signed and complete, which presents a serious impediment to oversight and accountability.*

**The foundation has not adopted a formal document retention policy, which could account for some of the problems with regard to the minutes noted by PEER.**

The foundation has not adopted a formal document retention policy, which could account for some of the problems with regard to the minutes noted by PEER.

For example, the foundation's bylaws require all standing committees of the board to meet at least once per year. There are no minutes for the Executive Committee for 2005. Finance Committee minutes are missing from 2004, 2005, and 2006. Investments Committee minutes are missing from 2005. Development Committee minutes are missing from 2004, 2005, 2006, and 2007. Nominating Committee minutes are missing from 2004, 2005, and 2006. Also, there are no minutes from meetings of the ad hoc committees--i. e., special committee on bylaws, another on scholarships, and another "special investment review committee."

Also, minutes are missing for a meeting of the Executive Committee by conference call prior to the February 9, 2006, meeting of the Foundation Board of Directors. The minutes of the February 9, 2006, meeting of the Foundation Board of Directors state: "Chairman ______ informed the Board that the Executive Committee met by conference call to discuss the University's request that the Foundation fund the costs for the vice president for institutional advancement search." The minutes of the full board also report that the Executive Committee agreed to reallocate $30,000 budgeted for capital campaign costs (which campaign was on hold until a new vice president was hired) to fund half the cost of the search at the rate of $25,000 in fees and up to $5,000 in travel expenses (see discussion on page 65). Therefore, an official action of the Executive Committee was taken with no corresponding minutes.

Also missing are attachments to the minutes, which should include all documents referenced in the minutes. For example, the minutes of the October 18, 2003, meeting of the Foundation Board of Directors refer to an "Exhibit Book" for the meeting containing items such as information on a capital campaign and Endowment Giving and Management Guidelines, but this book is not on file at the foundation offices and the Endowment Giving and Management Guidelines were not attached to the minutes.

Also, as discussed on page 50, the minutes of the January 23, 2004, meeting of the Foundation Board of Directors state that the previous President of the Foundation presented the board with a draft copy of the MUW Foundation's Capital Campaign Plan, but a copy of the plan was not made part of the official record of the Foundation Board of Directors.

**Without complete formal minutes, there is an inadequate record of what the foundation's committees are doing and whether they are in compliance with provisions in the bylaws.**

Further, the agendas for meetings of the Foundation Board of Directors list numerous other reports (e. g., Finance Committee Report, Investment Committee Report), none of which are presented in writing, or if presented in writing, were not retained as part of the official record. For example, the minutes of the 5/31/2007 meeting of the Foundation Board of Directors provide the following official record of the report of the Development Committee: "____ presented the Development Committee report. The committee met this morning with _____ and _____ to review the mailings and contact schedule for the year."

Without complete formal minutes, there is an inadequate record of what the foundation's committees are doing and whether they are in compliance with provisions in the bylaws governing the scope of their duties and the provision in the bylaws requiring each standing committee to meet at least once per year. The lack of attachments to the minutes provides an incomplete record of foundation activities.

## Lack of Written Contracts

*Best practices require that a formal written contract be executed when promises are exchanged to ensure that needed services are being provided as economically and effectively as possible. The foundation does not follow best practices with respect to contracts because it has expended significant foundation funds on marketing and public relations services provided to the university without requiring a written contract.*

Best practices and good stewardship require that a written contract be executed when promises are exchanged. A contract is a formal and legally binding agreement between two or more parties for performing, or refraining from performing, some specified act(s) in exchange for consideration. Failure to secure a written contract amounts to potential waste, because there is no proof of the parties' agreed-upon terms. In addition, costly disputes may arise in order to determine the specifics of a particular agreement. Without a contract, funds are precariously exposed and the negligence to secure a contract leads to unnecessary and avoidable criticism and allegations.

IHL Bylaw § 707.01 requires institutional executive officers and the Commissioner to authorize and approve and execute service contracts on behalf of their respective institutions. Section 707.01 mandates service contracts "be executed in accordance with state law and board policy." The bylaws also require university service contracts with an aggregate total expenditure of $250,000 or more to be approved by the IHL Board prior to their execution.

**PEER identified two cases between February 1, 2007, and May 1, 2009, in which the foundation paid entities that reportedly provided marketing and public relations services to the university. The foundation neither issued formal requests for proposals nor written contracts for the performance of these services.**

PEER identified two cases during the period of February 1, 2007, through May 1, 2009, in which the foundation paid entities that reportedly provided marketing and public relations services to the university. The foundation neither issued formal requests for proposals nor written contracts for the performance of these services. The foundation paid these two entities a total of $304,028.47.

Without a written contract it is not possible to hold the service provider accountable for the content or value of work performed. Further, without a formal request for proposals, the university cannot be assured that it received the services that it needed at a competitive price. Given the limited discretionary funds available to the university through the foundation, the foundation should ensure that these funds are being expended as efficiently and effectively as possible.

# Chapter 4: Has the foundation used unrestricted funds to create a "slush fund" for the university's president?

**While the foundation does provide a portion of its unrestricted funds to the university for general assistance, these funds should not be considered a "slush fund" because they are not completely unregulated or used for illicit purposes. However, the foundation has been lax in its exercise of budgetary and other approval controls over the expenditure of these funds and has not developed a written policy governing the expenditure of its unrestricted funds, as recommended by best practices. Further, the foundation used cash from restricted and endowed funds to cover a $1.4 million deficit in unrestricted funds that resulted from allowing unrestricted fund expenditures to exceed unrestricted fund revenues for seven of the past eight fiscal years.**

In answering the above question, PEER sought the answers to several related, more specific questions:

- What are unrestricted funds and how do they differ from other forms of contributions to the foundation?
- What is a "slush fund" and could the foundation's unrestricted funds be considered one?
- What controls does the foundation exercise over unrestricted funds and are these controls adequate?
- How was the foundation able to continue, year after year, expending more unrestricted funds than it collected?

The following sections address these questions.

## What are unrestricted funds and how do they differ from other forms of contributions to the foundation?

***Unrestricted funds are not restricted as to their use by the foundation--i. e., the foundation may use such funds for any purpose supporting its mission of providing funds for the educational support of the university. The foundation must use restricted funds (either temporarily restricted or endowed) for the purposes specified by the donor.***

Financial Accounting Standards Board Statement 116 (FASB 116) establishes standards for accounting and reporting contributions received and contributions made by not-for-profit organizations. FASB 116 divides contributions into three categories:

- *Unrestricted Support*--revenues or gains from contributions that are not restricted by donors.

- *Temporary Restriction*—a donor-imposed restriction that permits the donee organization to use up or expend the donated assets as specified and is satisfied either by the passage of time or by actions of the organization.
- *Permanent Restriction*--a donor-imposed restriction that stipulates that resources be maintained permanently but permits the organization to use or expend part or all of the income derived from the donated assets for purposes specified by the donor.

## Unrestricted Support (Unrestricted Funds)

Donors do not place restrictions on the use of unrestricted contributions. Management of a not-for-profit organization may use unrestricted contributions for any purpose that, in the opinion of management, supports the mission and goals of the not-for-profit organization. For example, unrestricted contributions may be used for operating expenses, such as office supplies, printing, and fundraising expenses of the organization. Management of a not-for-profit organization may also use unrestricted funds in direct support of the organization's purpose. For example, the foundation provides MUW scholarship funds from unrestricted contributions. In the foundation's accounting system, unrestricted support is denoted as unrestricted funds.

## Temporary Restriction (Restricted Funds)

Donors may place restrictions on contributions. The restrictions direct the not-for-profit organization to use the contribution and any earnings from the contribution only for a specific purpose or purposes.

For example, a temporary restricted gift may be made to the foundation for the benefit of students with a specified major. The contribution itself and earnings from the contribution may be used as a scholarship to support students with the specified major. Because the contribution itself, rather than just earnings from the contribution, may be used for the specified purpose(s), temporary restricted gifts are not a permanent source of funds for a not-for-profit organization unless temporary restricted contributions are received often enough to prevent depletion of the funds. In the foundation's accounting system, temporary restricted contributions are denoted as restricted funds.

### Permanent Restriction (Endowed Funds)

In addition to restricting donations to a specified purpose, donors may also restrict the not-for-profit organization to only using the earnings from contributions. For this reason, permanent restricted donations are typically large and the not-for-profit organization uses the earnings from the donation for the specified purpose.

For example, a large donation may direct the foundation to use the earnings from the contribution for scholarships or to support a particular school, such as the School of Fine Arts. The foundation would use the contribution's earnings for the specified purpose without using the contribution itself. As a result, permanent restricted contributions provide a permanent source of revenue for the specified purpose. In the foundation's accounting system, permanent restricted contributions are denoted as endowed funds.

## What is a "slush fund" and could the foundation's unrestricted funds be considered one?

***A slush fund is "an unregulated fund often used for illicit purposes." The foundation's unrestricted funds should not be considered a slush fund because they are not completely unregulated and PEER found no evidence that the funds were being used for illicit purposes.***

According to the Merriam-Webster dictionary, a *slush fund* is "an unregulated fund often used for illicit purposes." While the foundation should improve the management and oversight of its unrestricted funds through better utilization of the controls that it has in place, as will be discussed in the following sections, the foundation does exercise a degree of regulation over their expenditure. While the foundation used part of these funds for a purpose that some alumni view might view as contentious (i. e., the hiring of a firm to conduct market research on a name change for the university), PEER found no evidence that the foundation used these funds for "illicit" purposes.

## What controls does the foundation exercise over unrestricted funds and are these controls adequate?

***The foundation's controls over its unrestricted funds include an annual budget and requirements for prior approval of the expenditure of non-budgeted unrestricted funds. Because the foundation has not consistently adhered to these controls, it spent more in unrestricted funds than it collected in seven of the last eight fiscal years.***

### The Foundation's Budget

**While the foundation has recently increased the level of detail included in its annual budget, overly general budget categories and wide variations in actual revenues and expenditures from budgeted amounts limit the utility of this important management tool.**

A budget is an organization's primary means of directing resources toward the accomplishment of objectives. A budget must contain realistic projections of revenues and sufficient detail to allow for proper control. Further, a budget must be adhered to and adjusted quickly once a possible revenue shortfall has been identified.

While the foundation has recently increased the level of detail included in its annual budget, overly general budget categories and wide variations in actual revenues and expenditures from budgeted amounts limit the utility of this important management tool.

#### *Responsibility for Budget Preparation and Adherence to the Budget*

**According to the IHL Board's bylaws governing the establishment and operation of university foundations and affiliated entities, these entities are expected to adopt budgets to help them in achieving their missions.**

As discussed on page 13, according to the IHL Board's bylaws governing the establishment and operation of university foundations and affiliated entities, these entities are expected to adopt budgets to help them in achieving their missions. According to the MUW Foundation's bylaws, the President of the Foundation must annually prepare a budget for the foundation's operation for the next fiscal year and present this budget to the Finance Committee for consideration at its spring meeting. The Finance Committee then presents the budget as prepared by the President to the Executive Committee. Any budget amendment requests must also be presented to the Finance Committee for consideration before being presented to the Executive Committee. The Board of Directors approves the foundation's operating budget annually.

*The foundation only adopted a separate Unrestricted Fund Budget in three of the six fiscal years for which it provided foundation budget information to PEER.*

While the foundation adopted separate annual budgets for each of its major funds (i. e., unrestricted, non-endowed restricted, and endowed) for FY 2004 and FY 2005, the foundation adopted a consolidated budget for FY 2006 through FY 2008. In FY 2009, the foundation returned to a separate budget for each of its major funds.

**While a separate unrestricted fund budget provides the foundation with a better opportunity to control the expenditure of these funds, the budget must be based on a realistic estimate of revenues.**

Because PEER did not have FY 2009 actual expenditure data at the time of this review, it could only compare actual unrestricted fund receipts and expenditures to budgeted for FY 2004 and FY 2005. For these two fiscal years, while the foundation expended less in unrestricted funds than budgeted, the amount of unrestricted funds collected was so far below the budgeted amounts that in each year the foundation expended more in unrestricted funds than it collected.

While a separate unrestricted fund budget provides the foundation with a better opportunity to control the expenditure of these funds, the budget must be based on a realistic estimate of revenues. In both FY 2004 and FY 2005, the foundation budgeted $1.6 million in unrestricted fund contributions; however, it only received $335,816 in actual unrestricted fund revenues in FY 2004 and $328, 202 in FY 2005.

*The foundation's recent addition of more line-item detail within major budget categories provides it with the opportunity to exert more control over the expenditure of its unrestricted funds; however, PEER noted significant deviations in actual expenditures from the budgeted amounts in the category of MUW Assistance.*

In FY 2006, the foundation added a significant number of expenditure line items under two of its major objects of expenditure that are funded with unrestricted funds: "University Assistance-other program services" and "Support Services." Examples of line items added include moving expenses, office supplies, honoraria, postage/freight, and promotional flowers. By adding a significant level of detail to its budget, the foundation has improved its ability to oversee and manage its expenditures toward achieving primary organizational goals.

However, especially in FY 2006, in the category of MUW Assistance (also referred to as University Assistance), PEER noted several examples of significant deviations in actual expenditures from budgeted amounts, as shown in Exhibit 11, page 62. As shown in Exhibit 12 on page 63, the foundation significantly increased the MUW Assistance budget in FY 2007, which could help to explain why the number of budget over-expenditures in the category of

MUW Assistance declined significantly in FY 2007 and FY 2008.

As shown in Exhibit 12 on page 63, in FY 2004 through FY 2006, the foundation expended more than it budgeted in the category of University Assistance; however, in FY 2007 and FY 2008 the foundation increased its budget for this category and total expenditures were within the higher budgeted amounts.

*The historical inadequacy of the foundation's annual budget as a management tool is evidenced by the fact that over the eight-year period of FY 2001 through FY 2008, the foundation's unrestricted fund expenditures exceeded its unrestricted fund revenues in every year but one.*

As shown in Exhibit 10 on page 48, in every fiscal year except for FY 2003 (a year when the foundation had an unusually large amount of unrestricted contributions), the foundation expended more of its unrestricted funds than it collected (a total of $1.5 million for the period). Because PEER did not have data showing the beginning cash balance in the foundation's unrestricted fund account at the end of FY 2000, it cannot conclude what portion of this amount might have been covered by a beginning fund balance (if one existed).

While year-end expenditure information is not yet available for FY 2009, the foundation budgeted $335,472 in unrestricted fund assistance to the university for this fiscal year and as of December 31, 2008, the foundation had expended $246,958 for this purpose.

**Exhibit 11: Examples of Significant Deviations in Actual Expenditures from Budgeted Amounts within the Unrestricted Fund Expenditure Category of MUW Assistance**

| Fiscal Year | Line Item | Budgeted Amount | Actual Expenditure | Difference |
|---|---|---|---|---|
| 2006 | Equipment | $5,000 | $38,679 | ($33,679) |
| | Postage/Freight | 0 | 9,521 | (9,521) |
| | Professional Fees | 2,000 | 32,779 | (30,779) |
| | Promotional Gifts | 5,000 | 21,573 | (16,573) |
| | Property Transfer | 0 | 78,773 | (78,773) |
| | Salaries | 22,000 | 45,224 | (23,224) |
| | Special Projects | 0 | 36,820 | (36,820) |
| 2007 | Advertising | 5,000 | 15,679 | (10,679) |

SOURCE: MUW Foundation statements of budgeted and actual expenditures for FY 2004 through FY 2008.

**Exhibit 12: MUW Foundation Budgeted versus Actual Expenditures of Unrestricted Funds for University Assistance-Other Programs for FY 2004 through FY 2008**

| Fiscal Year | Budgeted | Actual | Difference |
|---|---|---|---|
| 2004 | $40,000 | $232,121 | ($192,121) |
| 2005 | 40,000 | 373,592 | (333,592) |
| 2006 | 330,000 | 579,835 | (249,835) |
| 2007 | 542,500 | 396,617 | 145,883 |
| 2008 | 466,750 | 305,679 | 161,071 |

SOURCE: MUW Foundation statements of budgeted and actual expenditures for FY 2004 through FY 2008.

***Requirement for Prior Approval of Expenditures Outside of the Budget***

*On several occasions, the President of the Foundation and the Executive Committee of the Foundation Board of Directors exceeded their expenditure authority with regard to approval of non-budgeted expenditures, thereby undermining the authority and responsibility of the full board and adding to the concern that an inner circle of individuals controls the foundation in an "environment of secrecy."*

**Examples of Executive Committee Exceeding its Expenditure Authority**

**PEER found three examples in which the foundation board's Executive Committee significantly exceeded its expenditure authority provided in the bylaws.**

PEER found the following examples in which the Executive Committee of the MUW Foundation Board of Directors significantly exceeded its expenditure authority. These examples occurred when the foundation's 2003 bylaws were in effect, requiring the board of directors to approve expenditures of non-budgeted expenses above $10,000 and prohibiting the Executive Committee from making binding commitments for the foundation for more than $25,000 without prior authorization of the board of directors.

- *Approval of an expenditure of up to $65,000 for an executive search firm to conduct a search for a new university Provost and Vice President for Academic Affairs*

  According to the minutes of the Executive Committee's Telephone Conference Meeting of February 20, 2004, the university president asked the foundation to provide up to $65,000 for an executive search firm to conduct a search for a new university Provost and Vice President for Academic Affairs. The Executive Committee voted to approve the MUW president's request.

PEER reviewed the minutes of the meetings of the Foundation Board of Directors immediately prior and subsequent to the vote of the Executive Committee (i. e., the board meetings of January 23, 2004; February 20, 2004; and June 4, 2004) and found no discussion or formal authorization of the expenditure in question. Instead, PEER found an entry in the minutes of the June 4, 2004, meeting of the board of directors noting that the university president announced the hiring of a new Provost and Vice President of Academic Affairs effective July 1, 2004. According to the foundation's financial records, the foundation expended a total of $47,517 on the search without proper approval by the Foundation's Board of Directors.

- *Approval of a $75,000 expenditure to renovate the Hogarth Banquet Room and approval of a $79,000 expenditure to purchase property for the university*

According to the minutes of the Executive Committee's Phone Conference of August 16, 2004, because only $75,000 of the $150,000 in loan costs that the board approved in June would be needed for the fiscal year due to construction delays with the FEMA/MEMA projects, the committee discussed redirecting the remaining $75,000 in available funds toward the renovation of the Banquet Room in Hogarth. According to the minutes, renovation of the room would allow for greater use of the facility, including holding the Welty Gala on campus. The Executive Committee voted to authorize the expenditure.

During the same phone conference, the Executive Committee was asked by the foundation staff to consider approving the purchase of property located at 424 11th Street South for the price of $79,000. According to the minutes, "The University currently does not have legislative authority to purchase this property, and the present owner would like to sell as soon as possible." The Executive Committee voted to authorize the purchase.

The full Foundation Board of Directors did not discuss either of these issues at its June 4, 2004, meeting, which was the meeting immediately prior to the Executive Committee's August 16, 2004, meeting by telephone. Further, at the next meeting of the full board, held on October 14, 2004, the following entry was made:

> *[Chairman] reviewed actions taken by the Executive Committee to authorize $75,000 in funding to renovate the Hogarth Banquet Room and authorize the purchase of the*

> *Laundromat property at the corner of 11th Street South and 5th Avenue South for $75,000. Following the property purchase, the property was deeded to the University.*

There was no official action taken by the full board to approve these expenditures. The foundation's financial records show that $89,749 was expended on "construction-related items" in September and October of 2004 (there was no account specifically for the Hogarth renovation) and $78,773.46 on the property purchase.

- *Approval of a $30,000 expenditure for half the cost of an executive search firm's search for a Vice President for Institutional Advancement for MUW*

  According to the February 9, 2006, minutes of the Foundation Board of Directors:

  > *[Chairman] informed the Board that the Executive Committee met by conference call to discuss the University's request that the Foundation fund the costs for the vice president for institutional advancement search.*

  The Foundation Board minutes also report that the Executive Committee agreed to reallocate $30,000 budgeted for capital campaign costs (which campaign was on hold until a new vice president was hired) to fund half the cost of a search at the rate of $25,000 in fees and up to $5,000 in travel expenses. As in the previous examples, there was no official action taken by the full foundation's board of directors to approve these expenditures.

### Examples of President of the Foundation Exceeding His Expenditure Authority

The following discussion provides examples in which the President of the Foundation exceeded his expenditure authority under the 2007 and 2008 bylaws, which require that non-budgeted expenditures of more than $10,000 but less than $25,000 be approved by the Executive Committee.

**PEER found three examples in which the President of the Foundation exceeded his expenditure authority provided in the bylaws.**

On three separate occasions, the President of the Foundation approved the payment of non-budgeted expenditures in excess of $10,000 to a marketing agency prior to consideration of the matter by the Executive Committee. Specifically, the president authorized the payment of $17,500 to the agency on April 10, 2008; $17,500 on July 2, 2008; and $15,193.75 on August 11, 2008.

The Executive Committee did not take up the university president's request to authorize $195,000 for a multi-year project with the marketing agency until its meeting dated September 22, 2008, during which the committee approved it unanimously. At its meeting on September 25, 2008, the full board of directors passed the motion to accept the recommendation of the Executive Committee to spend up to $195,000 for the project.

## No Written Policies Governing the Expenditure of Unrestricted Funds

*The foundation has not followed best practices governing the expenditure of unrestricted funds because it has not developed a written policy governing the expenditure of such funds.*

According to best practices, a university development foundation should distribute income according to an established policy that includes details on the distribution of unrestricted funds. *College and University Foundations: Serving America's Public Higher Education* notes that university development foundations should distribute income according to an established policy that should include details such as the percentage of unrestricted funds to be reserved for scholarships; the percentage of unrestricted funds to be set aside as a discretionary fund for the university president, if any; and the appropriate uses of such a fund.

The Association of Governing Boards notes that it is a common practice "for the institution and the foundations to designate a portion of unrestricted donations for a discretionary fund for the president of the institution." Because of the negative media attention that can come from discussion of the president's discretionary fund, at a minimum the agreement between the university and the foundation should include development of a special protocol for the use of these funds, including an approval process. "If disbursements are made directly from the foundation for the president's benefit, the foundation's board has the ultimate responsibility for determining the appropriateness of any expenditure. . . .foundation boards should exercise extreme caution in approving discretionary expenditures."

For example, the foundation's board must decide whether unrestricted funds should be used to enhance the office of the university president, including transportation, furnishings for residence and office, and entertainment. If such use is approved, the board must decide "how much is enough." According to *College and University Foundations: Serving America's Public Higher Education*, "Dealing with the public-relations fallout for foundation activities that exceed its mission is a potential nightmare." The best way to assess the propriety of a foundation's initiative is the newspaper test: "If reading about an initiative in the daily paper would have a detrimental effect on the foundation and the institution, don't do it."

While the foundation has, in recent years, as previously noted, developed budgetary detail for the expenditure of unrestricted funds made available for university assistance, the MUW Foundation has not developed a written policy governing the expenditure of its unrestricted funds.

**In the absence of a clear policy governing the expenditure of unrestricted funds, alumni may question the appropriateness of the foundation's expenditures.**

Also, according to Phelan, to help ensure its success, the foundation should liberally publicize expenditures of unrestricted funds.

In the absence of a clear policy governing the expenditure of unrestricted funds, alumni may question the appropriateness of the foundation's expenditures and begin to view the foundation as the President's "slush fund," as evidenced by this allegation. The absence of an expenditure policy for unrestricted funds could negatively impact donations to the MUW Foundation, as the understanding of what should be done with contributions may not match what the foundation is doing with contributions.

As financial pressure has increased on public universities, the pressure on foundations to provide a source of discretionary (unrestricted) funding has increased. In 1997 when *College and University Foundations: Serving America's Public Higher Education* was published, the mission of university foundations had broadened from a strict focus on educational purposes--"to have more resources for new buildings, scholarships and to have discretionary dollars."

According to Phelan, "the governing board is responsible for establishing the policy framework within which its foundation(s)must operate." While the IHL Board of Trustees has addressed the issue of salary supplements, it has not addressed the issue of whether unrestricted foundation funds should be used to enhance the office of the president, including transportation, furnishings for residence and office, and entertainment.

## How was the foundation able to continue, year after year, expending more unrestricted funds than it collected?

***The foundation was able to continue expending more unrestricted funds than it collected year after year by using cash from its restricted and endowed funds to cover the negative cash balance in unrestricted funds that resulted from unrestricted expenditures. As of March 31, 2009, the MUW Foundation had a negative unrestricted cash balance of approximately $1.4 million.***

### Management Deficiencies that Allowed the Large Negative Unrestricted Fund Cash Balance

*Prior to February 2006, the foundation maintained separate accounts in its accounting system for unrestricted, restricted, and endowed funds. When these separate accounts were combined into one account in the accounting system in February 2006, the foundation's management did not demonstrate an appreciation of the importance of knowing the cash balance for its unrestricted, restricted, and endowed funds.*

The foundation was able to sustain the practice of expending more unrestricted funds than it collected year after year by using cash from its restricted and endowed funds to cover the negative cash balance in unrestricted funds that resulted from unrestricted expenditures. As of March 31, 2009, the MUW Foundation had a negative unrestricted cash balance of approximately $1.4 million.

Prior to February 2006, the foundation maintained separate accounts in its accounting system for unrestricted, restricted, and endowed funds. In February 2006, these accounts were combined into one account. This change occurred during prior foundation management and current foundation staff do not know the reasoning for combining the accounts.

**Although the foundation's board and management have been aware of the deficit in unrestricted cash since the summer of 2007, the board and management continued to allow unrestricted expenditures to exceed unrestricted revenues.**

Although the foundation's board and management have been aware of the deficit in unrestricted cash since the summer of 2007, the board and management continued to allow unrestricted expenditures to exceed unrestricted revenues. As a result, the deficit in unrestricted funds had grown to approximately $1.4 million as of March 31, 2009.

Per foundation management, the deficit in unrestricted expenditures was reflected on the foundation's balance sheet that was prepared and approved by the foundation's Finance Committee throughout each fiscal year. Foundation management also noted that attempts have been made to increase unrestricted giving and maintain or decrease unrestricted expenditures and a fundraising campaign is planned in FY 2010 to address the deficit.

## Consideration of the Quasi-Endowment Fund as a Potential Reserve Account for Unrestricted Funds

*The foundation's board and management improperly considered the quasi-endowment fund and another reserve fund as being available for use as unrestricted funds.*

In June 2004, the foundation's board established a quasi-endowment fund. Per the board's June 4, 2004, minutes, the need for the foundation to have a quasi-endowment for long-term security was presented, a motion made, seconded, and was passed unanimously.

The foundation's "Treasurer's Notes" dated June 2, 2005, explain the purpose of the foundation's quasi-endowment fund as follows:

> *The quasi-endowment is a holding fund that would provide resources for endowment spending in times of need when the endowment does not earn a sufficient amount to produce spendable funds.*

**Under the IRS definition of quasi-endowment funds, any money retained from endowment investment earnings must be used for the purpose and intent specified by the donor or source of the original funds.**

The quasi-endowment is funded by retaining a portion of earnings from endowment investments when earnings are above targeted expectations in order to supplement the endowment when investment earnings are below targeted expectations.

When discussing the negative unrestricted cash balance, foundation management referred PEER to the foundation's reserve funds. Foundation management stated that these funds serve as "rainy day" funds and would be available for use at the discretion of the board as unrestricted funds.

However, Internal Revenue Service (IRS) 2008 Instructions for Schedule D (Form 990) defines quasi-endowment funds as:

> *Board designated or quasi-endowments are funds functioning as an endowment that are established by the organization itself, either from donor or institution funds, and that must retain the purpose and intent as specified by the donor or source of the original funds.*

Under the IRS definition of quasi-endowment funds, any money retained from endowment investment earnings must be used for the purpose and intent specified by the donor or source of the original funds. Therefore, the Foundation Board could not use the quasi-endowment funds or other reserve funds resulting from endowment investment earnings as a "rainy day" fund for unrestricted funds and be in compliance with IRS regulations. No accounting entry was made from the quasi-endowment or other reserve fund to pay unrestricted expenditures.

As of April 30, 2009, the amount in the quasi-endowment and other reserve fund was approximately $241,000. Even if such quasi-endowment and reserve funds could be used at the board's discretion as unrestricted funds, and per IRS regulations, such use is not permitted, the total amount available would be far from sufficient to cover the amount of the negative unrestricted cash balance.

Under the IRS definition of quasi-endowment funds, the foundation may place *unrestricted* funds in a quasi-endowment fund to serve as a "rainy day" fund for unrestricted purposes but may not use earnings from restricted or endowment investments as an unrestricted "rainy day" fund. However, before placing any unrestricted funds in a quasi-endowment fund for future use, the foundation's board must address the foundation's negative unrestricted cash balance.

## Apparent Contradiction Between the Audited Financial Statements and PEER's Assertion of a Negative Cash Balance

*The foundation's June 30, 2008, audited financial statements show Net Unrestricted Assets of $613,352 by totaling unrestricted assets and liabilities, even though unrestricted cash had a $1.4 million deficit.*

In the foundation's audited financial statements, Net Unrestricted Assets represents the sum of all unrestricted assets and liabilities of the foundation. As noted in the June 30, 2008, financial statements, the sum of net unrestricted assets was $613,352. The table below shows how that figure was determined.

| Account Name | Balance |
|---|---|
| Cash | $150,710 |
| Real Property | 45,000 |
| Furniture, Fixtures, and Equipment (Net of Depreciation) | 9,948 |
| Life Insurance-Cash Surrender Value | 48,213 |
| Accounts Payable | (58,496) |
| Net Value of Gift Annuity Program | 417,977 |
| Net Unrestricted Assets | $613,352 |

In the table, cash shows a positive balance of $150,710 because the deficit in unrestricted cash was offset by cash on hand from restricted and endowed funds.

*Foundation management is responsible for the financial statements and accompanying footnotes. The independent auditor is responsible for expressing an opinion on the financial statements and adequacy of accompanying footnotes.*

Foundation management is responsible for the financial statements and accompanying footnotes. Under the Standards of Reporting, which are part of Generally Accepted Auditing Standards, an auditor must state whether the financial statements are presented in accordance with generally accepted accounting principles and express an opinion regarding the financial statements. Further, if the auditor determines that footnotes are not reasonably adequate, the auditor must state a conclusion regarding footnotes in the auditor's report.

**While GAAP does not prohibit the presentation of the financial statements as presented, such presentation does obscure the fact that the foundation had an unrestricted cash deficit of approximately $1.3 million as of June 30, 2008.**

In the Independent Auditor's Report for the June 30, 2008, financial statements, the auditors note that in their opinion, the June 30, 2008, financial statements present fairly, in all material respects, the financial position of the foundation in conformity with accounting principles generally accepted in the United States and do not note any inadequacies in the accompanying footnotes.

While GAAP does not prohibit the presentation of the financial statements as presented, such presentation does obscure the fact that the foundation had an unrestricted cash deficit of approximately $1.3 million as of June 30, 2008 (see Exhibit 13, page 72). Therefore, PEER believes a footnote to the financial statements, which noted the deficit in unrestricted cash, would have been informative to users of the financial statements and would have noted an important financial condition of the foundation--namely, that as of June 30, 2008, the foundation had an unrestricted cash deficit of approximately $1.3 million, which would have been of importance to foundation donors and alumni of the university.

## Exhibit 13: MUW Foundation Unrestricted, Restricted, and Endowed Quarterly Cash Balances*

| Fund Name | 12/31/07 | 3/31/08 | 6/30/08 | 9/30/08 | 12/31/08 | 3/31/09 |
|---|---|---|---|---|---|---|
| Unrestricted Funds | $ (921,263) | $ (1,036,718) | $ (1,285,534) | $ (1,355,529) | $ (1,377,970) | $ (1,438,876) |
| Restricted Funds | 1,108,387 | 960,504 | 949,033 | 1,391,800 | 1,305,902 | 1,237,733 |
| Endowed Funds | 1,429,820 | 663,698 | 425,656 | 484,532 | 283,479 | 312,536 |
| **Total Fund Cash Balance** | $ 1,616,944 | $ 587,484 | $ 89,155 | $ 520,803 | $ 211,411 | $ 111,393 |

* Balances shown exclude reconciling items such as real property, furniture, and equipment.

SOURCE: PEER analysis of MUW Foundation accounting records.

# Chapter 5: In obtaining a line of credit in 2005 for the benefit of the university, did the MUW Foundation violate federal or state laws prohibiting private benefit and conflict of interest and did the foundation violate its fiduciary responsibilities?

**While the circumstantial evidence surrounding the foundation's approval and execution of the line of credit could create an appearance of impropriety, no evidence exists that the MUW Foundation violated federal or state laws prohibiting private benefit or conflict of interest in obtaining a line of credit from a bank that employed a member of the foundation's board of directors. With respect to its fiduciary responsibilities, the foundation imperiled restricted and endowed funds and risked breaching its fiduciary duty by pledging these funds as collateral for the line of credit.**

To obtain the answer to this question, PEER sought the answers to several related, more specific questions:

- Why did the foundation obtain a line of credit for the university in 2005?
- What federal and state laws prohibit private benefit and conflict of interest?
- What circumstances led to the allegation that the MUW Foundation may have violated federal or state laws prohibiting private benefit and conflict of interest by obtaining the line of credit?
- Do these circumstances rise to the level of a violation of state or federal laws prohibiting private benefit and conflict of interest?
- Did the circumstances surrounding the Foundation Board of Directors' obtaining the line of credit create an appearance of impropriety?
- Are the conflict-of-interest policies of the MUW Foundation sufficient to protect it from violations of private benefit and conflict of interest?
- Did the MUW Foundation imperil restricted and endowed funds and risk breaching its fiduciary duty by pledging these funds as collateral for the line of credit?

The following sections address these questions.

## Why did the foundation obtain a line of credit for the university in 2005?

***The foundation obtained a line of credit for the university in 2005 in order to provide a cash flow to the university for the repair of numerous university buildings damaged by a tornado in 2002. The university asked the foundation to obtain the line of credit because the university's cash flow needs for the repair project could not be met through the federal and state emergency management agencies' reimbursement processes.***

On November 10, 2002, a tornado damaged twenty-six buildings on MUW's campus. In response, during the Third Extraordinary Session of 2002, the Legislature authorized issuance of $10 million in bonds to serve as matching funds for assistance from the United States government. The bond proceeds were to be disbursed by the Mississippi Emergency Management Agency (MEMA) and the federal funds were to be received through the Federal Emergency Management Agency (FEMA).

In late 2003, because the university was unable to meet its cash flow needs for tornado recovery efforts through FEMA and MEMA (due in part to FEMA disputes regarding eligibility for certain repairs and improvements), the university approached the foundation seeking assistance in providing the necessary cash flow. In June 2004, the foundation's board was presented with the Executive Committee's approval for the foundation to secure a line of credit not to exceed $5.6 million to assist the university with tornado recovery. The Foundation's Board unanimously approved the Executive Committee's action.

## What federal and state laws prohibit private benefit and conflict of interest?

***Both federal and state laws prohibit a member of a foundation's board of directors from allowing funds raised for public benefit to benefit an insider personally.***

### Federal Laws Prohibiting Private Benefit

*Federal laws impose an excise tax on a private shareholder or individual having a personal or private interest in the organization's activities. They also prohibit the net earnings of a 501 (c) (3) organization from inuring to the benefit of a private shareholder or individual having a personal and private interest in the organization's activities. Also, other federal laws include the lending of money or other extension of credit as a self-dealing transaction and impose an excise tax on any direct or indirect act of self-dealing between a private foundation and a disqualified person.*

A fundamental requirement for tax-exempt organizations under Internal Revenue Code (IRC) Section 501 (c) (3) is that these organizations must be organized and operated in a way that no part of their net earnings *inure* (accrue) to the benefit of any private shareholder or individual. Organizations have lost their exempt status because of private benefit from unreasonable compensation; unreasonable fringe benefits; improper (generally personal) use of an organization's assets; forgiveness of debts owed by insiders; personal expenses being paid by the entity; low-interest or unsecured loans to insiders; unreasonable housing allowances; and other-than-arm's-length fair-market-value purchases, sales, or property rental between the organization and insiders. An organization is not prohibited from transacting business with members of its board of directors or paying competitive salaries. Certain guidelines and procedures must exist, however, to ensure that transactions do not unreasonably benefit the insider.

**An organization is not prohibited from transacting business with members of its board of directors or paying competitive salaries. Certain guidelines and procedures must exist, however, to ensure that transactions do not unreasonably benefit the insider.**

26 USC 501 (c) (3) prohibits the net earnings of a 501 (c) (3) organization from inuring to the benefit of a private shareholder or individual having a personal and private interest in the activities of the organization. Such a move is a conflict of interest and may constitute self-dealing, which covers a wide range of transactions that are prohibited even though they may be fair to the foundation and advantageous to all parties to the transaction. The directors of a 501 (c) (3) organization owe it a duty of loyalty, which requires a director to act in the interest of the charity rather than in the personal interest of the director or some other person or organization. In particular, the duty of loyalty requires a director to avoid conflicts of interest that are detrimental to the organization.

Lending money or other extension of credit between a private foundation and a disqualified person[8] is an act of self-dealing according to TITLE 26, Subtitle D, CHAPTER 42, Subchapter A, Section 4941 (d) (1) (B). Performing trust functions and certain general banking services by a bank that is a disqualified person is not an act of self-dealing if the services are reasonable and necessary in carrying out the exempt purposes of the private foundation and the compensation paid to the bank or trust company is not excessive (considering the fair interest rate for the use of the funds by the bank or trust company). 26 USC 4941 imposes an excise tax on any direct or indirect act of self-dealing.

As noted previously, directors of a 501 (c) (3) organization owe it a duty of loyalty. The duty of loyalty requires a director to act in the interest of the charity rather than in the personal interest of the director or some other person or organization. In particular, the duty of loyalty requires a director to avoid conflicts of interest that are detrimental to the organization.

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[8] The IRS defines a "disqualified person" as a foundation manager, which is an officer, director, or trustee of a foundation or a corporation of which more than 35 percent of the total combined voting power is owned by a foundation manager.

## State Laws Prohibiting Conflict of Interest

*MISS. CODE ANN. Section 79-11-269 (1) (a) (1972) provides that a conflict of interest transaction cannot be set aside solely because of a board member's conflicted interest if the material facts of the transaction and the conflicted board member's interest are disclosed prior to board approval.*

MISS. CODE ANN. § 79-11-269 (1972) provides that a conflict of interest transaction is a transaction with the corporation in which a director has an indirect interest in another entity of which he is a director, officer or trustee, is a party to the transaction, and the transaction is or should be considered by the board. According to MISS. CODE ANN. § 79-11-269 (1) (a) (1972), a conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if a full disclosure of material facts of the transaction and the director's interest were disclosed or known to the board or a committee and the board or committee authorized, approved, or ratified the transaction.

## What circumstances led to the allegation that the MUW Foundation may have violated federal or state laws prohibiting private benefit and conflict of interest by obtaining the line of credit?

***A foundation board member was an executive officer of the bank at the time that the foundation decided to move its general business from another bank to the bank employing the board member and several months after the move of the foundation's general banking business, said bank issued the line of credit to the foundation.***

On January 23, 2004, the MUW Foundation Board of Directors voted to move the foundation's primary banking business from AmSouth to the National Bank of Commerce (i. e., NBC; now Cadence) for "greater services and customer support." On April 21, 2004, the foundation informed AmSouth of its decision to move its entire banking relationship, including gift annuities, to NBC.

On May 21, 2004, AmSouth responded that it was "concerned about the reasons for the move." AmSouth conveyed that the foundation's motives in transferring to NBC were disingenuous and "that if all the board members knew all the facts they would believe it to be their fiduciary responsibility to review the decision and the process from which the decision was made." Board minutes reflect that a member of the Foundation Board of Directors who was also an NBC executive officer at the time recused himself from this discussion and vote.

On June 4, 2004, the Foundation Board of Directors voted to accept the vote of its Executive Committee to secure a line of credit to assist the university with construction costs related to the 2002 tornado which damaged several buildings, including the Fine Arts Building, Hogarth Dining Center, McDevitt Hall, the tennis courts and dormitories at the Mississippi School for Mathematics and Science, and destroyed the Pohl Physical Education Assembly Building. The tornado also shattered windows on campus and knocked down power lines. Although discussions regarding the MUW Foundation Board of Directors' vote to secure the line of credit, as reported in the board's official minutes, did not include mention of a specific bank from which the line of credit would be obtained during this meeting, it was noted in the minutes that a senior vice president of NBC was in attendance at the meeting of the Foundation Board of Directors. The member of the Foundation Board of Directors who was also an NBC executive officer did not recuse himself from the vote to proceed with securing the line of credit.

**Correspondence dated November 12, 2004, shows that the MUW Foundation President addressed the member of the Foundation Board of Directors in his official capacity as a National Bank of Commerce (NBC) executive officer to discuss the line of credit and foundation funds to be used as collateral. It should be noted that his November 19, 2007, conflict-of-interest statement disclosed his position with NBC.**

On July 20, 2004, the Foundation Board of Directors issued a Request for Proposals (RFP) for the line of credit to three banks: BankFirst, Union Planters, and NBC. The foundation addressed the RFP to NBC to the member of the board of directors who was also an executive officer of the bank, in his official capacity as an officer of NBC.

On September 8, 2004, the Chairman of the MUW Foundation Board of Directors accepted NBC's line-of-credit proposal because of "virtually identical" interest rates among the proposals and NBC's holding of investments to be used as security on the line of credit. According to the minutes of the October 14, 2004, meeting of the Foundation Board of Directors, the board voted to authorize the line of credit with NBC. The minutes record that the member of the Foundation Board of Directors who was also an executive officer of NBC recused himself from the vote.

Correspondence dated November 12, 2004, shows that the MUW Foundation President addressed the member of the Foundation Board of Directors in his official capacity as an NBC executive officer to discuss the line of credit and foundation funds to be used as collateral. It should be noted that his November 19, 2007, conflict-of-interest statement disclosed his position with NBC.

## Do these circumstances rise to the level of a violation of state or federal laws prohibiting private benefit and conflict of interest?

***No. The MUW Foundation did not violate the prohibition against private benefit under the United States Tax Code because the compensation (i. e., interest rate) paid to the bank was not excessive and the bank is presumably not a "disqualified person." The foundation did not violate the prohibition against conflict of interest transactions under MISS. CODE ANN. Section 79-11-269 (1972) because the foundation's board of directors was apprised of the material facts of the line of credit transaction, as well as the director's interest in the bank, before approving the line of credit.***

There is no evidence that the MUW Foundation violated the Internal Revenue Code's restriction against private benefit when it obtained the line of credit from NBC because the compensation paid to the bank (i. e., interest rate) was not excessive (i. e., set at market value and virtually identical to the interest rates submitted by the two other banks that responded to the foundation's request for proposals). Furthermore, NBC does not qualify as a "disqualified person" under the Internal Revenue Code because PEER found that no individual owns more than 2% of the bank's voting power.

**The board member's recusal during the January 23, 2004, meeting of the Foundation Board of Directors provides evidence that the board knew of his working relationship with NBC.**

Also, there is no evidence that a conflict of interest transaction occurred under MISS. CODE ANN. Section 79-11-269 (1972) because the board was apprised of all material facts of the execution of the line of credit transaction (e. g., price, length of time) and was aware of the member of the Foundation Board of Directors' association with National Bank of Commerce before it approved the transaction. The member's recusal during the January 23, 2004, meeting of the Foundation Board of Directors provides evidence that the board knew of his working relationship with NBC.

## Did the circumstances surrounding the Foundation Board of Directors' obtaining the line of credit create an appearance of impropriety?

***Yes. The circumstances surrounding the Foundation Board of Directors' obtaining the line of credit create an appearance of impropriety.***

**Foundations' images should be above reproach.**

PEER is concerned that a third party who might consider making gifts to the foundation might be concerned about transactions between the foundation and business entities whose officers serve on the Foundation Board of Directors. The Committee believes that the foundation should be sensitive to the potential that other persons might see such transactions as questionable and might allow such appearances to influence their decisions to make gifts to the foundation. Foundations' images should be above reproach.

The circumstances surrounding the foundation's approval and execution of the line of credit created an appearance of impropriety on the foundation's behalf, as evidenced by the following:

- the Foundation Board of Directors' approval to move the foundation's banking relationship to NBC several months before executing the line-of-credit agreement with NBC, with no apparent justification for the move other than a vague reference to "greater services and customer support;"
- the Chairman's acceptance of the line of credit from NBC prior to board approval;
- meetings of the Foundation Board of Directors during which the member of the board of directors who was also an executive officer of the bank was present for discussions on securing a line of credit, which meetings were also attended by the same senior executive officer of NBC who is the foundation's agent who assisted in the transfer of the foundation's banking relationship from AmSouth to NBC and who was not serving on the Foundation Board; and,
- foundation requests for proposals and correspondence regarding the line of credit addressed to the member of the Foundation Board of Directors in his official capacity as an executive officer of NBC, rather than an NBC commercial loan officer.

## Are the conflict-of-interest policies of the MUW Foundation sufficient to protect it from violations of private benefit and conflict of interest?

***The foundation's conflict-of-interest policies should be extended to include all staff who perform work for the foundation in order to protect them from possible violations of the prohibition against private benefit contained in 26 USC § 501 (c) (3).***

The foundation has adopted a conflict of interest policy for its board of directors; however, because the policy does not apply to all staff who perform work for the foundation, the foundation is exposed to the potential risk of entering into a transaction or arrangement that could violate the prohibition against private benefit contained in 26 USC § 501 (c) (3).

The foundation's conflict of interest policy requires its directors to disclose, in writing, on an annual basis, any known financial interest that the individual, or a member of the individual's family, has in any business entity that transacts business with the charity. However, the policy does not require disclosure of ownership interest percentages. The policy requires directors to act solely in the interests of the charity without regard for personal interests; includes written procedures for determining whether a relationship, financial interest, or business affiliation results in a conflict of interest; and prescribes a course of action in the event a conflict of interest is identified.

## Did the MUW Foundation imperil restricted and endowed funds and risk breaching its fiduciary duty by pledging these funds as collateral for the line of credit?

***Yes. The MUW Foundation Board imperiled restricted and endowed funds and risked breaching its fiduciary duty by pledging these funds as collateral for the line of credit obtained by the foundation for the benefit of the university. Further, the foundation paid $437,000 in interest to the financial institution on the line of credit, which reduced the amount of support given directly to the university by the foundation.***

*The foundation's board pledged the foundation's restricted and endowed assets as collateral for the line of credit.*

As previously discussed, in October 2004 the foundation's board selected a local financial institution's proposal for the line of credit and authorized the assignment of the foundation's assets as collateral for the loan.

**Because the foundation's board pledged the foundation's restricted and endowed assets as collateral for the line of credit, the financial institution had the legal authority to access restricted and endowed funds to satisfy the foundation's debt.**

In November 2004, representatives of the foundation and the university signed an agreement that stated that the university would pay the principal amount of the line of credit and the foundation would pay the interest on the line of credit. In exchange for paying the interest, the foundation and university agreed that the foundation would reduce its annual support to the university based on the amount of interest paid on the line of credit. The line of credit was secured by the foundation in April 2005 with a maturity of April 2007 and was later extended to mature in November 2007.

According to the line of credit note and the accompanying security agreement, the foundation's board pledged the foundation's restricted and endowed assets as collateral for the line of credit. Thus the financial institution had the legal authority to access restricted and endowed funds to satisfy the foundation's debt.

The board failed to recognize that pledging the restricted and endowed funds as collateral placed the funds at risk. If payments from MEMA or FEMA had been delayed beyond the point at which payment was required or if the university had been unable to make the principal payments, the foundation would have been liable for the principal and interest due on the line of credit and the financial institution possessed legal authority to call upon the collateral to satisfy the amount due. Although the chances that the restricted and endowed funds would be called upon to satisfy the line of credit were remote and the occasion did not arise, the board imperiled the funds by pledging them as collateral.

*The foundation's board risked breaching its fiduciary duty by pledging the foundation's restricted and endowed funds as collateral for the line of credit.*

The IRS defines a *fiduciary* as any person acting for another person and applies it to persons who have positions of trust on behalf of others. Since the foundation's board has been entrusted by donors to receive and manage funds, the board had and continues to have the fiduciary responsibility to act in the best interest of the donors in seeing that their wishes and directions for the donated funds are followed.

**Even though the line of credit might have been beneficial to the university, the restricted and endowed funds were not entrusted to the foundation for the purpose of serving as collateral for a line of credit.**

Although the foundation's board has a responsibility to support and assist the university, the board risked breaching its fiduciary duty to donors by pledging the foundation's restricted and endowed funds as collateral for the line of credit. Even though the line of credit might have been beneficial to the university, the restricted and endowed funds were not entrusted to the foundation for the purpose of serving as collateral for a line of credit; thus, using the funds in such a manner risked violating the board's fiduciary responsibility.

*The foundation paid $437,000 in interest to the financial institution on the line of credit, which reduced the amount of support given directly to the university by the foundation.*

In accordance with the line of credit agreement between the foundation and the university, the foundation paid the financial institution the interest on the line of credit. Over the life of the line of credit, the foundation paid approximately $437,000 in interest rather than in support to the university.

**The decision of the foundation's board to pay the interest on the line of credit directly impacted students by reducing the amount of unrestricted funds available for scholarships.**

Although one might argue that paying interest on the line of credit constituted support to the university, the decision of the foundation's board to pay the interest on the line of credit directly impacted students by reducing the amount of unrestricted funds available for scholarships.

PEER does not question the legality of the arrangement between the foundation and the university concerning the line of credit. However, PEER would caution the foundation's board that using restricted and endowed funds for purposes outside donor intent risks breaching the board's fiduciary responsibility and could undermine donors' confidence in the foundation.

# Chapter 6: Did the MUW Foundation violate the Internal Revenue Code's restrictions on lobbying by making payments to the university to employ a company to perform marketing services?

**The MUW Foundation did not violate restrictions on lobbying contained in the Internal Revenue Code because the work performed by the marketing firm and another firm hired to perform public relations work for the university did not attempt to influence legislation currently under consideration by a legislative body. Further, while the foundation reported lobbying expenses on its Form 990, the amount of these reported expenses did not exceed the limits established in the Internal Revenue Code for a 501 (c) (3) organization.**

To obtain the answer to this question, PEER sought the answers to several related, more specific questions:

- What restrictions on lobbying does the Internal Revenue Code place on a 501 (c) (3) organization such as the MUW Foundation?
- What circumstances led to the allegation that the MUW Foundation might have violated Internal Revenue Code restrictions on lobbying by its payments to the university to hire a company to provide marketing services?
- Did these circumstances rise to the level of a violation of Internal Revenue Code restrictions on lobbying?

The following sections provide answers to these questions.

## What restrictions on lobbying does the Internal Revenue Code place on a 501 (c) (3) organization such as the MUW Foundation?

***The Internal Revenue Code defines lobbying as a direct or indirect attempt to influence specific legislation currently being considered by a public body. The code places limits on the amount that a 501 (c) (3) organization can expend on such activities, based on the organization's total expenditures.***

The United States Tax Code does not prohibit 501 (c) (3) organizations from engaging in lobbying; rather, the code restricts the amount of lobbying that such an organization may engage in. Specifically, according to 26 USC 4911, a 501 (c) (3) organization may lose its tax-exempt status and be penalized a tax if a *substantial* part of its activities include attempts to influence specific legislation or official actions currently being considered by a public body (i.e., lobbying) either directly or indirectly. The foundation's level of total annual exempt-purpose expenditures allows it to expend up to the following amount on lobbying under 26 USC § 4911 (c) (2): $225,000 plus five percent of the excess of the foundation's total expenditures over $1.5 million (refer to Exhibit 14 on page 85 for the foundation's yearly limits for the period of FY 2004 through FY 2008).

According to 26 USC § 4911 (d) (1), an organization will be regarded as attempting to influence legislation if it attempts:

> *. . .to affect the opinions of the general public or any segment thereof, and any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.*

26 USC § 4911 (e) (2) defines "legislation" as:

> *. . .any action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.*

26 USC § 4911 (e) (3) limits action "to the introduction, amendment, enactment, defeat, or repeal of Acts, bills, resolutions, or similar items."

**501 (c) (3) organizations may engage in unlimited general advocacy or attempt to influence public opinion on issues without the activity being considered lobbying.**

501 (c) (3) organizations may, however, engage in unlimited general advocacy or attempt to influence public opinion on issues without the activity being considered lobbying. 26 USC § 4911 (d)(2) provides that lobbying does not include "making available the results of nonpartisan analysis, study, or research." A private foundation may fund an independent and objective report on a chosen subject, even if the report advocates a particular viewpoint on proposed legislation, so long as there is a sufficiently complete and balanced discussion to enable members of the public to form their own opinions or conclusions on the issue. This report is called a "nonpartisan analysis, study, or research" and it must be made widely available, as opposed to being distributed selectively to persons on only one side of the issue.

**Exhibit 14: Lobbying Expenses Reported by the MUW Foundation on IRS Form 990 for Fiscal Years 2004 through 2008, in Comparison to Total Foundation Expenses and the Maximum Nontaxable Lobbying Expenses Allowable by the Internal Revenue Code**

| Fiscal Year | Total Foundation Expenses | Lobbying Expenses Reported | Maximum Allowable Nontaxable Lobbying Expenses |
|---|---|---|---|
| 2004 | $1,829,363.00 | $ 518.00 | $241,468.15 |
| 2005 | 1,882,578.00 | 1,152.00 | 244,128.90 |
| 2006 | 2,177,944.00 | 432.00 | 258,897.20 |
| 2007 | 2,229,499.00 | 160.00 | 261,474.95 |
| 2008 | 2,652,762.00 | $0 | 282,638.10 |

SOURCE: MUW Foundation's Form 990 (Return of Organization Exempt from Income Tax) for fiscal years 2004 through 2008.

## What circumstances led to the allegation that the MUW Foundation might have violated Internal Revenue Code restrictions on lobbying by its payments to the university to hire a company to provide marketing services?

***The complainants believed that because the marketing firm's work concerning a name change for MUW would influence possible future legislative action necessary to effect a name change, the activities of this firm could constitute lobbying.***

This allegation focuses on the foundation's payments to the university for the hiring of a company to provide marketing services pursuant to a branding campaign for the university. One of the primary focuses of the campaign was to consider name changes for the university in order to bring the name more in line with the university's current identity.

While the university's legal name is the Mississippi University for Women, it began admitting men more than twenty years ago. The topic of a name change has been controversial among university alumnae and actually changing the name of the university would require the state legislature to pass a bill amending MISS. CODE ANN. Section 37-117-1 (1972) in order to effect the name change.

The following excerpt from the minutes of the September 22, 2008, meeting of the Executive Committee of the MUW Foundation Board of Directors reports the committee's unanimous approval of a co-operative relationship with the University and the marketing agency:

> *_________ presented Dr. Limbert's letter requesting $195,000 for this fiscal year to be used for branding. This is part of a multi-year project. This would be 7% of our support to the University.*
>
> *_______ also explained that the ____ Agency will be making a presentation to the full board. _______ stated that a bill will be received monthly. This is a multi-year project that will consist of marketing surveys, focus groups, and marketing research. _____ Agency and University will have the consulting relationship. The agency will work so many hours per month.*
>
> *_______ motioned to approve the co-operative relationship with the University and the _____ Agency to be billed monthly up to $195,000 with the approval of the University. It passed unanimously.*

**For the period of April 10, 2008, through April 8, 2009, the foundation paid a marketing agency $169,028.47 for its services for a branding campaign for the university, including research regarding a name change.**

In fall 2008, the university appointed a Naming Committee to gather suggestions for new names for the university. The marketing agency that the university hired with foundation funds designed a research study, comprised of online opinion surveys, and through focus group discussions tested proposed names from MUW faculty, staff, alumni, students, prospective students, and interested citizens. The agency then presented its report and results to the Naming Committee and, as a result, MUW requested that the agency conduct additional research into the popularity of potential new names for the university. The marketing agency's results will be forwarded to the MUW Leadership Committee, which is comprised of presidents of the Faculty Senate, Staff Council, Student Government Association, Alumni Association, and chair of the Board of Directors of the MUW Foundation. Upon selecting a name, this group will recommend one name to MUW's President and she will recommend one name on behalf of the university to the Board of Trustees of State Institutions of Higher Learning for its approval. Once a new name for the university has been agreed upon, the university will seek to have a bill introduced in the Legislature to legally change the university's official name in state law.

For the period of April 10, 2008, through April 8, 2009, the foundation paid the marketing agency $169,028.47 ($17,500 in FY 2008 and $151, 528.47 in FY 2009) for its services.

The complainants believed that because the work of the marketing agency could be used to influence future possible legislation to change the name of the university, it could be considered "lobbying." (See discussion in following section, page 87.)

In conducting its fieldwork, PEER identified a second company that the university recently hired using funds from the foundation to "assist with strategic planning and public relations related to the University's dispute with its former alumnae association." According to its own website, this company is "the South's leading state and federal government relations firm," providing a full scope of government relations services, including direct lobbying. Over the period of February 1, 2007, to May 1, 2009, the foundation paid $135,000 ($25,000 in FY 2007; $65,000 in FY 2008; and $45,000 in FY 2009) to this company for services provided to the university.

Finally, as will be discussed in the next section of the report, PEER notes that the MUW Foundation reported very small amounts of annual lobbying expenses on each of its Form 990s for fiscal years 2004 through 2008.

## Did these circumstances rise to the level of a violation of Internal Revenue Code restrictions on lobbying?

***Because neither the marketing firm nor the public relations/lobbying firm was performing work to influence specific legislation or official actions currently being considered by a public body, such activities did not fall within the Internal Revenue Code's definition of "lobbying."***

In the case of the university's hiring of a company to conduct a branding campaign, including conducting marketing research on a name change for the university, there was no active legislation being considered regarding a name change at the time that the company was conducting its work for the university. According to the university's attorney, at the point when there is a bill introduced to change the name of MUW, any company hired by the university to seek support for the name change would then register as a lobbyist for the university.

**While the foundation reported lobbying expenses on each of its Form 990s filed for fiscal years 2004 through 2007, none of the reported lobbying expenditures came close to exceeding the maximum allowable under the "substantial" test of the Internal Revenue Code applicable to the foundation.**

In the case of the company hired to conduct strategic planning and public relations for the university, according to the university's attorney, the university was not supporting or opposing any particular legislation during the 2009 session, therefore the company could not have engaged in lobbying for the university.

Finally, as shown in Exhibit 14, page 85, while the MUW Foundation reported lobbying expenses on each of its Form 990s filed for fiscal years 2004 through 2007, none of the reported lobbying expenditures came close to exceeding the maximum allowable under the "substantial" test of the Internal Revenue Code applicable to the foundation. In fact, even if the expenses of the two marketing and public relations companies hired by the foundation were added to the foundation's reported lobbying expenses for the appropriate fiscal years for which data was available (i. e., FY 2007 and FY 2008), the foundation's total "lobbying" expenses would still not have exceeded the maximum amount allowable in the Internal Revenue Code.

# Chapter 7: Has the foundation violated donor intent in handling restricted funds?

**Although no evidence shows that the foundation has used funds from specific restricted or endowed accounts for purposes not compliant with donor intent, the foundation pledged funds in the restricted and endowed accounts as collateral for a line of credit. Further, the foundation used $1.4 million from these accounts to cover the deficit in unrestricted funds for an extended period.**

***In testing for compliance with donor intent regarding individual restricted and endowed accounts, the foundation's independent CPA firm tested 86% of contributions for the year ending June 30, 2008, and found no violations of donor intent.***

PEER contacted the independent certified public accounting (CPA) firm that had conducted the audit of the MUW Foundation and inquired regarding the firm's procedures in verifying that donor intent followed in the receipt and disbursement of funds. In its response, the CPA firm noted that eighty-six percent of contributions (in terms of dollars) were tested by confirmation, reference to the minutes, or examination of supporting documentation. The CPA firm traced twenty contributions, of which fifteen were restricted or endowed, to the appropriate fund. The CPA firm noted no exceptions relating to contributions.

**Overall, the CPA firm that had audited the foundation did not note any findings or conditions that would impact the foundation's financial statements.**

Also, the CPA firm selected and reviewed for appropriate documentation sixty disbursements, which included thirty-six restricted or endowed items. One disbursement from a restricted fund did not have adequate supporting documentation. The CPA firm noted that the lack of documentation appeared to be an isolated incident and the finding was communicated to foundation management. The CPA firm noted that disbursements from restricted and endowed funds appear to have complied with the restrictions or endowment of funds. Overall, the CPA firm did not note any findings or conditions that would impact the foundation's financial statements.

PEER elected to accept the CPA firm's work in the areas of contributions and disbursements from individual accounts as sufficient in addressing concerns in these areas and did not perform additional fieldwork concerning contributions or disbursements during PEER's review.

***From April 2005 to November 2007, the foundation pledged funds in the restricted and endowed accounts as collateral for a line of credit. Further, the foundation used $1.4 million from these accounts to cover the deficit in unrestricted funds for an extended period.***

Although PEER noted no expenditures from individual restricted or endowed accounts for purposes not compliant with donor intent, from April 2005 to November 2007, the foundation pledged funds in the restricted and endowed accounts as collateral for a line of credit. Also, the foundation used $1.4 million from these accounts to cover the deficit in unrestricted funds for an extended period. As noted on pages 80 and 70, the foundation pledged funds from the restricted and endowed accounts as collateral on the foundation's line of credit and to cover the deficit in unrestricted funds for an extended period.

**The use of restricted and endowed accounts for purposes outside donor intent could be detrimental to the foundation's ability to raise funds.**

Although no restricted or endowed funds were ever expended by serving as collateral on the line of credit, as noted on page 80, the funds were placed at risk of being accessed by the financial institution to satisfy the line of credit. Further, although approximately $1.4 million in restricted and endowed funds was expended for unrestricted items, no accounting entry was made to reduce an individual account; rather, cash on hand, which represents money available from all restricted and endowed accounts, was used.

The use of restricted and endowed accounts for purposes outside donor intent could be detrimental to the foundation's ability to raise funds due to possible donor misgivings regarding how donated funds might be used by the foundation.

# Recommendations

## Relationship Between the Foundation and the University

1. According to *College and University Foundations: Serving America's Public Higher Education*:

   > *On many campuses, institutional personnel are used to staff the foundation. To preserve the foundation's independent nature, an arms-length relationship should exist between the foundation and the institution regarding the services the institution provides. Consequently, the foundation either should pay cash for the services provided or recognize these services as payments-in-kind.*

   Pursuant to recognizing the services provided to the university by the foundation as "payments-in-kind," the foundation should clearly differentiate between foundation work and university work and require its staff to maintain a daily record (preferably a computer-based record) of the time spent on each.

   The value of this time, as well as all other support provided by the university, including the value of space, utilities, equipment and other materials provided to the foundation, should be reported to the Internal Revenue Service as required on line 21 of the Support Schedule (Part IV-A) on the foundation's annual Form 990.

2. IHL should adopt a policy requiring university staff who provide work for university foundations and affiliated entities to maintain a record of the time spent on such work.

## Transparency

3. The foundation should include in its annual report a description of the programs and activities that it has in place to achieve the results reported in the annual report.

4. The foundation should develop a document retention policy that includes the storage and retrievability of foundation minutes and supporting documents. The foundation should explicitly make the President of the Foundation the official custodian of its records.

5. To ensure the authenticity of its record of board meetings, an officer of the board of directors should sign all final adopted board minutes.

6. The Chair of the Foundation's Board of Directors should ensure that the standing committees meet annually as required by the bylaws and keep an official written record of every meeting.

7. As a precondition to paying expenses for personal and professional services rendered on behalf of MUW, the foundation should require that the university enter into a written contract setting out responsibilities and compensation.

8. The foundation should implement a strategic planning process to address its current and future support of the Mississippi University for Women. The process should incorporate clear missions and goals for the foundation's support of the university and contain clear performance measures to evaluate the effectiveness of the strategic plan in meeting the purposes of the foundation.

9. Pursuant to IRS recommendations, the MUW Foundation should develop a whistleblower policy and a code of ethics and make them available on its website.

10. In order to improve its transparency and accountability, the foundation should make the following documents and information available on its website:

    - a copy of its strategic plan;
    - reports on its success in meeting the objectives laid out in the plan, including reports on the foundation's investment performance and asset allocation;
    - copies of its IRS Form 990 for the most recent three to five fiscal years;
    - its audited financial statements for the most recent three to five fiscal years;
    - a detailed record of its expenditure of unrestricted funds for the past fiscal year, including a detailed accounting of the expenditures for university assistance (reported expenditures should clearly tie to objectives contained in the foundation's strategic plan);
    - a copy of its operating agreement with the university (IHL bylaws state that this is a public document);
    - copies of all other policies developed in accordance with these recommendations; and,

- a more accurate description of its relationship to the university. For example, the foundation should include a statement explicitly stating that the Foundation's Board of Directors includes the university's President and Vice President for Institutional Advancement as non-voting ex-officio members and explaining that the university provides, at no cost to the foundation, all staff, office space, utilities, equipment and supplies.

11. The IHL Board of Trustees should adopt a policy requiring university foundations and affiliated entities to be transparent in their operations (with the exception of donor records) as a condition of their continued affiliation with a public institution of higher learning in Mississippi.

    Such university foundations and affiliated entities should, at a minimum, make the following information publicly available:

    - copies of their IRS Form 990s and audited financial statements for the past five fiscal years;
    - copies of their operating agreements with the university;
    - strategic plans;
    - performance data for all programs;
    - policies (including a policy governing the expenditure of unrestricted funds); and,
    - reports of budgeted and actual expenditures for the most recent fiscal year, including a breakdown of unrestricted fund expenditures.

    By July 1, 2010, all universities should enter into agreements with affiliated organizations that ensure compliance with these disclosure requirements.

## Management of Unrestricted Funds

12. The foundation should develop a clear policy governing the expenditure of unrestricted funds, including the percentage of such funds that it might want to make available to the university president for legal, but discretionary, purposes.

13. Throughout the year, the board should monitor its revenues and expenditures and make appropriate adjustments when revenues fall short of projections.

14. The board's Executive Committee should immediately cease approving non-budgeted expenditures above the limits established in its bylaws. In every case in which

the request for a non-budgeted expenditure exceeds the limit established in the bylaws, the request should be acted on by the full board.

15. Beginning immediately, during each fiscal year the foundation should limit expenditures from unrestricted funds to the amount of unrestricted fund revenues received. The foundation should continue with plans for a fundraising campaign in FY 2010 to address the deficit.
16. Foundation personnel should perform a monthly reconciliation of the foundation's cash balances, documenting available balances by fund—i. e., unrestricted, restricted, and endowed. Foundation personnel should report this information to the full board on a monthly basis.

## Private Benefit and Conflict of Interest

17. The foundation should revise its "Annual Statement Concerning Conflict of Interest" as completed by the foundation's board of directors to include the percentage of direct or indirect interest in any affiliated company that the director lists on the form.
18. The foundation's board of directors should expand its conflict of interest policy to include all staff who perform work for the foundation.

## Fiduciary Responsibilities

19. The foundation should remove from consideration the potential use of quasi-endowment funds to pay unrestricted fund expenses or serve as a reserve fund for unrestricted funds.
20. In keeping with the requirements of FASB 116, the foundation should not use restricted or endowed funds as collateral for loans, lines of credit, or other debt instruments without obtaining written permission from the donor for revised use of such funds. Also the foundation should not use restricted or endowed funds for an extended period of time to cover a deficit in unrestricted funds.

# Appendix: Sources for PEER's Criteria for Best Practices: The Association of Governing Boards of Universities and Colleges and The Panel on the Nonprofit Sector

## Association of Governing Boards of Universities and Colleges

According to its website, the Association of Governing Boards of Universities and Colleges, which was founded in 1921, is "the only national association that serves the interests and needs of academic governing boards, boards of institutionally related foundations, and campus CEOs and other senior-level campus administrators on issues related to higher education governance and leadership."

The association serves more than 34,000 individuals and 1,200 member institutions, including Mississippi's Board of Trustees of State Institutions of Higher Learning, plus public college and university foundations' boards, including the Mississippi State University Foundation and the University of Mississippi Foundation.

Other members of the association as of January 5, 2009, included: Auburn University Foundation, University of Southern California, Harvard University, Yale University, Amherst College, Tulane University, Louisiana State University Foundation, University of Minnesota Foundation, Dartmouth College, Columbia University, University of North Carolina at Chapel Hill Endowment, University of Virginia, Georgia Tech Foundation, Inc., Virginia Tech Foundation, Inc., and Kansas University Endowment Association. The association's publication entitled *College and University Foundations: Serving America's Public Higher Education*, Joseph F. Phelan and Associates, Copyright 1997 ("A Handbook for Members and Chief Executives of Foundations and Governing Boards") provided much of the material used by PEER to define best practices for establishing, managing, and operating a public university foundation.

## The Panel on the Nonprofit Sector

PEER also used material from The Panel on the Nonprofit Sector to identify best practices that can apply to public university foundations. The panel, comprised of "24 distinguished leaders from public charities and private foundations from around the country," was convened in October 2004 at the encouragement of the leaders of the U. S. Senate Finance Committee to develop and refine recommendations to Congress, the Internal Revenue Service, and the nonprofit sector community for preventing unscrupulous individuals from abusing charitable resources for personal gain. The panel brought together thousands of people involved with charities and foundations for a thorough examination of the sector's governance, transparency, and ethical standards.

The panel issued its first report, *Strengthening Transparency Governance Accountability of Charitable Organizations*, to Congress and the nonprofit sector in June 2005, followed by its issuance of *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*, in October 2007. According to the 2005 report:

> *. . .the recommended actions offer a guide to maintaining the essential balance between adequate oversight that keeps potential abusers from using the sector to benefit themselves and safeguarding the independence of organizations in facilitating the opportunity for them to contribute to the wellbeing of society.*

SOURCE: www.agb.org; *College and University Foundations: Serving America's Public Higher Education* by Joseph F. Phelan and Associates (Washington, D. C.: Association of Governing Boards of Universities and Colleges), 1997; *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations* (Washington, D. C.: Panel on the Nonprofit Sector), October 2007; *Strengthening Transparency Governance Accountability of Charitable Organizations* (Washington, D. C.: Panel on the Nonprofit Sector), June 2005.

Mississippi University
for Women
*A Tradition of Excellence for Women and Men*

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August 6, 2009

Max K. Arinder, Ph.D.
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Joint Committee on Performance
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***Sent Via Federal Express***

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PEER COMMITTEE

RE: The Mississippi University for Women Foundation

Dear Dr. Arinder:

On behalf of The Mississippi University for Women Foundation ("Foundation")[1], I want to thank you and your staff for the work done in connection with the fiscal and management audit[2] of the Foundation. The PEER staff was very professional at all times during the process and their cooperation was appreciated.

We are very proud of the Foundation and the progress it has made in recent years under new leadership. PEER has brought to the Foundation's attention a number of specific recommendations, which will be addressed below. Some of the suggestions made by PEER will be a challenge, given the size of the Foundation and the resulting limitations. Other recommendations can and will be implemented promptly.

## ***Response to Recommendations***

## Relationship Between the Foundation and the University

**PEER RECOMMENDATION**

1. According to College and University Foundations: Serving America's Public Higher Education:

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[1] The Foundation is a Mississippi non-profit. It is not a state agency or independent contractor of a state agency. For these reasons, and others, the Foundation reserved all of its rights to object to participation in the audit.

[2] The audit was prompted by a complaint from three MUW alumnae shortly after the historic alumnae association was disaffiliated from Mississippi University for Women.

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> *On many campuses, institutional personnel are used to staff the Foundation. To preserve the Foundation's independent nature, an arms-length relationship should exist between the Foundation and the institution regarding the services the institution provides. Consequently the Foundation either should pay cash for the services provided or recognize these services as payments-in-kind.*

Pursuant to recognizing the services provided to the university by the Foundation as "*payments-in-kind*," the Foundation should clearly differentiate between Foundation work and university work and require its staff to maintain a daily record (preferably a computer-based record) of the time spent on each.

The value of this time, as well as all other support provided by the university, including the value of space, utilities, equipment and other materials provided to the Foundation, should be reported to the Internal Revenue Service, as required on line 21 of the Support Schedule (Part IV-A) on the Foundation's annual Form 990.

**FOUNDATION RESPONSE**: ***The Foundation will determine the most efficient method of accounting for work performed by university staff directly benefitting the Foundation. Significant changes have been made to the Form 990, and the Foundation will work closely with its external auditor to insure its proper completion.***

**PEER RECOMMENDATION**

2. IHL should adopt a policy requiring university staff who provide work for university foundations and affiliated entities to maintain a record of the time spent on such work.

**FOUNDATION RESPONSE:** ***The Foundation will comply with IHL policies pertaining to work performed by university staff.***

## Transparency

**PEER RECOMMENDATION**

3. The Foundation should include in its annual report a description of the programs and activities that it has in place to achieve the results reported in the annual report.

**FOUNDATION RESPONSE:** ***The Foundation currently produces a comprehensive annual report, and will continue to refine the report to reflect the Foundation's work.***

**PEER RECOMMENDATION**

4. The Foundation should develop a document retention policy that includes the storage and retrievability of Foundation minutes and supporting documents. The Foundation should

explicitly make the President of the Foundation the official custodian of its records.

**FOUNDATION RESPONSE:** ***The Foundation will consider the development of a formal document retention policy, and will consider the appointment of the President of the Foundation as the official custodian of its records.***

**PEER RECOMMENDATION**

5. To ensure the authenticity of its record of board meetings, an officer of the Board of Directors should sign all final adopted board minutes.

**FOUNDATION RESPONSE:** ***Currently, at meetings of the Foundation Board of Directors, minutes of the prior meeting are presented by the Foundation Secretary, considered and approved, which serves to authenticate the minutes. The Foundation will research and incorporate best practices associated with the adoption of the minutes of its meetings.***

**PEER RECOMMENDATION**

6. The Chair of the Foundation's Board of Directors should ensure that the standing committees meet annually as required by the bylaws and keep an official written record of every meeting.

**FOUNDATION RESPONSE:** ***The Chair of the Foundation's Board of Directors currently ensures that all standing committees meet annually. The Chair will work with the Foundation President and the Chairs of the standing committees to ensure compliance with its bylaws relative to the recording of minutes of meetings of its standing committees. Currently, at meetings of the Foundation Board of Directors, minutes of the committees are presented by the Foundation Secretary, considered and approved, which serves to document actions of the committee.***

**PEER RECOMMENDATION**

7. As a precondition to paying expenses for personal and professional services rendered on behalf of MUW, the Foundation should require that the university enter into a written contract setting out responsibilities and compensation.

**FOUNDATION RESPONSE:** ***Subject to the rules of the IHL and affiliated entities, the Foundation will urge the university to enter into written contracts, absent exigent circumstances.***

**PEER RECOMMENDATION**

8. The Foundation should implement a strategic planning process to address its current and future support of Mississippi University for Women. The process should incorporate clear missions and goals for the Foundation's support of the university and contain clear

performance measures to evaluate the effectiveness of the strategic plan in meeting the purposes of the Foundation.

**FOUNDATION RESPONSE:** ***The Foundation has had informal discussions among its Board in the recent past regarding the implementation of a strategic planning process that would incorporate involvement of the university's leadership as well as the MUW Alumni Association. The Foundation will continue to work toward the adoption of a written strategic plan.***

**PEER RECOMMENDATION**

9. Pursuant to IRS recommendations, the Foundation should develop a whistleblower policy and a code of ethics and make them available on its website.

**FOUNDATION RESPONSE:** ***The Foundation will consider the development of a whistleblower policy and a code of ethics. It should be noted that the university is a member of the Council for the Advancement and Support of Education (CASE) which adopted a Code of Ethics for its members in 1992.***

**PEER RECOMMENDATION**

10. In order to improve its transparency and accountability, the Foundation should make the following documents and information available on its website:

- a copy of its strategic plan;
- reports on its success in meeting the objectives laid out in the plan, including reports on the Foundation's investment performance and asset allocation;
- copies of its IRS Form 990 for the most recent three to five fiscal years;
- its audited financial statements for the most recent three to five fiscal years;
- a detailed record of its expenditure of unrestricted funds for the past fiscal year, including a detailed accounting of the expenditures for university assistance (reported expenditures should clearly tie to objectives contained in the Foundation's strategic plan);
- a copy of its operating agreement with the university (IHL bylaws state that this is a public document);
- copies of all other policies developed in accordance with these recommendations; and,
- a more accurate description of its relationship to the university. For example, the Foundation should include a statement explicitly stating that the Foundation's Board of Directors includes the university President and Vice-President for Institutional Advancement as non-Voting ex-officio members and explaining that the university provides, at no cost to the Foundation, all staff, office space, utilities, equipment and supplies.

**FOUNDATION RESPONSE:** ***The Foundation recently created a new website which includes the Foundation's Annual Report. The Foundation will continue to enhance its website as time and resources permit.***

**PEER RECOMMENDATION**

11. The IHL Board of Trustees should adopt a policy requiring university Foundations and affiliated entities to be transparent in their operations (with the exception of donor records) as a condition of their continued affiliation with a public institution of higher learning in Mississippi. Such university Foundations and affiliated entities should, at a minimum, make the following information publicly available:

- copies of their IRS Form 990s and audited financial statements for the past five fiscal years;
- copies of their operating agreements with the university;
- strategic plans;
- performance data for all programs;
- policies (including a policy governing the expenditure of unrestricted funds); and,
- reports of budgeted and actual expenditures for the most recent fiscal year, including a breakdown of unrestricted fund expenditures.

By July 1, 2010, all universities shall enter into agreements with affiliated organizations that ensure compliance with these disclosure requirements.

**FOUNDATION RESPONSE:** ***The Foundation will comply with IHL policies pertaining to affiliated entities.***

## Management of Unrestricted Funds

**PEER RECOMMENDATION**

12. The Foundation should develop a clear policy governing the expenditure of unrestricted funds, including the percentage of such funds that it might want to make available to the university President for legal, but discretionary, purposes.

**FOUNDATION RESPONSE:** ***The Foundation's Board of Directors, through its Finance Committee, will take this recommendation under consideration.***

**PEER RECOMMENDATION**

13. Throughout the year, the Board should monitor its revenues and expenditures and make appropriate adjustments when revenues fall short of projections.

**FOUNDATION RESPONSE:** ***The Foundation's Finance Committee currently reviews the Foundation's financial statements (including revenues and expenditures) throughout the year.***

**PEER RECOMMENDATION**

14. The Board's Executive Committee should immediately cease approving non-budgeted expenditures above the limits established in its bylaws. In every case in which the request for a non-budgeted expenditure exceeds the limit established in the bylaws, the request should be acted on by the full Board.

**FOUNDATION RESPONSE:** ***The Foundation Executive Committee will take this recommendation under consideration.***

**PEER RECOMMENDATION**

15. Beginning immediately, during each fiscal year the Foundation should limit expenditures from unrestricted funds to the amount of unrestricted fund revenues received. The Foundation should continue with plans for a fund-raising campaign in FY 2010 to address the deficit.

**FOUNDATION RESPONSE:** ***The Foundation has already adopted a balanced budget for its unrestricted funds for Fiscal Year 2010.***

**PEER RECOMMENDATION**

16. Foundation personnel should perform a monthly reconciliation of the Foundation's cash balances, documenting available balances by fund—i. e., unrestricted, restricted, and endowed. Foundation personnel should report this information to the full Board on a monthly basis.

**FOUNDATION RESPONSE:** ***The Foundation's Finance Committee will take this recommendation under consideration.***

## Private Benefit and Conflict of Interest

**PEER RECOMMENDATION**

17. The Foundation should revise its "*Annual Statement Concerning Conflict of Interest*" as completed by the Foundation's Board of Directors to include the percentage of direct or indirect interest in any affiliated company that the director lists on the form.

**FOUNDATION RESPONSE:** ***The Foundation will take this recommendation under consideration.***

**PEER RECOMMENDATION**

18. The Foundation's Board of Directors should expand its conflict of interest policy to include all staff who perform work for the Foundation.

**FOUNDATION RESPONSE:** ***The Foundation will expand its existing conflict of interest policy to include Foundation staff.***

## Fiduciary Responsibilities

**PEER RECOMMENDATION**

19. The Foundation should remove from consideration the potential use of quasi-endowment funds to pay unrestricted fund expenses or serve as a reserve fund for unrestricted funds.

**FOUNDATION RESPONSE:** ***The Foundation will continue to review and implement appropriate methods to fund the needs of the university and the necessary operations of the Foundation.***

**PEER RECOMMENDATION**

20. In keeping with the requirements of FASB 116, the Foundation should not use restricted or endowed funds as collateral for loans, lines of credit, or other debt instruments without obtaining written permission from the donor for revised use of such funds. Also the Foundation should not use restricted or endowed funds for an extended period of time to cover a deficit in unrestricted funds.

**FOUNDATION RESPONSE:** ***The Foundation's Treasurer will take this recommendation under consideration.***

Sincerely,

THE MISSISSIPPI UNIVERSITY FOR
WOMEN FOUNDATION

MD

R. Edward Betcher, M.D.
Chair, Board of Directors

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