

To: Members of the Movement Charter Drafting Committee
From: Wikimedia Foundation legal affairs team (governance)
Date: January 5, 2024

Re: Replies to the MCDC's questions on legal responsibilities

Thank you for submitting these questions. The Wikimedia Foundation Legal Affairs team has prepared the following memo in response.

The memo is presented in two distinct parts. First, you will find some general comments, providing background on themes that appear throughout the questions. In the second part, we respond to each question. The goal of the initial section is to establish context; many of the questions asked are interrelated, and are also tightly connected to the legal environment in which the Wikimedia Foundation and Wikimedia projects operate. Our hope is that discussing some key elements of that environment will provide helpful context for the specific answers that follow.

General Comments

Responsibilities as Project Host

Many of the Foundation's current activities, including product and technology development and methods of banner fundraising, are inextricably tied to its role as the host of the Wikimedia projects.

MediaWiki and other pieces of technology that the Foundation develops for the Wikimedia projects are open source, and [accept non-staff contributions](#). In that way, the Foundation shares decision making in the area of product and technology. However, the Foundation needs to maintain some level of oversight of the contributions to the sites, both technical and content. This allows the Foundation to undo potentially malicious contributions to the code, and to protect the projects by following applicable law¹ in line with Human Rights standards² that are relevant for Wikimedia's work. For example, as the host of the Wikimedia projects, the Wikimedia Foundation may be responsible for removing and reporting child abuse imagery, or

¹ For the Wikimedia Foundation's formal policy on determining applicable law, see: https://meta.wikimedia.org/wiki/Legal/Legal_Policies#Applicable_Law_Determination

² In addition to legal obligations, all organizations need to consider additional steps under human rights obligations as outlined in the United Nations' Guiding Principles for Business and Human Rights: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf
The Wikimedia Foundation has implemented these commitments in its [Human Rights Policy](#).

other content subject to a court order. It is a step that the Foundation usually only takes when necessary, and when this step is taken it must be handled rigorously and transparently.³

Place of Incorporation & Applicable Law

While the local laws of the place where the Foundation is headquartered affect every part of its operations, the laws that have been and continue to be most important are the ones that govern what content the Foundation can host on the Wikimedia projects. Because the Foundation is based in the United States, it receives the protection of the [First Amendment, Section 230](#), and US copyright law (including the [DMCA's safe harbor provisions](#) and [fair use](#)). With these protections, the community self-governance model of the projects can thrive.

The First Amendment helps to minimize the Foundation's exposure to claims of defamation for Wikipedia article content. Section 230 shields the Foundation from liability more generally for project content added by users. The DMCA further protects the Foundation from liability for copyright infringement by user-uploaded content, as long as it complies with the notice-and-takedown process. And the statutory protections for fair use in the US enable the Foundation to continue to host some copyright-protected material, particularly given the projects' educational purpose. These strong legal protections are what allow the Foundation to maximize volunteer editors' control over project content with as little interference as possible. If the Wikimedia projects were based in a different country, it would not allow communities the same amount of editorial control over the projects and would require greater involvement from the project host.

Because so many of the Foundation's responsibilities are tied to its role as project host, as described above, the laws related to project content are relevant to any conversation about sharing responsibility or global organizational structures. The Foundation's lawyers evaluate the impact on jurisdiction and applicable law when advising on a wide range of the Foundation's activities, including [setting up data centers](#), hiring staff, fundraising, grantmaking, organizing in-person events, and formalizing affiliate relationships.

There are, of course, other US laws relevant to the Foundation's work, as well as non-US laws that apply to the Foundation. A growing trend in global Internet regulation, taking a path paved in particular by the [EU privacy regulations](#), is to attempt to explicitly or implicitly claim jurisdiction over any online platform that serves users in a particular country even if the platform is not located there. The Foundation needs to navigate this increasingly complicated regulatory landscape, just like every other [large platform](#). This regulatory landscape is currently [going through unprecedented change](#) globally, including increasing pressure for platforms to have more direct responsibility for content that it hosts.

³ The Wikimedia Foundation publishes a regular transparency report to describe these steps: <https://wikimediafoundation.org/about/transparency/2023-1/>

There may be times when non-US laws would be more favorable to the Foundation's operations and ability to support the global Wikimedia community than laws in the United States. However, splitting up various operations and dividing them among different separate organizations comes at the cost of increasing organizational complexity and having correspondingly higher administrative operational costs. And it could make the projects more susceptible to being governed by more countries' laws regarding what online content is allowed—leading to [a potential “race to the bottom” where the most restrictive laws win](#). Being mindful of these administrative costs and avoiding restrictive content laws, there are still opportunities to change how the Wikimedia movement operates—particularly in grant funding decisions, affiliate recognition and strategy, and aspects of product/technology development.

Fiduciary Duties

Members of the Board of Trustees are [fiduciaries](#) of the Wikimedia Foundation. A "fiduciary" is a legal term to describe a person who is in a position of trust. Fiduciaries must act reasonably, prudently, and in good faith.⁴ In the context of a nonprofit organization dedicated to act in the public interest—such as the Foundation—“fiduciary duties” are the legal duties of the organization's governing board, as the board supports the organization in pursuing its mission.

As fiduciaries, trustees have a variety of different responsibilities that can be broken down into different components, including a duty of care, duty of loyalty, duty of obedience, and duty of confidentiality. All new members of the Wikimedia Foundation Board of Trustees receive [a legal orientation that explains their fiduciary obligations](#), and there are various other publicly available resources that discuss the fiduciary responsibilities that accompany service on the board of a US-based organization.⁵

As a public charity, the Foundation's interests are defined by its [mission](#). Trustees are responsible for providing the oversight necessary to ensure that the Foundation's programs and use of resources are aligned with that mission. Trustees of the Foundation, then, must act based on what they believe will best help the Foundation achieve its mission and not based on what would be best for them personally or for any private gain. They are not legally allowed to engage in self-dealing.⁶

⁴ The fiduciary standards for a Florida Not-for-Profit Corporation are in Chapter [617, Section 830\(1\)](#) of the Florida Statutes. These standards are similarly adopted across the United States; see the [Section 8.30](#) of the Revised Model Nonprofit Corporation Act (1987).

⁵ Here are a few more from the [National Council of Nonprofits](#), [Board Effect](#), and [Northern Trust](#), as well as a [detailed set of guidelines](#) prepared by the California Attorney General.

⁶ See the IRS's definition of self dealing:

<https://www.irs.gov/charities-non-profits/private-foundations/acts-of-self-dealing-by-private-foundation>

Trustees' fiduciary obligations mean that they remain responsible for the use of the resources entrusted to the Foundations, even if some decision-making has been delegated to others. Before delegating any authority, the Board must be confident that there are appropriate measures in place to ensure that the resources are used in compliance with the law and in service of the Foundation's mission.⁷ Their responsibilities as fiduciaries obligate them to consider not only whether a particular action would further the mission but also whether it would be an appropriate use of resources.

Specific Responses

1. *Are there any examples of decision-making arrangements where a US-based 501(c)(3) organization, in particular, registered under Florida law, is part of an international, institutional setup where decision-making/authority is shared?*

No, research has not turned up any organization in precisely this structure. The Wikimedia movement is in a unique position given the level of shared authority and open decision making process, especially related to hosting an online platform as widely used as Wikipedia.

As described in the section above on *Place of Incorporation & Applicable Law*, one significant aspect of the Wikimedia movement is its desire to operate internationally while minimizing the number of compounding jurisdictional requirements that would limit what can be hosted on the Wikimedia projects. Other social movements that are dedicated to in-person activities have different strategic considerations for which laws apply to their activities and their physical locations.

2. *What are potential legal scenarios that would allow a new body (i.e. Global Council - GC) to have formal authority (i.e. authority to make decisions or veto unilaterally) in topics like Fundraising, Grantmaking, and Product and Tech development when such decisions are currently made exclusively by WMF? Are there different theoretical setups where this is feasible, or nearly so?*

Currently, decisions related to Fundraising, Grantmaking, and Product & Tech development are shared to some degree among the Foundation and other movement bodies. The Wikimedia Foundation has standards for certain fundraising activities that use shared resources, but Wikimedia movement agreements allow all Wikimedia organizations to engage in fundraising on their own without additional permissions.⁸ The Wikimedia Foundation issues grants based on recommendations from [regional committees](#) composed of volunteers, which gives volunteers significant responsibility over where funds are distributed. The Wikimedia Foundation incorporates community input into its own planning decisions and works in

⁷ This [article from Venable LLP](#) contains additional discussion on the delegation of authority.

⁸ All Wikimedia Chapter Agreements permit fundraising activities under the chapter's name, for example.

collaboration with volunteers and other organizations in multiple aspects of Product & Technology development.

It is certainly possible for these responsibilities to be shared with a new body. One example would be the creation of the regional grant committees. These committees determine the funding allocations that are implemented by the Wikimedia Foundation. The Global Council could be built upon a similar or extended model to share decision making responsibilities with respect to grant funding decisions, affiliate recognition and strategy, and aspects of product/technology development.

- 3. In order for such a figure to have formal authority, does it make a difference if it's a separate registered legal entity? Does it matter where it is registered (e.g. Making the GC a registered nonprofit in another US state or country like Switzerland? You mentioned an option for formal authority would be reforming the Board's structure, and making the GC a subcommittee composed of Trustees. Is this the only scenario? If so, what are the steps to proceed with such a reform? Is there a limit to the new number of Trustees? Alternatively, would it be possible to reform the board so that the majority of its members are selected from a GC representing the various communities?*

Establishing a new entity or determining the right structure for the Global Council's relationship with the Board of Trustees will depend on a number of preliminary factors, starting with the Global Council's purpose. The purpose will determine the resources that the Global Council will need to conduct its work, as well as the most efficient and prudent way to manage those resources in light of the risks that the work will face. Collectively, the purpose, resources, and risks will inform the choice of the best committee or organizational structure, as well as other factors like the country for registration. For example, certain tasks may be efficiently accomplished by setting up a committee connected to the Wikimedia Foundation. Other activities might be more appropriate for setting up an entity.

The number of trustees is set in the Bylaws, which the Board of Trustees can amend.⁹ The current Bylaws allow for there to be [9 to 16 trustees](#); the Board has appointed 12. The Board can also amend the Bylaws to change [how trustees are selected](#) and the number of trustees selected using each method. If the Board agrees, this could include adding a category of trustees who are selected from the Global Council, even if the Global Council is not set up as a legal entity.

- 4. WMF as a US charitable 501 (c)(3) organization, currently heading an international movement, is seeking to improve the participation of its international stakeholders through the establishment of a 'Global Council'. In one scenario, the Board of Trustees delegates authorities and annual funds to this Council, which in turn makes recommendations to the board, which the board is then expected to approve. In a second, possibly sequential scenario, the Global*

⁹ There is a legal minimum number of trustees (3), but no maximum. See [Chapter 617, Section 803 of the Florida Statutes](#).

Council turns into the General Assembly (GA) of a new international nonprofit B, most likely (though not necessarily) incorporated outside the US. Through a series of agreements the US Organization then transfers authorities, functions, and funds to the new organization. WMF is now a voting member of the GA of organization B, along with other affiliates and individuals around the world (similar to AI or Greenpeace). Questions:

- a. *What risk, if any, do any of those scenarios present for tax exemption status or for WMF's Fiduciary duties, and how would you mitigate them? Is there case law precedence of a 501(c)(3) losing exemption because of the influence or transfer of its duties of an international body or organization? Are there examples of US organizations successfully managing these challenges over time?*

The Foundation's 501(c)(3) status is unlikely to be impacted by a new movement governance structure. That said, the Board of Trustees would need to consider any proposed changes in light of the Wikimedia Foundation's charitable purpose, which include maintaining and operating Wikipedia and related free educational projects. Maintaining an organization's 501(c)(3) status is primarily about ensuring that its activities are related to its charitable purpose,¹⁰ and filing the appropriate paperwork each year. There are a few limitations,¹¹ but in general 501(c)(3) organizations have a great deal of flexibility in their operations, associations, and expenditures that advance their charitable purpose.

- b. *What steps must be taken to mitigate such a risk, both in the by-laws/charter of WMF and nonprofit B, and/or in the agreements between them?*

While it's unlikely that the Foundation's nonprofit status would be at risk, this risk will need to be assessed based upon the specific situation. Before considering how the setup is implemented—like the bylaws, charters, and agreements—it would be important to come to an

¹⁰ For a more detailed overview of what is required for ensuring that activities are related to an organization's charitable purpose, see the IRS's memorandum on [International Grants and Activities](#) (2005):

A section 501(c)(3) organization will not jeopardize its exemption even though it distributes funds to organizations that are not themselves charities. The exempt organization must "ensure" use of the funds for permitted purposes by limiting distributions to specific projects that further its own purposes. The exempt organization also needs to retain control and discretion as to the use of the funds and maintain records establishing that the funds were used for section 501(c)(3) purposes. Rev. Rul. 68-489, 1968-2 C.B. 210. These procedures do not make any distinction regarding the geographic location of the non-exempt organizations.

Similarly, a section 501(c)(3) organization will not jeopardize its exemption even though it distributes funds to individuals, provided the distribution is on a charitable basis in furtherance of the organization's purpose. Again, there is no distinction regarding the geographic location of individual distributees. In order to substantiate that individual distributions are appropriate, the organization needs to maintain records and case histories showing the name and address of each recipient, the amount distributed to each, the purpose for which the aid was given, the manner in which the recipient was selected and the relationship, if any, between the recipient and members, officers, or trustees of the organization. Rev. Rul. 56-304, 1956-2 C.B. 306.

¹¹ For example, there are [restrictions on lobbying and a prohibition on "political campaign activity"](#).

agreement on the underlying goals and scope of the change. This will enable all of the parties to identify and prioritize the risks to which the change may create. Once there is an agreement on the goal, there is more opportunity to: (1) creatively design a structure that will meet these underlying goals, (2) conduct a thorough review of the project's legal implications, and (3) develop a framework for successfully carrying out the change over time while confronting issues and challenges that arise.

- c. *Is the fact that WMF delegating annual funds for the GC's operation giving WMF any legal control or authority over the GC, or would it be an independent body besides its financial control/oversight by WMF? Are there any other legal implications to consider with the fact that the GC would be funded by WMF?*

Grant funding does not require legal authority or control over the recipient's overall activities, as long as the funded activities are aligned with the grantee's charitable purpose. A grant's purpose as defined in the grant agreement can avoid potential compliance risks and ensure the recipient retains independence.

5. *If there is no legal scenario for such formal authority to be achieved, what would be the alternative? Are there any other alternatives than just having the GC be an advisory body? If such as the case, this advisory body would provide WMF with decision-making advice for WMF to confirm such or not. Is there a scenario where there could be a binding agreement between the GC and WMF to guarantee that recommendations coming from the GC are always reviewed and approved, or that terms are discussed, without creating any risks to its fiduciary duties? Could this be an MoU, or a contract, or would it matter what legal instrument is used? Should the GC be a legally registered entity to be a party to such an agreement?*

For the sake of clarity, it would probably be helpful to have governing documents that explain the purpose of each body and their relationship to each other. A Memorandum of Understanding (MoU) would be one efficient way to do that—it can be a useful tool in memorializing an agreement that includes broad principles. An organization or group of people do not need to be legally registered to be party to an MoU.

6. *We're exploring a scenario where the GC is composed of a General Assembly (similar to this proposed model by some volunteers) (~100-30 people representing every part of the movement), and for it to have a Governing International Board of ~10-30 people (similar to a Parliament model, such like the [one of Amnesty International](#)). Based on the questions above, is there any difference or legal implication if the GC follows a parliamentary / General Assembly model versus a smaller body when it comes to the questions around formal authority and legal registration? Can/should the Governing International Board be a separate legal entity so it can enter into agreements?*

The form of the Global Council will certainly impact its operations and methods of functioning. Multiple structures, including this sort of general assembly model, could be fit for purpose,

depending upon the goals of the organization. After there is additional clarity on the Global Council's purpose and responsibilities, it will be possible to investigate its potential forms in more detail in order to determine which form would be most conducive to achieving the Global Council's goals.

- 7. What would the implications be for the charter if we were to consider having an interim global council? The responsibilities of this interim council could be setting up various committees to start work on policies and procedures for fundraising, hub recognition/derecognition, affiliate recognition/derecognition, funds distribution, and similar. As well, it would be charged with developing the proposal for a permanent global council under more formal auspices, to take to the community subsequently (probably 2-3 years later), with approval similar to the current ratification plan, and resulting in modification of the charter (Noting that this is an early form of this proposal.)*

The legal implications of an interim Global Council will not be significantly different from a Global Council that is intended to be permanent.

Since it is noted that this is in an early form of consideration, one non-legal point to consider is how any proposal will be ready to iterate and adapt over time. The Wikimedia movement's challenges and opportunities have evolved since the start of the movement strategy process, and will likely continue to evolve rapidly alongside changes to the technology and environment. Any permanent solution should likely allow for its structure and operations to be assessed and updated. However, labeling a Global Council as "interim" could create a perception that the idea itself is temporary or not sufficiently developed. Having an interim Global Council would likely extend the timeline for making progress implementing the Movement Charter and other Movement Strategy recommendations. It may also make setting up any governance structures for the Global Council a little more complicated, but it would be unlikely to pose significant additional legal challenges.

- 8. What is the definition of "fiduciary duties"? What does this mean for WMF? What are some examples of what would violate WMF's fiduciary duties?*

As described in the section above on *Fiduciary Duties*, a fiduciary duty describes the obligations that the Board of Trustees has towards an organization and its charitable purpose. In practice, the governing body of a nonprofit organization is responsible for ensuring that a nonprofit's assets are used appropriately; that the nonprofit remains accountable to its donors, its beneficiaries, and the general public; staying informed on the nonprofit's legal obligations; and proposing, overseeing, and reviewing the policies and guidelines that govern how the nonprofit is run.

Activities that would violate these duties include violations of an organization's conflict of interest policy (like using charitable assets for personal enrichment), acting negligently, or using the organization's resources wastefully.

9. *In what way, if any, would the BoT violate their fiduciary if they allow another body (like the GC, it being a registered legal entity inside or outside of the US) to have formal authority over a subset of fundraising, grantmaking, or product decisions?*

If the Board of Trustees determined that it was in the best interest of the Wikimedia mission and consistent with the responsibilities described in response to Question 8 to delegate or transfer a subset of these authorities, there would be no violation of their fiduciary duty. Depending on what specific grantmaking or fundraising activities are being considered, there may be significant tax considerations.

10. *What are the most important risks that come with sharing donor data with Wikimedia affiliates and what are ways to mitigate them? Would sharing donor data with Wikimedia affiliates create any risk or legal responsibility for WMF, beyond the fiduciary duties question above - for instance, GDPR compliance? How can these risks be mitigated?*

The Wikimedia movement should strive to treat personal data, including donor data, with utmost care and consideration. Any sharing of donor data collected by the Wikimedia Foundation must be done in compliance with the Foundation's [Donor Privacy Policy](#), as well as applicable privacy laws and regulations. The Donor Privacy Policy was written in a way to be respectful of the privacy of individual donors, so it may not permit transfers to third parties that were not anticipated when the policy was drafted.

Any request to share donor data with an affiliate would have to be evaluated on a case-by-case basis, based on the specific details of the request and the data requested. The conclusion may be different depending on the source of the data being requested, the purpose of the request, technical and administrative safeguards in place, the place of residence of the various donors whose data is concerned, the jurisdiction of the organization requesting the data, and other factors.

11. *Is the term "Fiscal Sponsor" defined in any way under Florida Law, US Law, or Law associated with WMF? Should we not use that term, or use a different one? Please note we're defining Fiscal Sponsorship as a requirement for an affiliate to be able to form a Hub. We're doing so the following way:*

- a. *A fiscal sponsor is an organization that administers a grant on behalf of a grantee. In the context of this document, Fiscal sponsors do not need to be Wikimedia affiliates. Fiscal sponsors must be incorporated organizations registered as a charity/nonprofit in their local contexts, and need to meet some basic eligibility requirements]. Basic eligibility requirements include but are not limited to being an organization:*
 - i. *with an IRS registration with a 501(c)(3) status and in good standing; a current listing at Guidestar (for U.S. organizations).*

- ii. *registered as an organization within their country (not a program or project with no formal organizational structure)*
 - iii. *that engages primarily in charitable purposes. Documentation for its overall activities, mission, and purpose must reflect this.*
 - iv. *that does not engage in any amount of activity involving the election of public officials in any amount.*
 - v. *that has a plan and documentation of the organization's assets upon its dissolution.*
- b. (Derived from https://meta.wikimedia.org/wiki/Grants:Fiscal_sponsorships)
 - c. *Under the sense we are using, the “Fiscal Sponsor” would have an active role in managing the Hub, unlike some definitions that assume a passive fiduciary role.*

Fiscal sponsorship is a common term within nonprofit grantmaking. Generally, a tax-exempt fiscal sponsor helps a nonexempt grantee receive grants when the grantee may not be able to receive grants directly. This may be due to multiple reasons—the grantee may not be set up in a way to receive funds, the grantmaker may have certain requirements for what kind of organizations can receive their grants, or the laws governing the grantor or grantee may not allow the transfer without an appropriate intermediary. The key element of fiscal sponsorship is that the sponsor is responsible for ensuring that the funds are used for a proper purpose.¹²

While there is no statutory definition of a fiscal sponsor, here are some sources who provide an overview of how the term is used for US-based grantmakers:

[National Council of Nonprofits](#)

A fiscal sponsor is a nonprofit organization that provides fiduciary oversight, financial management, and other administrative services to help build the capacity of charitable projects.

[American Bar Association](#)

Fiscal sponsorship is a contractual relationship that allows a person or organization that is not tax-exempt to advance charitable or otherwise exempt activities with the benefit of the tax-exempt status of a sponsor organization that is exempt from federal income tax under Internal Revenue Code (IRC) Section 501(c)(3). When done correctly, fiscal sponsorship can be a great tool for fulfilling a client's charitable goals without necessarily requiring the formation [of] a new nonprofit entity, application for tax-exempt status, or compliance with ongoing filing and registration requirements.

¹² For a history of the scenarios that fiscal sponsorship is designed to address, see: [Fiscal Sponsorship: Six Ways To Do It Right](#) (1993).

Fiscal sponsors usually charge an administrative fee to pay for the services they provide a project, typically between 5% and 10% of the funding for a project or a set dollar amount that is reasonably based on the sponsor's expenses.¹³ This administrative fee is usually reported as revenue by the fiscal sponsor.

The exact role and expectations of a fiscal sponsor may vary depending on the countries involved. Some countries unfortunately have highly restrictive rules on transferring funds to foreign grantees, or receiving funds from foreign grantors, which may make fiscal sponsorship impossible or impractical. For example, India's Foreign Contribution (Regulation) Act (FCRA) puts significant administrative obligations on receipt and use of foreign funds, and prohibits sub-grants that are common for fiscal sponsors in other countries.¹⁴ In light of these jurisdictional differences, any global standards should be described at a high level so they can be implemented in different ways when necessary.

¹³ Based on Thomas Reuter/Practical Law's Comprehensive Fiscal Sponsorship Agreement, drafting note on Administrative Fees.

¹⁴ The International Center for Not-for-Profit Law has a detailed summary of India's FCRA, as well as other regulations that affect international grantmaking, available at: <https://www.icnl.org/post/assessment-and-monitoring/indias-foreign-contribution-regulation-act-fcra>