

# NON-PROFIT CORPORATE GOVERNANCE

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May 20, 2009



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## Summary:

- Overview
- Basic Corporate Governance Documents
- Basic Governance Structure
- Board of Directors
- Officers & Executive Director
- Other Topics
- Your Questions

# Overview



## Overview

- Non-profit corporation formed under state law
- Tax-exempt under the Internal Revenue Code and applicable state law
- Tax-exempt purpose – organized and operated exclusively for religious, charitable, scientific, public safety, literacy or educational purpose or for the promotion of prevention of cruelty to animals or children
- Need corporate governance to maintain non-profit, tax-exempt status

# Basic Corporate Governance Documents

## Basic Corporate Governance Documents

- Articles of Incorporation – corporate birth certificate
- Bylaws – internal rules
- Others depending on organization
  - ✓ Conflict of Interest Policy
  - ✓ Committee Charters
  - ✓ Code of Ethics

# Basic Governance Structure

## Basic Governance Structure

Directors

 *Self-Elect*

Officers and  
Executive Director

 *Hire & Supervise*

 *Hire & Supervise*

Staff



## Directors

- “Direct” the organization
- Act as a group
- Self-elect
- Priority is to assume that purpose being pursued
- May form committees

## Officers

- Carry out responsibilities delegated by board
- Elected by board

## Other Groups

- Staff
- Advisors and advisory boards

## Directors

- Focus on board composition
- Have regular meetings and require attendance
- May also act by written consent
- Minutes should be taken

## Board Minutes

- Boards (and committees) should keep written minutes of their meetings (and of actions taken by written consent outside of meetings)
- New IRS Form 990 asks whether minutes are kept “contemporaneously” – contemporaneously means the later of (a) 60 days following the meeting or (b) the next meeting
- Taking good minutes is an art form
  - ✓ Minutes should not be a transcript of what was said
  - ✓ Generally not necessary to “name names”
    - Example: “A discussion ensued among the directors regarding ...”
  - ✓ Minutes should specify when presentations are made and when materials are distributed (including if the materials were distributed in advance of the meeting)
    - Usually advisable to attach non-routine reports/materials to minutes (but discuss with counsel)
  - ✓ Be specific about the action taken
    - Best case: Resolutions are prepared in advance of the meeting
  - ✓ Shorter or medium length minutes are usually better than very long and detailed minutes
  - ✓ Best practice is to draft minutes as soon as practicable after meeting
- Can also act by written consent
- Minutes and consents should go in minute book

## Director Considerations:

- Does this action advance the tax-exempt purpose of the organization?
- Does this action benefit a private individual?
- Mission statements

## Director Duties:

- Duty of Care
- Duty of Loyalty
- Some say, a Duty of Obedience

## Fiduciary Duties of the Board of Directors

- **Duty of Care**

- The care an ordinarily prudent person in a like position would exercise under similar circumstances
  - ✓ Reasonable care
  - ✓ Good faith
  - ✓ Must be reasonably informed

- **Duty of Loyalty**

- Have affirmative duties to:
  - ✓ Act in the best interests of the organization
  - ✓ Maintain confidentiality
- Have negative duties to:
  - ✓ Not self-deal
  - ✓ Avoid conflicts of interests
  - ✓ Not usurp corporate opportunities

## Business Judgment Rule

A board's action will generally not be second-guessed by a court if the directors acted:

- In a reasonable and informed manner
- In good faith
- With care that an ordinarily prudent person in a like situation would reasonably believe appropriate in similar circumstances, and
- In the best interests of the organization



## Committees of the Board

- Executive
- Corporate Governance
- Audit
- Personnel



## Director Liability

- Directors can be held accountable for not discharging responsibilities consistent with duties
- Organizations should provide for director indemnification
- If affordable, organizations should purchase director and officer insurance

# Officers & Executive Director

## Officers & Executive Director

- Elected by board
- Duties delegated by board or specified in bylaws
- President/Executive Director
- Secretary
- Treasurer

# Other Corporate Governance Topics

## Form 990

- Annual filing with IRS
- Requires extensive disclosure
- Must disclose personal benefit contracts
- Must disclose changes to corporate governance documents
- Consider whether board should review

## Financial Controls & Assets

- Organizations should ensure that fundraising solicitations meet applicable federal and state laws
- Internal accounting controls and procedures
- Budgets and periodic financial statements
- Audited vs. Reviewed vs. Unaudited
  - ✓ If charitable organization solicits from the public in Georgia and received more than \$1,000,000 during preceding fiscal year, audited financial statements are required
  - ✓ If charitable organization solicits from the public in Georgia and received more than \$500,000 (but less than \$1,000,000) during preceding fiscal year, reviewed financial statements are required
  - ✓ Audited financial statements may also be required if charity receives government funding
- Audit Committee
- Manage use of assets

## Document Retention and Destruction

- Sarbanes-Oxley makes it a crime to alter, cover up, falsify or destroy any document (or persuade someone else to do it) to prevent its use in an official proceeding
  - ✓ This section of Sarbanes-Oxley applies to nonprofits
- Nonprofits should adopt a written policy regarding procedures for disposing and archiving records, which includes guidelines for handling electronic files and voicemails and covers back-up procedures
  - ✓ Georgia law requires that charities maintain contribution and paid solicitation records for at least three years
- If an official investigation is underway (or even suspected), stop any document destruction in order to avoid criminal obstruction charges

## Whistleblower Protection

- Sarbanes-Oxley makes it a crime for any corporate entity (including a nonprofit) to punish whistleblowers
- Nonprofits should adopt a written policy to deal with employee complaints and prevention of retaliation
  - ✓ Policy should include a prohibition against reprimanding an employee who makes a claim in good faith
- Upon receiving any employee complaints, nonprofit should investigate and address any problems (or be able to explain why corrections are not necessary)
  - ✓ Document, document and document



## Executive Compensation

- Executive compensation is also a very hot issue right now (for both profit and nonprofit corporations)
- Tax law requires that the charity not pay in excess of “reasonable compensation”
  - ✓ Goes to the essence of tax exempt status (no private inurement or benefit)
- Tax law does not require any particular formula or process, but:
  - ✓ Organizations should have a documented process which includes comparability data and independence
  - ✓ Board should approve compensation of key officers and employees
- Organization should make sure that Form 990 accurately reflects actual compensation

# What are Your Questions?