

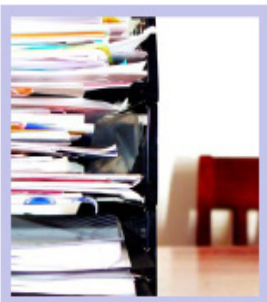
Staying Legal:

General Guidelines

for Operating a

§501(c)(3) Nonprofit

Corporation in Georgia



PROBONO[™]
PARTNERSHIP / ATLANTA

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The information contained herein is intended as general guidance for the operation of a Georgia nonprofit corporation with IRS recognition as a Section 501(c)(3) public charity. The specific facts involved in a particular situation could raise other issues and call for different analysis. Please consult periodically with an accountant (especially since compliance matters are the subject of frequent changes), and seek legal counsel if there are specific questions.

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1 Corporate Governance

A. Basic Practices

A well-run tax-exempt organization should strive to follow the “best practices” of corporate governance. Although many corporate governance practices apply equally to for-profit and nonprofit corporations, some guidelines have been proposed specifically for tax-exempt organizations (see “Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations” by the Panel on the Nonprofit Sector at www.nonprofitpanel.org.) For many small and community-based tax-exempt organizations, some of those guidelines will be largely aspirational, as resources may be limited and many of the contemplated risks may not be relevant. All organizations, however, should follow some basic governance practices, some of which are set forth below.

- **Read and be familiar with articles and bylaws.** This is a critical, but often overlooked, first step of governance. All of the officers and directors¹ should read and *be familiar* with the governing instruments of the organization, which are most often the articles of incorporation and bylaws. These documents not only create the entity, but also set forth the goals and purposes of, and restrictions on, the operation of the organization – as well as the more practical processes and procedures as to how the organization is run.
- **Know and understand fiduciary duties.** Officers and directors of nonprofit corporations are subject to important fiduciary duties, such as the duty of care and duty of loyalty.² The duty of care requires that a Board member act in a manner that he or she believes in good faith to be in the best interest of the organization and with the care an ordinary prudent person in a like position would exercise under similar circumstances. The duty of loyalty requires that a Board member act in

¹ Nonprofit corporations typically only have officers and directors, but directors are sometimes called trustees. For purposes of this brochure, “director” shall include trustees of nonprofit corporations.

² See Official Code of Georgia Annotated (O.C.G.A. §§ 14-3-830 and 14-3-842).

the best interest of the organization and not for personal gain. There may be state law repercussions if an officer or director violates these duties.

- **Plan for leadership succession.** Although you may have founded the organization and serve as an officer and director, the organization has a perpetual life and plans need to be made for its future. Steps should be taken to develop and educate new leaders who will serve as successor officers and directors.
- **Have regular and well-planned meetings – and keep minutes.** All nonprofit corporations are required to have an annual board meeting.³ (Check the organization’s bylaws for the specific requirements.) It is better practice, however, to have more frequent meetings so that the directors are aware of ongoing projects and any problems or issues that may arise. These meetings, if well-planned and well-run, will help the directors meet their duty of care. It is best to have an agenda that is circulated before the meeting, preferably along with any relevant materials that will aid the directors in making any decisions at the meeting. In addition, the Secretary should take minutes of the meeting and circulate these minutes at or prior to the next meeting for review and approval. The minutes need not (and often should not) recite each and every comment or statement of a meeting, but they should at least record important items and all votes and resolutions.
- **Keep good records.** Records (corporate minutes, donor contributions and acknowledgments, accounting and financial statements, contracts, etc.) should be maintained in a safe place. Some of these records (such as financial statements) should be reviewed by the Board, and others (such as Form 990) must also be made available to the public upon request (*see Public Disclosure Requirements in Section 2*).
- **Implement financial controls.** The organization should have “controls” in place to make sure the assets of the organization are being used properly. It is beyond the scope of this brochure to go into much detail, but examples include requiring two people to sign checks above a certain dollar amount and not permitting a person to review and approve his or her own expense reimbursements.
- **Obtain insurance.** Exempt organizations should obtain insurance against various risks, such as property and casualty insurance. Seek out the guidance of a competent and reputable insurance broker with experience working with nonprofit organizations. Although volunteers of tax-exempt organizations may be provided some legal protection against certain types of liability, the organization should consider “directors & officers” insurance to protect the officers and directors from personal liability.

³ Nonprofit corporations with members are required to have an annual meeting of the members.

2 Compliance

A. Your Code § 501(c)(3) Exemption – Maintaining the Organization’s Most Valuable Asset

If you are reading this pamphlet, your organization should have obtained a determination letter stating that it is recognized as exempt from federal income tax as a charitable organization that meets the requirements of § 501(c)(3) of the Internal Revenue Code (the “Code”). Tax-exempt status is often an organization’s most valuable asset, so it should be monitored, reviewed and protected in the same manner as any other valuable asset, including by educating directors, officers, staff and volunteers.⁴

- **Monitor operations.** The organization obtained tax-exempt status based upon two criteria: (1) the structure of the organization (as shown in its articles of incorporation and bylaws); and (2) the information provided to the IRS about how the organization would be operated. The first criterion is often called the “organizational test,” as it relates to how the organization is formed. The second criterion is referred to as the “operational test,” as it deals with how the organization actually functions. It is important to monitor how the organization operates, to make sure operations are consistent with federal and state requirements, and to notify the IRS and the Georgia Secretary of State of significant operational changes (such as amendments to the articles of incorporation) in the organization’s annual filings.
- **Review the Form 1023.** Organizations should take care to operate as required by the federal tax rules. To do so, it is good practice to educate directors and officers. As explained above, *all* directors and officers should review and be familiar with the organization’s governing documents.

⁴ Consider purchasing a tax-exempt organizations reference book, such as “Tax Planning and Compliance for Tax-Exempt Organizations: Rules, Checklists, Procedures” by Jody Blazek. Two other excellent sources of information for maintaining tax-exempt status are provided by the IRS: Publication 4221-PC “Compliance Guide for §501(c)(3) Public Charities” (www.irs.gov/pub/irs-pdf/p4221pc.pdf) and the free online workshop – “Stay Exempt – Tax Basics for §501(c)(3)s” (found at www.stayexempt.irs.gov).

In addition, they should also review Form 1023 – Application for Recognition of Exempt Status (the “Form 1023”). Form 1023 is what the organization supplied to the IRS to obtain tax-exempt status, so it is important to know what was said in the form. In Form 1023, the organization made representations as to how it would be operated, and the IRS recognized the organization’s tax-exemption based upon those representations. If the actual operations differ from those described in Form 1023, notice of the variation may need to be given to the IRS. In some instances, significant differences between actual and projected operations can threaten the tax-exempt status of the organization.

- **Review Form 990.** Directors and officers should review the Form 990 (the organization’s annual information return to the IRS) annually to make sure they are familiar with the financial information and important disclosures contained therein. As indicated on Form 990, variations in activities and certain changes to the organization’s structure (including changes to the governing documents) need to be disclosed to the IRS.⁵

B. Other Steps to Preserving Exempt Status

In addition to the requirements described above, there are other steps that should be taken as well as certain activities that *should not* be carried out by the organization in order to preserve the tax-exempt status of the organization.

- **Politics.** Politics, in this case, refers to two separate areas: (1) political campaigning and (2) lobbying. Tax-exempt organizations *are not* permitted to engage in *any* amount of campaigning for or against anyone running for political office. Tax-exempt organizations are, however, allowed to engage in *some* activities related to endorsing or opposing legislation (often called “lobbying”). These rules are complicated, so the organization should seek professional advice before participating in actions that support or oppose legislation. Note that under Georgia law, a “lobbyist” generally must register with the Georgia Government Transparency and Campaign Finance Commission, and the definition under Georgia law is quite broad.⁶

⁵ Additional information can be found on the IRS website, including the “Life Cycle of a Public Charity,” at www.irs.gov/.

⁶ Any employee, contractor, or volunteer may be considered a lobbyist if: (1) he/she receives or anticipates receiving more than \$250 in a calendar year in compensation or reimbursements for lobbying activities; (2) he/she is hired specifically for lobbying and is compensated; or (3) he/she is reimbursed for more than \$1000 in “lobbying expenditures” in one calendar year. Lobbying expenditures are certain expenditures paid by lobbyists to or on behalf of public officials. For more information on what payments meet the legal definition of lobbying expenditures, see <http://www.pbpatl.org/nonprofit-legal-alerts/registering-as-a-lobbyist-in-georgia-2014-changes-to-ethics-in-government-act-2>.

- **Private benefit and private inurement.** Tax-exempt organizations are required to serve public, rather than private, interests. Thus, they must not allow their income or assets to benefit, more than insubstantially, a private person or entity. Tax-exempt organizations are also not permitted to distribute or transfer assets to “insiders” (basically, directors, officers, key employees, and immediate family members thereof), other than in exchange for fair market value. This is the prohibition of “private inurement.” The most common example is the payment of excessive compensation. Other examples could include the payment of an officer’s personal expenses by a tax-exempt organization, or allowing an insider to use the organization’s assets without proper compensation (for example, allowing an officer’s business to use the organization’s office without payment of sufficient rent). If the organization carefully follows the conflict of interest policy requirements (*see Section 2 C*), then private inurement should not pose a problem.
- **Unrelated business income.** A tax-exempt organization under § 501(c)(3) is exempt from income tax so long as its business activities are related to its tax-exempt purposes. There are, however, rules that require even tax-exempt organizations to pay federal income taxes – essentially when they carry on trades or business that are unrelated to their tax-exempt purposes. For example, assume a community organization teaches English as a foreign language to poor immigrants as a tax-exempt activity. If the organization expands and offers these classes for a fee to executives of foreign corporations, those fees *might* be subject to the “unrelated business income tax” (or “UBIT”). Even if the activity is designed to raise money for the organization to use to accomplish its charitable purposes, if the activity is unrelated to those charitable purposes, the income could be subject to unrelated business income tax. These rules are complicated, and include numerous exceptions, so you should seek professional advice if you are unsure whether items of income are subject to UBIT.⁷
- **Public disclosure requirements.** Tax-exempt organizations are obligated under federal law to make certain information available to the public. The most recent three years of annual information returns (Form 990) and the schedules filed with Form 990 (other than Schedule B) must be provided to anyone upon request. In addition, the organization must provide copies of its Form 1023 and IRS determination letter. These items generally must be provided the day requested or, in some instances, within two weeks. The organization may charge reasonable copying expenses. As an alternative, these items may be posted on the organization’s website. However, paper copies must be made available for anyone who wants to inspect them rather than visit the website. There are penalties for failing

⁷ See also <http://www.stayexempt.irs.gov/Existing-Organizations/Unrelated-Business-Income-1>

to comply with these requirements.⁸

- **Donor contributions and acknowledgment.** Once an exempt organization receives a donation, it should take several steps to acknowledge the donor’s contribution. These acknowledgments are extremely important to the donor, as they permit the donations to be tax deductible.
 - a. An exempt organization must provide a written acknowledgement to the donor of any contribution of \$250 or more. Although multiple gifts made in one year that separately are less but together total more than \$250 are not subject to this rule, it is advisable for the organization to acknowledge *all* gifts.
 - b. The acknowledgment should be sent to the donor soon after the donation is made, but not later than the date the donor files his or her tax return taking the deduction for the donation.
 - c. The acknowledgment should state the amount received and (assuming it is accurate) that the donor received no cash, goods, services, benefits, or privileges from the organization in return for the donation.
 - d. If the donor receives goods or services in return for a donation of \$75 or more (a so-called “quid pro quo” contribution), the acknowledgment generally must also give a description and good faith estimate of the value of those goods and services. Some quid pro quo items and amounts are essentially ignored: “token benefits” (in 2015, items worth less than \$10.50); up to 2% of a donation (but not more than \$104 in 2015); and certain types of customary membership benefits (like discounts on parking and gift shop items).⁹
 - e. If the donation is or includes goods or property, the organization must describe the goods or property and state that the donor received nothing in return for the donation (assuming that is the case). The organization should *not* put a value on the goods or property it received from the donor.
 - f. Additional disclosure requirements apply when an organization receives a vehicle, such as a plane, boat, or automobile, as a donation. These requirements vary depending on the value of the vehicle and what the organization did or intends to do with the vehicle.¹⁰

⁸ For more information, visit <http://www.stayexempt.irs.gov/Existing-Organizations/Required-Disclosure>.

⁹ IRS Publication 1771, Charitable Contributions and Disclosure Requirements, available on the IRS website at www.irs.gov.

¹⁰ For further guidance, see <http://www.pbpatl.org/resources/vehicle-donations>. The IRS also has several publications with details for handling such donations: IRS Publication

C. Conflicts of Interest

Tax-exempt organizations are governed by rules that limit and in some cases prohibit related persons from engaging in certain transactions with the organization.

- **Georgia law.** Georgia law requires that certain procedures be followed before transactions can occur between a nonprofit corporation and related persons.¹¹ These procedures are similar to, but not as stringent as, the procedures described in IRS rules below.
- **IRS rules.** Federal tax law contains what are generally referred to as the “Intermediate Sanctions Rules.” The Intermediate Sanctions Rules are designed to prevent “disqualified persons” (basically, persons who exercise substantial influence over the organization’s affairs, such as directors, officers, key employees and related persons or entities) and the tax-exempt organizations with which they are affiliated from engaging in transactions that yield a benefit, directly or indirectly, to the disqualified person in excess of the value or consideration received by the exempt organization (“excess benefit transactions”). Severe penalties can be imposed if a disqualified person engages in an excess benefit transaction. A penalty can be imposed on any officer, director, or other person who approves such a transaction on behalf of the organization if he or she knows the transaction is improper. A much higher penalty is imposed on the disqualified person participating on his or her own behalf. *These penalties can be imposed on the disqualified person even though he or she did not have any knowledge that the transaction was improper.*

Example # 1: Assume that a Georgia nonprofit organization (“Public Charity”) purchases a building from ACME Company. Public Charity pays \$1,000,000, without researching the fair market value. The husband of Public Charity’s Board Chair was an owner of 36% of ACME, and the building was only worth \$900,000. The IRS may impose excise taxes upon the Board Chair equal to 25% of the \$100,000 excess benefit received. The \$100,000 plus interest must also be paid back to the Public Charity by the end of the tax year to avoid an additional tax equal to 200% of the excess benefit. Additionally, a 10% excise tax may be imposed on officers and directors of Public Charity who knowingly approved the transaction.

Example #2: Assume Public Charity pays its Executive Director \$100,000 per year, but the Executive Director has no experience operating an organization and others in a similar position are paid

4302, “A Charity’s Guide to Vehicle Donations,” and Publication 4303, “A Donor’s Guide to Vehicle Donations,” which are available on the IRS website at www.irs.gov.

¹¹ See O.C.G.A. §§ 14-3-860 to 14-3-865.

only \$60,000 per year. The IRS might assess excise taxes upon the Executive Director and the officers and directors who approved the salary.

- **Conflict of interest policy.** Because of the Intermediate Sanctions Rules and their associated penalties, tax-exempt organizations should maintain a conflict of interest policy to protect both the organization and its employees, directors and volunteers.¹²
- **Best practices.** In addition to being aware of the conflict of interest rules and maintaining a conflict of interest policy, tax-exempt organizations should take affirmative steps to meet the requirements and avoid problems.
 - a. **Rebuttable presumption.** If a “disqualified person” engages in a transaction (including receipt of compensation) with the organization, the Board should make sure that the transaction meets the “rebuttable presumption of reasonableness” as described in the sample conflict of interest policy on the IRS website. In other words, the organization should make certain (1) the transaction is at arm’s length, (2) comparability data is reviewed and considered, and (3) the transaction is approved and documented in advance by Board members, not including any disqualified persons.
 - b. **Annual Disclosure Statements.** The organization should ask directors, officers, and key employees to annually sign a statement affirming that they have received a copy of the conflict of interest policy, have read and understand the policy, and have agreed to comply with its terms. Each director, officer, and key employee should also be asked to disclose any financial interests or family relationships that could give rise to a conflict of interest.
 - c. **Professional advice.** Most importantly, the organization should obtain professional advice if there is ever a question about a conflict of interest. Professionals can guide an organization through the necessary procedures.

¹² A sample conflict of interest policy is available at the IRS website - www.irs.gov/instructions/i1023/ar03.html.

3 Tax Reporting (Georgia and Federal)

A. Annual Filings

Most exempt organizations will be required to file information returns each year, and some will be required to file more than one. These returns are due by the 15th day of the 5th month after the close of the organization's taxable year. (For many organizations, their returns will be due May 15, as many will have a December 31 year-end.)

If an organization fails to file a required return by the due date (including any extensions of time), or it files an incomplete return, it must pay a penalty of \$20 a day for each day the return is late, or \$100 per day if the organization has gross receipts of over \$1 million for the year (in both cases, subject to certain maximum penalty amounts).

Exempt organizations should consult with a CPA to assist in preparing and filing these returns, but some of the important information is set forth below.

- **IRS Form 990.** Exempt organizations are generally required to file an annual return (Form 990) with the IRS. This return is an informational return and includes receipts, expenditures and additional information, including the compensation of the five most highly paid employees.
- **Form 990-EZ.** If an organization's gross receipts during the year are less than \$100,000 and its total assets at the end of the year are less than \$250,000, it may choose to file the Form 990-EZ short form.
- **Form 990-N (e-Postcard).** Exempt organizations with annual gross receipts of \$50,000 or less may file Form 990-N (commonly called the "e-Postcard").¹³
- **IRS Form 990-T.** While an exempt organization is generally not subject to federal income taxes, if the organization engages in certain *business activities* (see *Unrelated Business Income in Section 2.B. above*), it will be liable for tax on its "unrelated business income." If the organization has \$1,000 or more of *gross income* from an unrelated trade or business, it

¹³ See the IRS website for more information - [http://www.irs.gov/Charities-&-Non-Profits/Annual-Electronic-Filing-Requirement-for-Small-Exempt-Organizations-Form-990-N-\(e-Postcard\)](http://www.irs.gov/Charities-&-Non-Profits/Annual-Electronic-Filing-Requirement-for-Small-Exempt-Organizations-Form-990-N-(e-Postcard)).

must file Form 990-T. (Estimated taxes will also be due if the tax for the year is projected to be \$500 or more.) The obligation to file Form 990-T is separate from the obligation to file the annual information return (Form 990, 990-EZ or 990-N).

B. Georgia Filing Requirements

Georgia requires that a copy of Form 990, 990-EZ, or 990-N be filed with the Department of Revenue. If an organization also files a Form 990-T, Georgia requires that the organization also prepare and file Georgia Form 600-T, along with a copy of Form 990-T, and pay any applicable taxes.

C. Other Filings

Payroll

All exempt organizations with full or part-time employees who receive compensation (wages, tips or other income) are required to file the usual employment-related tax returns. The organization must determine whether individuals providing services to the organization are properly classified as employees or independent contractors because withholding and payment of employment taxes is not required for independent contractors. The determination of whether a worker is an employee or an independent contractor is based on a number of factors and is very fact-specific. Therefore, organizations are well-advised to seek professional guidance in making the determination.¹⁴

The organization must file Form 941 (Employer's Quarterly Federal Tax Return) quarterly to report any wages paid, tips received, federal income tax withheld, the employer's and employee's shares of Social Security and Medicare taxes, and advance earned income tax credit ("EITC") payments. Organizations exempt under § 501(c)(3) do not need to pay federal unemployment ("FUTA") tax.

The organization generally must furnish a copy of Form W-2, Wage and Tax Statement, to each employee who received compensation during the year by January 31 following the end of the calendar year covered. The organization generally must file Form W-3, Transmittal of Wage and Tax Statements, and transmit Copy A of Forms W-2 to the Social Security Administration by the last day of February after the calendar year for which the Forms W-2 are prepared. The organization must also provide a Form 1099-MISC if in any calendar year it pays an unincorporated individual or an entity \$10 or more in royalties or \$600 or more in rents, services (including parts and materials), prizes and awards,

¹⁴ Further information about classifying workers can be found at <http://www.stayexempt.irs.gov/Existing-Organizations/Employment-Issues> and at <http://www.dol.gov/elaws/esa/flsa/scope/er13/asp>.

other income payments, medical and health care payments, cash paid from a notional principal contract to an individual, partnership, or estate, or proceeds to an attorney.

Georgia also has payroll filing requirements. Employers are required to register for withholding with the Department of Revenue. Depending on the amount of tax required to be withheld, the employer must pay withholding taxes either semi-weekly, monthly, quarterly, or annually. Employers are required to submit copies of W-2s, 1099s, and other statement of income subject to Georgia income tax withholding. Interest and penalties may be applied for late filed returns, underpayment of withholding and late payment. In Georgia, 501(c)(3) nonprofit organizations with at least four workers in twenty different weeks in a calendar year are also liable for unemployment tax.¹⁵

Sales and Use Tax

Georgia provides no blanket sales and use tax-exemption for tax-exempt organizations, but there are a number of specific exemptions allowed for certain transactions with certain tax-exempt organizations. The specific exemptions are contained in O.C.G.A. § 48-8-3, which can be found at www.legis.state.ga.us. If sales and use tax is required to be collected, the organization must report and remit the taxes on Form ST-3, Sales and Use Tax Report Form.

Real Property

The Georgia Code allows several exemptions from property tax for certain tax-exempt organizations. The exemptions are contained in O.C.G.A. § 48-5-41 which can be found at www.legis.state.ga.us.

¹⁵ For more information on Georgia payroll requirements, consult the Employer's Tax Guide available on the Georgia Department of Revenue Website at <http://dor/georgia.gov/documents/2015-employer-tax-guide>.

4 State Filings

A. Annual Corporate Registration

Georgia nonprofit corporations are required to complete an annual registration (or renewal). The first registration is due within 90 days of incorporation, and then each year thereafter between January 1 and April 1. The corporation may change officer, registered agent or address information via the annual registration.

B. Charitable Solicitation Registration

Exempt organizations that solicit contributions from the public for charitable purposes are required to register with the Georgia Secretary of State, by submitting an initial filing fee along with a completed Form C-100, which must include certain financial disclosures and other information relating to the organization. “Solicit” is defined broadly under Georgia law and includes requesting or accepting, directly or indirectly, money, credit, property, financial assistance or any other thing of value to be used for any charitable purpose.¹⁶ This filing is separate from the annual corporate registration described in Section 4.A. above. If funds are solicited in other states, those states’ laws should be reviewed to determine if registration is required.¹⁷ Exempt organizations soliciting contributions from the public for charitable purposes should contact legal counsel for assistance.

¹⁶ Visit the Georgia Secretary of State website to find the form that must be filed. <http://www.pdfFiller.com/107884-C100-Form-C-100---Georgia-Secretary-of-State-State-Georgia-sos-georgia>

¹⁷ For more information on each state’s requirements see <https://harborcompliance.com/information/charitable-registration>. Many states requiring registration accept the Unified Registration Statement - see <http://www.multistatefiling.org>.

Helpful Links for Nonprofit Legal Questions

Department of Labor:

www.dol.gov/compliance (U.S.)
www.dol.state.ga.us/em/ (Georgia)

Foundation Center:

www.foundationcenter.org
(Library and resources on fundraising)

Georgia Center for Nonprofits:

<http://www.gcn.org/tools/Starting-a-Nonprofit-Organization-in-Georgia>
(Starting a Nonprofit in Georgia)

Georgia Secretary of State:

http://sos.ga.gov/index.php/corporations/first_stop_business_guide
(First Stop Business Information Center)

<http://sos.ga.gov/index.php/corporations/faq>
(Frequently Asked Questions for Corporations)

http://sos.ga.gov/index.php/securities/charitable_organization_and_paid_solicitor_forms
(Charitable Solicitation Registration)

Internal Revenue Service:

<http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations>
<http://www.stayexempt.irs.gov/>

Nonprofit Risk Management Center:

<https://www.nonprofitrisk.org/Default.asp>
(Insurance questions)

Pro Bono Partnership of Atlanta (Georgia Law):

www.pbpatl.org

Pro Bono Partnership (New York Law):

www.probonopartnership.org

Texas C-Bar (Texas Law):

www.texasbar.org/legal_library/

