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Goals for Today

1. Corporate Characteristics of Nonprofits
2. Required Filings
3. Know your Fiduciary Duties
4. New York's Not-for-Profit Corporation Law

Corporate Characteristics

Key Documents

Qualify for (and maintain) Tax Exemption

Relationships with Governing Authorities

Record-keeping Responsibilities

Key Documents

Certificate of Incorporation

Bylaws of the Corporation

Conflict of Interest Policy

Annual Conflict of Interest Disclosure
Statement

Whistleblower Policy



Organizational Documents

Certificate of Incorporation

- Describes Purposes
- Includes Language Required by IRS
- Can create certain structures
 - Membership
 - Number of Directors

Bylaws

- Governs Meetings and Procedures

Conflicts of Interest

Conflict of Interest Policy – *discuss in detail later*

Annual Disclosure Statement

Whistleblower Policy

If your nonprofit has more than 20 employees AND revenue in excess of \$1M, you must have a whistleblower policy, which:

Establishes procedures to report violations

Is confidential

Appoints someone to oversee and report to Board

No retaliation is permitted

Tax Exempt Status

Section 501(c) of the Internal Revenue Code

- (c)(3) – charitable, environmental
- (c)(4) – exempt, social welfare, public good
- (c)(7) – exempt, social club, recreational

Organized and operated exclusively for charitable or exempt purposes

Applying for Tax Exempt Status

1023 and 1023-EZ for charitable organizations

- 1023: hefty application, \$850 filing fee
- 1023-EZ: user friendly, \$250 filing fee
 - available to lower budget nonprofits

1024 for non-charitable organizations

- Significant application, \$850 filing fee

Maintaining Tax Exempt Status

Annual Informational Returns

- 990-N: annual revenue < \$50K
- 990-EZ: annual revenue < \$200K and assets < \$500K
- 990: annual revenues > \$200K or Assets

○

Governing Authorities

Department of State

Office of the Attorney General – Charities
Bureau

Internal Revenue Service – Tax Exempt and
Governmental Agencies Division

Attorney General Oversight

Annual filing with Charities Bureau

AG can obtain books and records

AG can rescind or void related party transactions

AG can sue for damages – double the profit to unrelated party

AG has jurisdiction over all Directors, Officers, Agents and Key Employees (of New York nonprofit) [TJ/TT5 1 Tf-1.3514 -2.88]

Annual Charities Bureau Filing

General Rule – if you are charitable and solicit funds, you must file. If you are non-charitable or do not solicit funds, no need to file.

- If formed after July 1, 2014, Certificate of Incorporation will state charitable or non-charitable.
- If formed before July 1, 2014, Certificate of Incorporation will identify a Type:
 - Type A – Non-charitable
 - Types B and C – Charitable
 - Type D – depends on purposes

Exemption – if you are charitable and solicit funds solely from your membership, no filing is required



Internal Revenue Service

Audits

Enforcement Actions:

- private benefit
- private inurement

Unrelated Business Income Taxation

Risk Losing Tax Exempt Status



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Record-Keeping Responsibilities

Minutes are the secretary's responsibility

No need to make available to the public unless

- Nonprofit elects to share or post
- Nonprofit is formed based on statute
- Subject to discovery in litigation

Reviewed (and reported) by auditors in certain circumstances

Officers and Directors

Officers

Required: President and Secretary cannot be the

Voting Requirements

f Quorum: how many directors need be present before corporation can act (typically 51%)

- o Conflicted Directors are Included

f Majority Vote: 51% of directors present

f Super-Majority Vote: 2/3 of directors present

- o By deliberate statement in bylaws (e.g., removal of Executive Director)
- o By statute (e.g., assets of corporation, real property)

Committees

Committees of the Board

Executive Committee

Finance Committee

Governance Committee

Committees of the Corporation

Strategic Planning

Quality Issues

Ad hoc (e.g., event-planning)



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Training Your Board Members

Orientation Materials:

- Certificate of Incorporation
- Bylaws or Constitution
- Names and contact information of full board, including officer designations
- Committee structure
- Financial snapshot
- Industry snapshot

Annual training on various topics of interest – legal, financial, industry



FIDUCIARY DUTIES

Duty of Care

Duty of Obedience

Duty of Loyalty

Duty of Care

Requires Board Members to:

Act in good faith with that degree of care which an ordinarily prudent person would exercise under similar circumstances, and which Director reasonably believes is in the best interest of the Corporation.

Act in Good Faith

Active Participation

Regular Attendance

Review Materials and Minutes

Report Corrections

Ask Questions

Ordinarily Prudent Person

Generalists, no need for specialized knowledge

Sound, practical judgment and common sense

Does not mean that all decisions are correct

Does not require excessive caution

You can rely on experts and committees

Duty of Obedience

Must act in pursuit of the Corporation's Mission

Board may determine precisely how mission can best be fulfilled

Cannot divert corporate resources to other purposes, even if charitable

Duty of Loyalty

Requires Board Members to:

Exercise power in the interest of the Corporation only – not in their own interest, or that of another entity or person

Demonstrate undivided allegiance to mission

Manage conflicts of interest

NOT-FOR-PROFIT CORPORATION LAW

Statutory History

Enacted on May 26, 1969, effective of September 1, 1970.

Amended by the New York Nonprofit Revitalization Act of 2013, which took effect on July 1, 2014.

Technical amendments enacted in October and December of 2015, and again in December 2016.

Fear of Fraud

James G. Sheehan, Chief of New York State Charities Bureau:

“[Fraud] is a surprisingly common problem.”

“We’ve seen organizations that have the same event occur two or three times because their control process is weak.”

“People are committed to the mission. But sometimes the first stop is: Who’s in this business that we know. And that often is a board member. So making sure you have strong conflict of interest rules and related party rules is really important in making your decisions work.”

- “Attorney General’s Charity Chief: Fraud is ‘Surprisingly Common’”,
New York Nonprofit Media, August 6, 2015.



Imposed specific duties on the Board to encourage more effective monitoring of the nonprofit's financial health and fraud controls.

1. Board duties may only be satisfied by the board members.

Committees

No more standing committees or ad hoc committees

Committees of the Board

- Comprised solely of Board members
- May be delegated Board responsibilities

Committees of the Corporation

- May include non-Board members
- May not be delegated Board responsibilities

Other than performing “Audit Functions”, board responsibilities means the ability to **act** on behalf of the board



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Audit Functions

1. Oversee accounting and financial reporting
2. Annually retain or renew independent auditor
3. Review scope and planning of audit prior to commencement
4. Review audit results
5. Discuss with auditor material risks and weaknesses in internal controls, any restrictions on the scope of auditor's activities or access to requested information, and any significant disagreements between auditor and management, adequacy of accounting and financial reporting processes.
6. Annually consider performance and independence of independent auditor
7. Report activities to Board



Conflicts of Interest

Conflicts of Interest are not unlawful.

A Conflict of Interest exists when a Director or Officer, directly or indirectly, has a **material personal interest** in a contract or transaction.

Conflicts of Interest

Obligation to disclose real or *potential* conflict.

Authorized committee determines whether conflict exists.

Conflicted director may present information relating to transaction at issue.

Conflicted director must leave for determination and vote by Board or authorized committee.

A “Related Party Transaction” is any

A “Related Party Transaction” is any

transaction or agreement in which a Related

New Exceptions

On May 27, 2017, the following transactions will be excluded:

- De minimis
- Those that would not be customarily reviewed by boards
 -

What is a Related Party?

Technical definition imposed by N-PCL
Section 102(23).

Check the box analysis.

Case-by-case identification.

Related Party Duties

Normal Conflict Procedure...

Obligation to disclose real or *potential* conflict.

Board or authorized committee determines whether conflict exists.

Conflicted director may present information relating to transaction at issue.

Conflicted director must leave for determination by board or authorized committee.

Related Party Duties

Plus...

1. Investigate alternatives to the proposed transaction.
2. Determine whether it is reasonably possible that a better transaction that will not give rise to a conflict can be obtained.
3. If not reasonably possible, board or authorized committee must determine by a majority vote, whether the related party transaction is...

Related Party Duties

Required Resolutions

Best interest of the Corporation

For the Corporation's benefit and not the related party

Fair and reasonable

The decision to enter transaction must be based on these determinations.

Liability and Indemnification

Your volunteer service is appreciated.

Immunity

Directors and Officers Liability Insurance

Indemnification

Summary

1. Corporate Characteristics of Nonprofits
2. Required Filings
3. Know your Fiduciary Duties
4. New York's Not-for-Profit Corporation Law

Disclaimer

This presentation is for informational purposes and is not intended as legal advice.