



A PRIMER ON CURRENT BEST GOVERNANCE PRACTICES OF NON-PROFIT ORGANIZATIONS IN NEW YORK AND NEW JERSEY

December 31, 2013

Non-Profit Governance Requirements Are Determined in Accordance with State Law

- ▶ The New York Not for Profit Corporation law reads in part: "... a corporation shall be managed by its board of directors".
- ▶ The New Jersey law reads: "The activities of a corporation shall be managed by its board..."
- ▶ Except for the Members in certain situations, the Board retains the ultimate authority to manage the organization

Some Board Responsibilities May be Delegated

- ▶ Certain responsibilities such as acting on behalf of the Board between meetings in time-sensitive matters may be delegated to an Executive Committee
- ▶ Day to day management/administration may be delegated to the Executive Director or President, and staff
- ▶ However, any delegation does not relieve the Board of its responsibilities, and ultimately the Board remains responsible for managing the organization

Responsibilities of the Officers and Directors under NY Law

- ▶ (a) Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions. In the administration of the powers to make and retain investments pursuant to section 512 (Investment authority), to appropriate appreciation pursuant to section 513 (Administration of assets received for specific purposes), and to delegate investment management of institutional funds pursuant to section 514 (Delegation of investment management), a governing board shall consider among other relevant considerations the long and short term needs of the corporation in carrying out its purposes, its present and anticipated financial

requirements, expected total return on its investments, price level trends, and general economic conditions.

- ▶ (b) In discharging their duties, directors and officers, when acting in good faith, may rely on information, opinions, reports or statements including financial statements and other financial data, in each case prepared or presented by: (1) one or more officers or employees of the corporation, whom the director believes to be reliable and competent in the matters presented, (2) counsel, public accountants or other persons as to matters which the directors or officers believe to be within such person's professional or expert competence or (3) a committee of the board upon which they do not serve, duly designated in accordance with a provision of the certificate of incorporation or the bylaws, as to matters within its designated authority, which committee the directors or officers believe to merit confidence, so long as in so relying they shall be acting in good faith and with that degree of care specified in paragraph (a) of this section. Persons shall not be considered to be acting in good faith if they have knowledge concerning the matter in question that would cause such reliance to be unwarranted. Persons who so perform their duties shall have no liability by reason of being or having been directors or officers of the corporation.

Consequence of Responsibility

- ▶ The Board has the responsibility to be knowledgeable about the finances, overall strategic direction, management and operation of the Organization
- ▶ Failure to act in accordance with the law can subject the directors to personal liability

Standards for Measuring Good Governance of Non-Profits

- ▶ The “Standards for Charity Accountability” from the Charity Navigator, an organization which evaluates many charities, uses “Financial Health”, “Accountability and Transparency”, and “Results” as its measuring standards
 - Elements of Financial Health include:
 - Program Expenses as a percentage of total expenses
 - Executive Pay as compared with other similar organizations
 - Trajectory of Growth of Revenue and Program Expenses
 - Approach to Fundraising
 - Accountability and Transparency
 - “Accountability” is defined as the “obligation or willingness of the charity to explain its actions to its stakeholders”
 - “Transparency” is the “obligation or willingness by a charity to publish and make available critical data about the organization”

- Results
 - Are the accomplishments of the organization consistent with its charitable goals as defined in its organizational documents?

Better Business Bureau Standards

- ▶ The Better Business Bureau “Wise Giving Alliance Standards of Accountability” are very similar to those from the Charity Navigator and were developed to assist donors in making sound donation or contribution decisions, as well as to foster public confidence in charitable organizations. The Standards contain the following categories, which are addressed by answering various questions, some of which appear following each category below :
- Organizational governance
 - Does the Board provide adequate oversight of the organization’s operations and staff?
 - Does the Board have a minimum of 5 voting members?
 - Does the Board have at least 3 evenly spaced meetings throughout the year with the majority of members attending and face to face participation?
 - Is the majority of the Board “independent”?
 - Are there transactions in which Board members have material conflicts of interest with the organization?
- Organizational spending policies and practices
 - Does the organization spend at least 65% of its total expenses on program activities?
 - Does the organization avoid accumulating funds that could be used for program?
 - Does the Board make available to all, on request, annual financial statements prepared in accordance with generally accepted accounting principles?
 - Are the organization’s solicitations and informational materials accurate, truthful and not misleading?

IRS 501(c)(3) Status

- ▶ This is extremely valuable status which allows the organization to be tax exempt, and provides eligibility to receive tax-deductible contributions
- ▶ The IRS requires that the Organization file annual 990 tax returns as a condition to being the recipient of the tax exempt status

Disclosures Required on the Form 990

- ▶ The 990 Forms require disclosure of information with respect to several important aspects of governance
- ▶ The information disclosed is used by the government and the public to determine whether the various charities are well run
- ▶ A positive correlation is seen between compliance with the required areas of disclosure and well managed charities

Examples of 990 Management Disclosures Required

- ▶ Independence of Board members
- ▶ Size of the Board
- ▶ Disclosure of a material diversion of assets
- ▶ Documentation of meetings
- ▶ Written policies and procedures
- ▶ Review of the draft 990 by the Board

Examples of written policies and procedures to be disclosed on 990

- ▶ Conflict of Interest
 - Is there regular monitoring and compliance?
- ▶ Whistleblower Policy
- ▶ Loans to related parties
 - Loans to Officers and Directors are prohibited under the NY Not for Profit law

Additional Policies to Be Disclosed

- ▶ Minutes of every Board meeting
- ▶ Document Retention Policy
- ▶ Annual review of CEO and salary
 - Compensation of key officials of the organization is subject to disclosure and review for comparability with similar organizations

CONCLUSION

- ▶ Non-Profit Boards are charged with the responsibility of managing their organizations in accordance with the law
- ▶ Observing best practices as outlined will help insure compliance with the law and with good governance standards,
- ▶ Compliance with the standards related to financial responsibility, oversight of the management of the organization, transparency and accountability is key
- ▶ Every director/trustee of a not for profit organization in NY and NJ should be familiar with his/her responsibilities under the law and best practices

Edward W. Ahart (Mr. Ahart is the former Managing Partner and Chairman of the firm. Having returned to the full-time practice of law, he is currently the Chair of the firm's Corporate Practice Group. He has extensive experience representing and sitting on the boards of privately held and not for profit organizations, including Lafayette College where he serves as Board Chair, the Fannie E. Rippel Foundation where is a Board member and counsel to the Association, and the Morris County Chamber of Commerce and the Greenwich Cemetery Association, where he continues as a Board member having also chaired each Board previously).