



Good Governance: Balancing Compliance with Practices that Work

St. Lawrence County Chamber of Commerce
Nonprofit Conference

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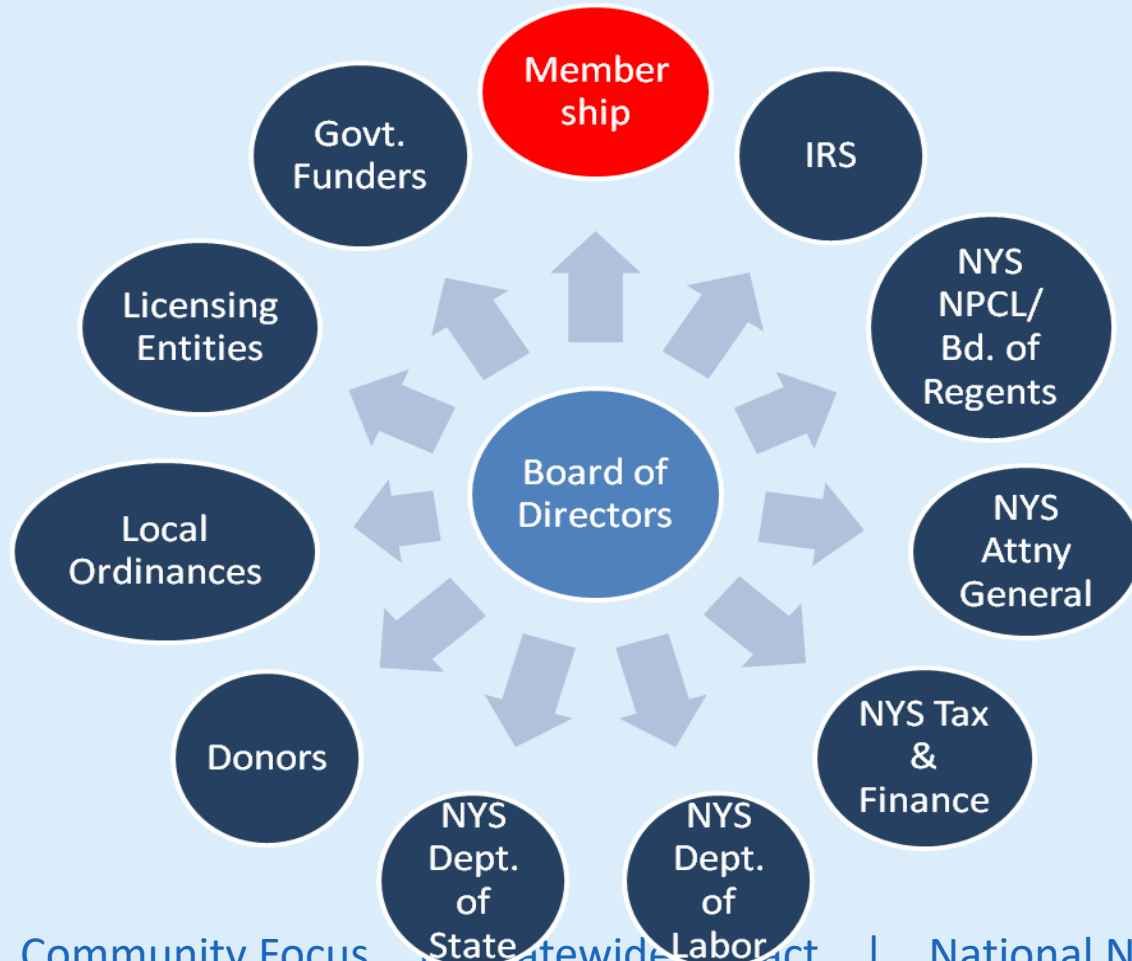
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What We Will be Covering

1. Board Structure & Accountability
2. The Board as Fiduciaries
3. Common Board Compliance Matters
 - COI. Charter, Bylaws & Policies
 - Meetings
 - Voting
 - Board Appointed Committees
 - Conflicts of Interest & Related Party Transactions
 - Audit Oversight & Independent Directors
 - Whistleblower Policies
4. Further Discussion & Questions

Board Accountability Landscape





Be Aware - Board Members Have Liability Exposure for:

- Violations of law, including employment related claims
- Operating outside of the bylaws
- Slander & libel
- Misappropriation of assets
- Unpaid payroll & other taxes
- Unsatisfied corporate debt
- Error or Neglect (under NYS Immunity Laws)
 - Gross error or neglect of fiduciary, legal, & financial responsibilities (if a volunteer)
 - Neglect of fiduciary, legal, & financial responsibilities (if paid)



Board Members Are Protected By:

- Immunity Laws
- Insurance Options
- Risk Management (including delegating administrative & operational responsibilities)

The Board as Fiduciaries

Act for someone else's benefit; has responsibilities in connection with the administration, investment & distribution of someone else's assets.

- Consists of the Duties of Care, Obedience & Loyalty



Duty of Care

The degree of competence & care expected to advance the mission & avoid reasonably foreseeable harm.

Carrying Out Duty of Care:

- Be Reasonable – Not Reckless!
- Be prepared for, attend & actively participate in meetings
- Deliberate, ask questions & inquire
- Vote your opinion
- Ensure documentation shows exercise of care and proper conduct in decision-making & actions



Duty of Obedience

- Compliance with the laws & regulations that govern the organization's actions including:
 - Federal, State & Local Laws
 - The Bylaws
 - The Certificate of Incorporation/Charter & any Amendments
 - Contractual Obligations
- Board decisions & policies
 - Respect process
 - Understand & support duly made decisions

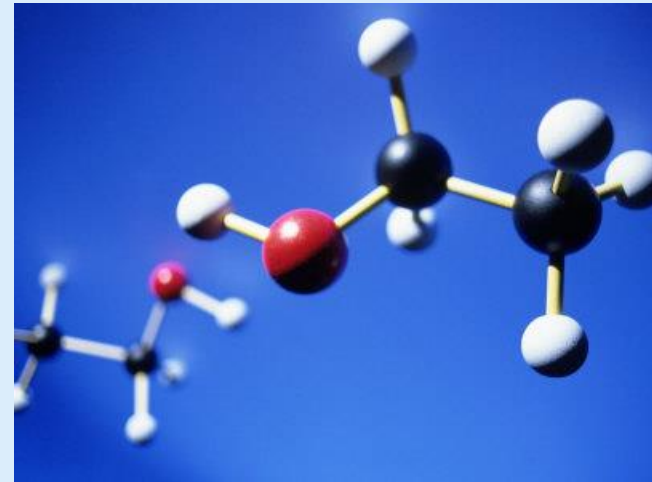


Duty of Loyalty

- Faithfulness/Allegiance to position & organization
 - Be publicly supportive of organization
 - Follow the established chain of command
- Make decisions in the best interest of the mission & the nonprofit without being compromised by private gain or other interests
 - Minimally, adhere to law & applicable regulations
 - Consider higher standard such as non-financial conflicts and those that are “perceived”
 - *Best Practice - put in bylaws*

An Board Accountability Structure...

Clearly defines the monitoring, reporting and decision-making roles and tasks at the board, committee & staff levels in order to know *who is responsible for what, accountable to whom and in what ways.*



Starts with Your COI/Charter and Bylaws

- The Certificate of Incorporation (COI) or Charter is the fundamental corporate document
- The bylaws are essentially your *legislation*
 - The board is legally bound to adhere to
 - Cannot conflict with statute, COI or Charter
- Sets the rules for composition, leadership & decision-making
- Distributes duties & powers to officers, committees, & executive leadership/management
- Serves as a compliance & risk management document

The Bylaws-Policy-Procedure Flow

Bylaws

- **Legal Obligations Established by Board (and/or Membership)**
- Usually advance notification required for amendment as stated in bylaws

Policies

- **Parameters Established by the Board**
- Can be changed at duly held board meeting
- May delegate some policy-making to ED

Procedures

- **Established By Administrative Leadership to Implement the Policies**

Meetings

- Requires quorum of voting members as per bylaws
- Minimum annual no.# of meetings annually should be in bylaws
- Phone – video conference participation
 - All parties must hear and be heard; provision should be in bylaws
- Meeting notices may be faxed or e-mailed
 - Reasonable certainty that destination is correct
 - Not valid if undeliverable
 - Number/address must be recorded with the Secretary
- Cannot act without a duly convened meeting *unless* there is unanimous written consent to waive meeting
- Document – board & committee minutes

Board Voting by Email

- Unanimous consent only, meaning all Directors must:
 - Consider & return/reply to the same resolution, &
 - Consent to its adoption without objection or abstention
- Consent resolutions can be paper or electronically (or a combination), *but must be identical*
 - *Related Party Transactions can't be authorized on consent as it would require the consent of interested Directors, who can't vote*
- Cannot use a combination of votes cast at a meeting of & approvals solicited by resolution

Voting by Proxy

- Is prohibited for board & committee meetings
 - Another Director nor surrogate cannot vote on behalf of another *unless* there is an authorized “alternate director” as per bylaws
 - Ballot cannot be cast in advance of a meeting
 - Ballot cannot be cast after the vote has been taken/tabulated
- If absent, a best practice is that a director request their view on a matter be stated in minutes at a subsequent meeting
- “Members” can vote by proxy (written, fax or e-mail)

Requirements for “Entire Board” Voting

- Purchase, sale, mortgage & lease of real property (all or substantially all)
 - 2/3rds vote of entire board (or membership)
 - If more than 21 directors, vote of majority
- Amending COI or bylaws (*majority*)
- Number of Directors (majority)
- Executive Committee Appointment (*majority*)
- Employee as Board Chair (*2/3rds*)
- Fixing compensation of officers (*majority*)

Board Appointed Committees

“Committees of the Board”

- Voting directors only and must have at least 3
- Committees have or could have authorized authority to “bind” the nonprofit, subject to statutory limitations
- Can be standing or ad hoc
- *Common Examples:* Executive, Audit & Finance (separate or combined)

“Committees of the Corporation”

- Can be voting directors and/or non-directors and must have at least 3
- Cannot be empowered to “bind” the nonprofit
- Can be standing or ad hoc
- *Common Examples:* Corporate Compliance, Program, Advisory

Best Practices – State these definitions in the bylaws and the charge of all standing Committees; also, delineate those committees that advise or report to management (not the board)

NPRA Limits on Board Committee Authority

No Committee can:

- Fill board or committee vacancies on the Board
- Fix compensation for Directors or committee members;
- Authorize any amendments to the by-laws or Certificate of Incorporation
- Authorize any action relative to the sale, lease, exchange or other disposition of all or substantially all the assets
- Amendment, or repeal, of any resolutions of the Board
- Elect or remove voting Officers or Directors
- Approval of a merger or dissolution;
- *If membership org* – take action that are rights of members by statute and/or bylaws

Best Practice – State these limits in the bylaws

Conflict of Interest Obligations

- Must have written conflicts of interest policy
- The Board or an “Audit’ Committee” (or an analogous committee) comprised solely of Independent Directors must oversee the adoption, implementation & compliance with the policy
- All voting Directors must annually submit conflicts disclosure statements

Conflict of Interest Definitions

- **“Related Party”**
 - any Officer, Director or Key Employee (or a “Relative”) of the nonprofit, or an affiliate corporation, or
 - any entity where that individual has a 35%, or more, ownership interest, or, for professional corporations/partnerships, more than a 5% interest.
- **“Related Party Transaction” (RPT)**
 - any arrangement in which a Related Party has a financial interest with the nonprofit or its affiliate
- **“Key Person”**
 - in a position to exercise substantial influence over a nonprofit’s affairs
- **“Relative”**
 - spouses, siblings (whole or half), children, spouses of siblings or children, grandchildren, great-grandchildren, ancestors, & domestic partners.

Conflicted/Related Party Transactions

- *Best Practice* – Avoid or act cautiously with any such transactions, which although legal, are strongly discouraged
- The Board can only authorize a RPT if it is *fair, reasonable and in the best interest* of the nonprofit
- If the transaction is one where a RP has a “*substantial*” financial interest, the Board must:
 1. consider alternate options prior to entering into the transaction
 2. approve the transaction by, at least, a majority vote, &
 3. document the basis for its decision
- RP must disclose all material facts & refrain from attending, or attempting to influence, deliberations &/or voting

Conflict of Interest Policy Requirements

1. Define circumstances that constitute a conflict and document procedures specific to conflicts
 - Board has discretion in defining
2. Key requirements:
 - Written disclosure statements (prior to initial election & annually) of real/potential conflicts to be submitted to the auditor
 - Required of officers, directors and key employees
 - Procedures for disclosing and addressing conflict to the Secretary and then to the Board Chair or Audit Committee Chair
 - Prohibition of conflicted Directors from being present at or participating in deliberations &/or voting on the matter
 - Restriction of conflicted Directors from attempting to improperly influence deliberations or voting
 - Proper documentation of existence & resolution (including minutes)

Conflict of Interest Exceptions

1. Where the Related Party's financial interest is *de minimis*
 - Depends on size of budget & assets, and size of transaction
2. Is a transaction that is in the ordinary course of business – consistent with applied past practices in similar transactions or common in the (sub)sector
3. Constituting a benefit provided to a Related Party solely as a member of a class of the beneficiaries that the Corporation intends to benefit as part of the accomplishment of its mission and is provided in good faith without unjustified favoritism



Audit Oversight and Independent Directors

- **Only** Independent Directors may participate in deliberations or voting relative to matters concerning a nonprofit's audit oversight & compliance with its conflict of interest & whistleblower policies.
- All nonprofits are essentially required to have, at least, 1 Independent Director as only Independent Directors can deliberate on & vote to authorize conflicts of interest.



Who Qualifies as an Independent Director?

If within the last 3 years, either the *Director or a Relative* was:

- employed by the nonprofit;
- compensated by the nonprofit in an amount of \$10K+;
- employed by, or had a substantial financial interest in, any entity that made payments to *or* received payments from the nonprofit exceeding between \$10K, \$25K or \$100K (depending the entity's gross) or 2% of the entity's gross; or,
- employed by, or had an ownership interest in, the nonprofit's auditing firm or was involved with the audit.
 - *Any Affiliates are considered to be the equivalent of the nonprofit*
 - *Relatives must have been Key Employees or Officers*
 - *Contributions to & business transactions between nonprofits are not considered "payments" for purposes of this definition*

Audit Committee Requirements

- Be comprised solely of Independent Directors
- Oversee the audit, in part, by consulting with the auditor about audit scope & planning before work even begins,
- Review the results of the audit & discuss any material risks or weaknesses:
 - restrictions on scope of activities or access to requested info
 - significant disagreements between the auditor & management
 - the adequacy of the accounting and financial reporting processes
- Annually renew or retain the auditor & in so doing consider auditor performance & independence
- Report Committee's activities to the Board

Audit Committee Structure

- Can be standalone or combined with other functions, such as budgeting and finance
 - Still must be comprised of exclusively of Independent Directors
- Treasurer can serve on and even Chair, but must be independent

Note - As a best practice, consider appointing someone other than the Treasurer to serve as chair

Whistleblower Policies

- Required for all Medicaid-funded orgs and for nonprofits with 20+employees and \$1M in annual revenue
- Policies must address procedures for reporting violations, preserving confidentiality & protecting whistleblowers from retaliation, specifically consider:
 - individuals to whom violations may be reported
 - possible means of reporting, such as email or telephone
 - investigative steps the nonprofit will take
 - consequences for policy violation relative to retaliation
 - any other organizationally-specific procedures



Further Questions

