



Nonprofit Governance, Fiduciary Responsibility, and Tax-exempt Requirements

Melody A. Simpson, Esquire
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Goals of Presentation

- Present an overview of the issues
- Provide (or point you toward) guidance
- Help you meet your responsibilities
- Basic tax-exempt & registration requirements

Nonprofit Governance

Sources of Nonprofit Governance Standards:

- Federal statutes, primarily Internal Revenue Code and Treasury Regulations
- State nonprofit statutes and charitable fundraising regulations
- Watchdog agencies, accrediting organizations (“best practices”)

Nonprofit Governance – IRS

IRS and Federal Law

- Requirements to be tax-exempt
- Recommendations for good governance
- Policies which should be in place
- Annual filing requirement (990)

“Good” Governance – IRS view

- Well-formulated, clear mission statement limited to tax-exempt activities
- Organizational documents that meet both federal and state law
- Independent, active and engaged governing body with mix of skills and experience

“Good” Governance – IRS view

Policies and procedures:

- Conflicts of interest
- Whistleblowers
- Document retention and destruction
- Gift acceptance
- Ethics

“Good” Governance – IRS view

Policies and procedures (cont.):

- Privacy
- Investments
- Compensation
- Foreign grantmaking (if applicable)

Nonprofit Governance - IRS

Sample resources on the IRS website:

- Tax Information for Charitable Organizations

<https://www.irs.gov/charities-non-profits/charitable-organizations>

- Life Cycle of a Public Charity

<https://www.irs.gov/charities-non-profits/charitable-organizations/life-cycle-of-a-public-charity>

- Compliance Guide for 501(c)(3) Public Charities

<https://www.irs.gov/pub/irs-pdf/p4221pc.pdf> (Publication 4221-PC)

Nonprofit Governance – State

Incorporation laws for nonprofits

- W.Va. Code § 31E-1-101 *et seq.*

Charitable registration requirements

- W.Va. Code § 29-19-1 *et seq.*

Nonprofit governance – Other

Watchdog Organizations, for example:

- Charity Navigator
- CharityWatch
- BBB Wise Giving Alliance

Information providers, for example:

- Guidestar USA

Nonprofit governance – Other

Accrediting Organizations, for example:

- Evangelical Counsel for Financial Accountability – for religious organizations
- Council on Foundations – for community foundations

Associations, for example:

- West Virginia Nonprofit Association
(www.wvnpa.org)

Fiduciary Responsibility

- Fiduciary duties
- Basic board duties
- Liability issues

Fiduciary Duties

Who is a Fiduciary?

You are!

Who is a Fiduciary?

- Any person who has discretionary authority over the assets of another
- This includes all members of the board of directors of every organization

Fiduciary Duties – Some General Principles

- Board members are subject to fiduciary standards
- Fiduciary duties have both a substantive and a procedural component

Fiduciary Duties – State Law

West Virginia Nonprofit Corporation Act

- Chapter 31E, Article 8 describes duties of directors and officers
- Must act “in good faith,” “in a manner the director reasonably believes to be in the best interests” of the nonprofit and “with the care that a person in a like position would reasonably believe appropriate under similar circumstances.”

Specific Fiduciary Duties

1. Duty of care in decision making
2. Duty of loyalty
3. Duty of obedience

Specific Fiduciary Duties (cont.)

4. Duty to avoid conflicts of interest
5. Co-fiduciary duty to investigate, to challenge another's wrongdoing and remedy it
6. Duty to comply with statutes, rules and regulations

Issues Requiring Fiduciary Attention - Examples

- Focus on the mission
- Private benefit/private inurement
- Compensation issues (IRC § 4958)
- Fundraising
- Basically, all board duties must be carried out as a fiduciary!

Basic Board Duties

1. Ensuring that nonprofit assets are used appropriately
2. Keeping the nonprofit accountable to its donors, beneficiaries and the public
3. Staying informed about the nonprofit's legal obligations

Basic Board Duties (cont.)

4. Complying with the nonprofit's governing documents
5. Proposing, approving and regularly reviewing the nonprofit's policies and guidelines
6. Overseeing the CEO (if applicable)

Liability Issues

- Statutory Limitations
- Indemnification
- Insurance

Statutory Limitations of Liability

West Virginia Limited Liability Act (55-7C-1 *et seq.*)

- Provides immunity from personal civil liability for “qualified directors” if various conditions are met

Volunteer Protection Act of 1997 (42 U.S.C. 14501 *et seq.*)

- Similar protections under federal law

Indemnification and Insurance

- WV law requires nonprofit corporations to provide certain indemnification to directors
- WV law permits additional indemnification if stated in documents, for directors and/or officers
- WV law permits nonprofits to purchase and maintain liability insurance for directors and officers

Basic Tax-Exempt Requirements

- Incorporation as a nonprofit is not the same as charitable tax-exempt status
- Obtaining 501(c)(3) status requires filing an application for exemption with IRS
- Type of tax-exempt status will depend on sources of funds, purposes of organization

Basic Tax-Exempt Requirements

- Form 1023, Application for Recognition of Exemption under IRC § 501(c)(3)
- Form 1023-EZ, Streamlined Application
 - If assets = \$250,000 or less and annual gross receipts = \$50,000 or less
- If file within 27 months of formation, exempt status generally will be retroactive

Fundraising Pending 1023?

- Yes, if disclosure in fundraising requests that application is pending
- No guarantee of deductibility to donors if exempt status not granted

Sample disclosure: “The Organization has applied for federal tax exemption as a 501(c)(3) public charity and if this designation is granted, then the full amount of your contribution will be deductible for federal income tax purposes.”

Fundraising Pending 1023?

- Alternative approach: obtain a “fiscal sponsor” – another 501(c)(3) organization already recognized as tax-exempt, which is willing to accept donations on your behalf
- Ideally, the fiscal sponsor will have a mission similar to yours

Public Charity or Private Foundation?

- IRS presumes all 501(c)(3) organizations are private foundations unless otherwise established
- Public support test for public charity status
 - must establish annually in 990 filing
- Public charity status generally more favorable

Charity Status Can Change!

- From one type of public charity to another type of public charity (*e.g.*, if the nature of activities or source of funds changes)
- From public charity to private foundation, or vice-versa
- If changes from what your determination letter says, may want to file Form 8940

IRS Resources for Obtaining Tax-Exempt Status

- Publication 557, Tax-Exempt Status for Your Organization

<https://www.irs.gov/pub/irs-pdf/p557.pdf>

- List of Publications and Notices for Exempt Organizations

<https://www.irs.gov/charities-non-profits/publications-and-notices-for-exempt-organizations>

Fundraising Registration Requirements

- Fundraising requires registration with WV Secretary of State, unless exempt
- Annual filing
- Fees range from \$15 to \$50, plus late fees
- Multiple documents to be provided with registration form

Fundraising Registration Requirements

Required with registration:

- IRS favorable determination letter
- Copy of most recent Form 990
- Financial information (with independent audit if receive more than \$500,000; statement of financial review if receive \$200,000-\$499,000)
- Copies of contracts with professional fundraisers

Exemptions From Registration

- Accredited educational institutions
- Individual relief funds
- Nonprofit hospitals and nursing homes
- Membership organizations soliciting only from members
- Churches and synagogues

Exemptions From Registration (cont.)

- Special fundraising events for registered charity
- Charities which raise less than \$25,000 per year and do not employ professional fundraiser (if inadvertently exceed this amount, must register within 30 days after that total is reached)

Fundraising Registration Requirements – Resources

- Consult the West Virginia Secretary of State's web site, at:
<https://sos.wv.gov/business-licensing/charities/Pages/default.aspx>
- Downloadable forms, FAQ, fee schedules, etc.

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Questions?

Thank You!

Melody A. Simpson, Esquire

msimpson@bowlesrice.com

(304) 347-1755

600 Quarrier Street

Charleston, West Virginia 25301

www.bowlesrice.com