





## **RIGHT FROM THE START: RESPONSIBILITIES of DIRECTORS of NOT-FOR-PROFIT CORPORATIONS**

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Attorney General Eric T. Schneiderman's Charities Bureau drafted this guidance to assist current and future boards of directors of not-for-profit corporations and trustees of charitable trusts to understand and carry out their fiduciary responsibilities to the organizations they serve. The information in this booklet reflects changes to the Not-for-Profit Corporation Law that were included in the Nonprofit Revitalization Act of 2013.

Charitable organizations contribute enormously to our society. They educate our children, care for the sick, find cures for disease, preserve our literature, art and music for us and future generations, house the homeless, protect the environment and much more. The fiduciaries of those charitable organizations are responsible for managing and preserving the charitable assets that benefit all of us. Whatever their mission or size, all organizations should have policies and procedures established so that (1) members of their boards unT[oboarza4(s)li0(p)2prW(a)6(W(a)6(c)4(e)4(d ))JTJ 0 Tc0(p)2)02 ,(bl)-22) assets are managed and (3) the charitable purposes are carried out. A failure to meet these obligations is a breach of fiduciary duty and can result in financial and other liability for the board of directors.

Please read this booklet carefully. It contains general information to assist current and prospective members of nonprofit boards. It outlines some of the duties of board members and points out questions to ask and information to look for when considering and/or fulfilling the responsibilities of board membership. The Charities Bureau also publishes other guidance containing more detailed information on managing a charitable organization and overseeing its assets. That guidance and other publications of interest to board members are posted at [www.charitiesnys.com](http://www.charitiesnys.com).





decline an invitation to join a board because you don't have the time to devote to the board should be respected.

## ” **Duty of Care**

The *duty of care* requires a director to be familiar with the organization's finances and activities and to participate regularly in its governance. In carrying out this duty, directors must act in "good faith" using the "degree of diligence, care and skill" which prudent people would use in similar positions and under similar circumstances. In exercising the duty of care, a responsible board of directors should, among other things, do the following:

✘The directors as a group, and the officers of the corporation, should exercise their responsibility to undertake reasonable efforts to assure that the organization is operating in compliance with the law. For directors, this means assuring that there is an effective compliance program reporting ultimately to the directors, that there is a policy for protection of whistleblowers which has been communicated to employees, that there are effective internal controls, that there is an effective external audit by an independent auditor, and that allegations of violations of law are investigated and addressed. (Although New York law only requires organizations with over 20 employees and over \$1 million in revenue to have a whistleblower policy, smaller organizations might find it helpful to adopt such a policy as well.)

✘Attend

¥Make sure that monthly financial reports prepared for management are available to the board or finance and audit committees, and that they are clear and communicate the information needed for proper stewardship. Make sure there is an ongoing actual to budget comparison with discrepancies explained.

¥Participate in risk assessment and strategic planning discussions for the future of the organization.

¥Ensure that the organization has addressed the sufficiency of its written internal financial controls and written policies that safeguard, promote and protect its assets and that they are updated regularly, and has considered an employees', officers' and directors' fidelity bond to protect the organization from embezzlement.

¥Assure that the organization has a background check policy for prospective employees.

¥Determine whether or not the organization indemnifies its officers and directors from liability and has directors' and officers' liability insurance. If it does, find out what is covered and what is not. If it does not, find out why.

¥Encourage diversity among board members. Diversity will help insure a board committed to serve the organization's mission with a range of appropriate skills and interests.

¥Be involved in the selection and periodic review of the performance of the organization's Chief Executive Officer, Chief Financial Officer and other key employees responsible for the day-to-day activities of the organization. The board is responsible for ascertaining whether these individuals have the appropriate education, skills and experience to assume a key position; communicating duties, expectations and goals; and then evaluating their performance at least annually, first in an executive session and then with the officer directly.

## ” **Duty of Loyalty**

Directors are charged with the duty to act in the interest of the corporation. This duty of loyalty requires that any conflict of interest, real or possible, be disclosed in advance of joining a board and when they arise. a;equ (

¥Prohibit anyone with a conflict of interest from being present during or participating in the deliberation, voting on the issue that resulted in the conflict, or influencing the deliberation or vote on the issue that resulted in the conflict;

¥Require the nonprofit to document the existence and resolution of each conflict;

¥Require directors to sign annually a statement that identifies entities in which they serve as an officer, director, trustee, member, or employee and with which the corporation has a relationship; as well as any transaction of the nonprofit in which the director might have a conflicting interest.

## ” **Duty of Obedience**

A board has a *duty of obedience* to ensure that the organization complies with applicable laws and regulations, its mission and its internal governance documents and policies, including:

¥Dedicating the organization's resources to its mission.

¥Ensuring that the organization carries out its purposes and does not engage in unauthorized activities.

¥Complying with all appropriate laws, including registering and filing annual financial reports with the Attorney General's Charities Bureau in New York State, complying with similar laws in other states in which it conducts activities and/or solicits contributions, filing required financial reports with the State Worker's Compensation Board, the State Department of Taxation and Finance and the Internal Revenue Service; and paying all taxes such as Social Security, income tax withholding (federal, state and local) and any unrelated business income tax. Board members may be personally liable for failing to pay employees' wages and benefits, and for failing to withhold, escrow and pay over to state and federal authorities withholding taxes on employees' wages.

¥Providing copies of its applications for tax-exempt status (IRS Form 1023), federal reports (IRS forms 990, 990 PF, 990 EZ) and its financial reports filed with the Attorney General's Charities Bureau to members of the public who request them. Many organizations post their annual reports and other information on the Internet.

## **y MONITOR FUNDRAISING CONDUCTED ON BEHALF OF THE ORGANIZATION**

Many organizations contract with outside organizations or individuals to raise funds on their behalf. Since the fundraiser represents the organization to the public, the selection of a fundraising professional is extremely important. Establishing and following procedures for selection of a fundraiser can avoid future problems. Board members



should assess whether management has undertaken reasonable procedures to protect the organization, including:

✘Obtaining bids from several fundraising professionals before entering into a contract. Services and fees differ, and comparing bids will aid in the selection of the best contractor for the organization.

✘Checking with the Attorney General's Charities Bureau to see if the fundraising professionals being considered are registered and have filed all required contracts and financial reports.

✘Asking the Charities Bureau for copies of the fundraising professional's contracts with other charities to determine the services performed for and the fees charged to those charities.

✘Asking the fundraising professional for references. Reputable fundraising professionals should be happy to provide a potential client with the contact information for some of its clients.

✘Contacting some of the fundraising professional's other clients to see if they were satisfied with the services received.

✘Finding out whether the organization's fundraising contracts contain the clauses required by Article 7-A of the Executive Law.

✘Reviewing written solicitations and scripts used by the fund raising professional to make sure that solicitations appropriately describe the organization and its activities, include the name of the organization as registered with the Attorney General and advise potential contributors that they may obtain the organization's financial report from the organization itself or from the Attorney General.

✘Requiring, as mandated by New York law, that the fundraising professional and any of its representatives ("professional solicitors") disclose the name of the specific professional solicitor and the employing fundraising professional and state that the solicitor is being paid to raise funds.

✘When considering engaging a fundraiser to solicit via the telephone, reviewing *PeersforChait* y, the Attorney General's annual report

for such advice. There