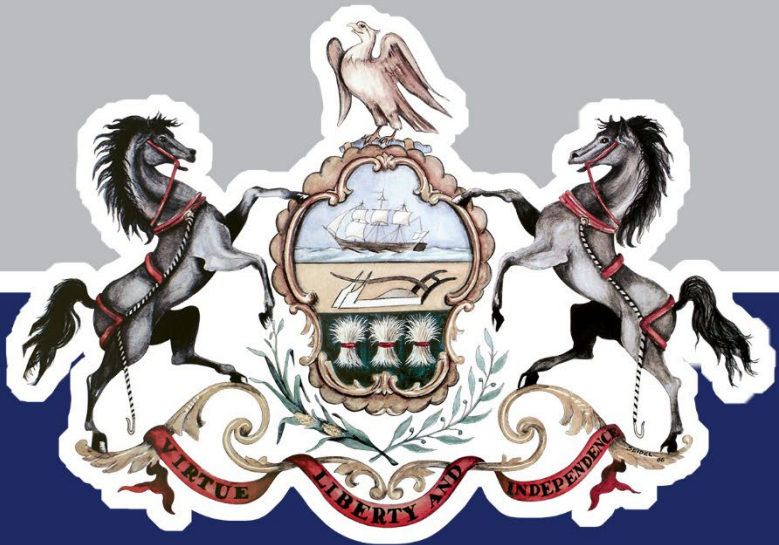


*Office of Attorney General
Commonwealth of Pennsylvania*

HANDBOOK FOR CHARITABLE NONPROFIT ORGANIZATIONS



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Attorney General



Nonprofit Board Members and Senior Management:

The Office of Attorney General recognizes the vital service that you provide to your community through your work as a board member or senior manager of a charitable nonprofit organization. Your willingness to volunteer your time and expertise is deeply appreciated.

The purpose of this guide is to provide you with some basic information about matters which affect charitable nonprofit organizations because those entities fall within the Attorney General's jurisdiction. The Attorney

General has a duty to protect the public's interest in the charitable assets held by nonprofit corporations.

In response to the many difficult questions confronting the boards of charitable organizations today, the Attorney General's office is offering this guide to assist you in your efforts to better serve your organizations. This guide presents general information and is not intended to direct the exact manner in which a Pennsylvania nonprofit board must operate.

To obtain additional information regarding your fiduciary duties as a manager or board member or the rules and regulations for the creation, operation and dissolution of nonprofit charitable organizations please consult the Nonprofit Corporation Law of 1988, as amended, 15 Pa. C.S.A. §§ 5101 – 6146 (Nonprofit Law). This guide is not a substitute for legal advice. If you have questions, seek qualified legal counsel to ensure that you and your board's actions are in compliance with Pennsylvania law.

This handbook and many other resources are also available on our website at www.attorneygeneral.gov. Thank you for your hard work and dedication to public service. Our Commonwealth is a better place because of your volunteer efforts.

INTRODUCTION

This guide is intended to provide senior management and board members with general information relating to the operation of charitable nonprofit organizations. If you have any questions regarding these organizations, please contact the Office of Attorney General at:

**Commonwealth of Pennsylvania
Office of Attorney General
Charitable Trusts and Organizations Section
14th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
Telephone: (717) 783-2853
Facsimile: (717) 787-1190
www.attorneygeneral.gov**

QUESTIONS YOU SHOULD ASK BEFORE JOINING A BOARD

What is the charitable purpose of the organization?

“Charitable purposes” is defined by the Nonprofit Law as “[t]he relief of poverty, the advancement and provision of education, including postsecondary education, the advancement of religion, the prevention and treatment of disease or injury, including mental retardation and mental disorders, governmental or municipal purposes and any other purpose the accomplishment of which is recognized as important and beneficial to the public.” Obtain as much information as possible about the organization. Review the Articles of Incorporation, bylaws, internal operating manuals, minutes of prior board meetings and annual reports.

What is the financial status of the organization?

As a board member or senior manager you are responsible for ensuring that the assets committed to a charitable purpose are used for the charitable purpose for which they were intended. Review the nonprofit organization's financial statements and tax returns. Talk with the executive director, staff and current board members if you have any questions about the finances of the organization.

What are my responsibilities as a board member?

Meet with the officers and executive staff of the charity to discuss your expected duties and responsibilities as a board member. Determine how much time you will be asked to commit to these duties. Ask about board committees, organizational structure, financial responsibility and conflict of interest policies.

OFFICERS AND DIRECTORS

Every nonprofit corporation must have a president, a secretary and a treasurer. Although it is not necessary to use the above titles, every nonprofit corporation must have an individual who fulfills each of those roles and the same individual may fill multiple roles. In order to avoid the appearance of impropriety, it is best not to give one individual too much control over the corporation. Instead, power should be distributed among different officers or board members. A corporation may have as many officers with as many different titles as it deems necessary.

The bylaws may set forth the qualifications for the positions and the manner in which officers and directors will be elected. The length of the term that each officer

or director will serve should be set forth in the bylaws. In the absence of a bylaw dictating term length, the Nonprofit Law provides that each officer or director will serve a one year term. Committees may be established to handle some aspects of the organization's governance. At any time, an officer or director may resign by giving written notice to the corporation.

FIDUCIARY RESPONSIBILITIES OF BOARD MEMBERS AND SENIOR MANAGEMENT

1. DUTY OF CARE

Board Members, senior management and members of committees must perform their duties in a manner they reasonably believe to be in the best interests of the corporation using the same degree of care, skill, caution and diligence that a person of ordinary prudence would use under similar circumstances. Decision-makers are required to make reasonable inquiries when analyzing contracts, investments, business dealings, and other matters. An individual who is acting in conformance with this standard will:

- attend and participate in board meetings on a regular basis;
- attend and participate in committee meetings when the individual is a member of the committee;
- diligently read, review, and inquire about material that affects the corporation;
- keep abreast of the affairs and finances of the corporation; and
- use independent judgment when analyzing matters that affect the corporation.

Decision-makers may rely on information provided by their employees, committees, attorneys, public accountants and qualified professionals as long as the decision-maker reasonably believes that the information provided is reliable. Decision-makers must use their own independent judgment when evaluating information. Individuals who fail to meet the prescribed standard may be personally liable to the corporation if their actions cause financial harm.

Board members, trustees and senior management have a fiduciary responsibility when handling finances and investments. That simply means, they must exercise the degree of care, caution and diligence that prudent persons would exercise in handling their own personal investments and finances. Individuals who have or claim to have special knowledge or skills in the area of investment will be held to a higher standard. Fiduciaries who carelessly or negligently invest funds may be personally liable for any losses sustained.

2. DUTY OF LOYALTY

Board members and senior management must always perform their duties in good faith with the best interests of the organization in mind. This means that they must not seek to derive private gain from business transactions that involve the nonprofit corporation or advance their own interests at the expense of the corporation. Acts of self-dealing constitute a breach of fiduciary duty which may result in personal liability to the nonprofit organization. Board members, trustees, and senior management should avoid conflicts of interest and even the appearance of impropriety. Individuals who take advantage of corporate opportunities to make profits for themselves at the expense of the corporation may be

liable for the profits they received at the organization's expense.

CONFLICT OF INTEREST

Board members and senior management have a duty to avoid potential or apparent conflicts of interest. To avoid the appearance of impropriety, it is important for individuals to be open and honest with their fellow managers and board members at all times. It is particularly important for board members to disclose the following facts:

- whether they have a potential conflict of interest with respect to any transaction, business decision or other matter in which the organization is involved;
- whether they have a financial, business or personal interest in an entity with which the nonprofit organization is or will be doing business;
- whether individuals related to them have a financial, business or personal interest in an entity with which the nonprofit organization is or will be doing business; or
- whether they serve as a director, member or employee of either a competitor of the corporation or a corporation with which the nonprofit organization is or will be doing business.

The board should proceed with caution when any of the above facts are present because there may be a conflict of interest. An individual who has a potential conflict with respect to a particular transaction should disclose it to fellow managers and board members and abstain from participating in the negotiations and decisions

surrounding that transaction. To avoid the appearance of impropriety, the individual who has the conflict of interest should not be present in the room during any discussions that relate to the transaction.

COMPENSATION FOR BOARD MEMBERS AND SENIOR MANAGEMENT

Board members and senior managers of nonprofit organizations are not always paid for their services and the bylaws should state whether any individual will be compensated. Individuals are not entitled to compensation unless a clear compensation agreement has been reached. The determination of whether or not to compensate individuals for their services is generally made by the board unless the bylaws provide otherwise.

In the event that compensation is received, the amount must be reasonable based upon the value of the services rendered; it must not be excessive. Compensation includes all salaries, commissions, bonuses, pensions, benefits, gifts, living expenses and all other perquisites and items of value of any kind. The level of compensation that is to be paid to each individual should be determined independently by the board of directors or a committee vested with the authority to set compensation. Individual employees should not be involved in setting their own compensation. In determining whether compensation is reasonable, the salary ranges of similarly situated individuals in similar nonprofit organizations should be examined.

A nonprofit organization may not compensate individuals who are not providing services to the organization. An organization's status as a nonprofit

entity may be threatened if its employees receive excessive compensation or if individuals receive compensation without rendering services.

RIGHTS OF BOARD MEMBERS

- Board members have the right to receive all information that is necessary and relevant to assist them in performing their duties.
- Board members have the right to call special meetings by submitting written requests and once requested, a meeting must be held within the 60 days following the organization's receipt of the written request.
- Board members may bring court actions to contest activities that affect their rights and duties.
- Board members have the right to disagree with actions taken at meetings and may ask to have their disagreement noted in the minutes of the meeting at which the action was taken. Otherwise, they may submit a written dissent to the secretary of the corporation immediately following the meeting. However, board members may not dissent if they voted in favor of the action that was taken. It is important to note that board members who fail to note their dissent either in writing or in the minutes will be assumed to have assented to the board's action.

RIGHTS OF GENERAL MEMBERS

- The rights of general members of the nonprofit organization are governed by the organization's

bylaws and the extent of the members' interest in the organization. For example, members who are entitled to cast at least 10% of the total membership votes are entitled to call special meetings by means of a written request. Once the written request is received, the meeting must be held within 60 days.

- Unless the members of a nonprofit organization have modified the bylaws to provide otherwise, each member is entitled to one vote.
- Members of nonprofit corporations do not have the right to sell their votes.
- Whenever a member makes a proper request, the organization's books or records of membership must be made available at either a regular meeting or a special meeting of the nonprofit corporation.
- A voting member may bring a court action to contest activities of a nonprofit organization that affect the member's rights or duties.

ARTICLES OF INCORPORATION

In Pennsylvania, the format and contents of Articles of Incorporation are governed by the Nonprofit Law which sets forth the specific provisions or requirements that must be met. When forming a nonprofit corporation, it is advisable to engage an attorney to review the law and assist in drafting the Articles. Articles of Incorporation must be filed with the Department of State. Generally, Articles of Incorporation must contain information including, but not limited to, the following:

- the name and registered address of the corporation;

- the purpose for which the organization was formed;
- a statement that the corporation is a not-for-profit corporation incorporated under the Nonprofit Corporation Law;
- the voting rights of members;
- the name and address of each individual incorporator;
- the effective date of the Articles; and
- whether or not the corporation is organized on a nonstock or a stock share basis.

BYLAWS

The bylaws of a nonprofit organization should be written carefully and clearly. Bylaws provide the framework for governance and management of the nonprofit organization. Bylaws regulate the conduct of all members of the nonprofit organization. Generally, bylaws dictate:

- the scope of the authority that has been granted to board members and members of senior management;
- the number of meetings that the organization must hold, the time period within which these meetings must occur (e.g., monthly, yearly, etc.), and the provisions for calling special meetings.

In certain instances, individuals or entities who do business with a nonprofit corporation and are aware of provisions within its bylaws may be subject to those provisions. Bylaws which are in clear opposition to Pennsylvania law will not be upheld.

SHARES OF STOCK IN A NONPROFIT CORPORATION

A nonprofit corporation may elect to have shareholders. If a nonprofit corporation chooses to have shareholders, the fact that the corporation is organized on a stock share basis must be clearly denoted in its Articles of Incorporation. The bylaws should describe the denominations in which shares will be issued and the shares should be evidenced by share certificates. The face of each share certificate must contain a conspicuous statement that the corporation for which it is issued is a nonprofit corporation.

Unless the bylaws state otherwise, holders are entitled to one vote per share. Similarly, unless the bylaws state otherwise, shares are nontransferable and may not be transferred by any method including operation of law. Shareholders are not entitled to and may not receive direct or indirect dividends on any shares. Further, shareholders of a charitable nonprofit corporation are not entitled to and may not receive any portion of the corporate earnings or corporate assets under any circumstance including its dissolution.

As long as the bylaws of a nonprofit corporation are lawful and reasonable, a shareholder who fails to comply with those bylaws may have their shares canceled by the nonprofit corporation and may be excluded from future membership.

CHARITABLE ASSETS

Property committed to charitable purposes has special protection under the law because it relieves the public burden by advancing one or more general or specific charitable causes. As soon as money or property is

donated or committed to a charitable purpose, the Attorney General acts on behalf of the public's interest to ensure it is duly administered; including the assets held by nonprofit organizations formed for charitable purposes.

In Pennsylvania, the Orphans' Court has jurisdiction over property committed to charitable purposes under Rule 2156 of the Pennsylvania Rules of Judicial Administration, Pa. R.J.A. No. 2156, and under Section 711(21) of the Probate, Estates, and Fiduciaries Code (PEF Code), 20 Pa. C.S.A. § 711(21). The Nonprofit Law provides that charitable assets may not be diverted from the purposes for which they were donated, granted, devised or otherwise vested in the corporation without obtaining an order from the Orphans' Court specifying the disposition of the assets, 15 Pa. C.S.A. § 5547(b). Under Rule 4.4(a) of the Pennsylvania Orphans' Court Rules, the Attorney General must receive notice of any Orphans' Court proceeding involving or affecting charitable assets. Under the Commonwealth Attorneys Act, the Attorney General may intervene in any action involving charitable bequests or trusts, 71 P.S. § 732-204(c). The termination of charitable trusts of \$100,000 or less may be accomplished without an Orphans' Court proceeding if the Attorney General consents to it, 20 Pa. C.S.A. § 7740.3(d).

Property committed to charitable purposes may be deemed to be held in trust regardless of whether a formal trust instrument has been prepared. If a trust instrument has been prepared, that document will govern investment and use of the assets or funds.

When a nonprofit organization is dissolved, the Orphans' Court must review the dissolution and approve the distribution of the assets.

A nonprofit corporation with responsibility for charitable assets acts as the trustee of those assets. Trustees are accountable for charitable assets and as such are responsible for ensuring that funds and assets are protected and invested wisely. A trustee which allows charitable assets to be squandered, diverted or otherwise dissipated may be individually liable for the loss of those assets regardless of whether the assets were administered through a corporation.

CHARITABLE SOLICITATIONS

Most states, including Pennsylvania regulate solicitations of charitable contributions. In Pennsylvania, charitable organizations and professional fundraisers are regulated by the Solicitation of Funds for Charitable Purposes Act, 10 P.S. §§162.1 162.23 (Charities Act), and the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§201-1 - 201-9.3 (Consumer Protection Law). In addition, certain fundraising activities such as bingo and small games of chance are regulated at the state, local and county levels.

Most charitable organizations and their fundraisers requesting donations within Pennsylvania are required to register with the Department of State, Bureau of Charitable Organizations, prior to beginning any fundraising activities. Certain public service organizations and charitable organizations raising less than \$25,000 annually are not required to register if they do not pay anyone to raise funds on their behalf. Even though a charitable organization may not be required to

register before soliciting in Pennsylvania, these solicitations must still comply with all other provisions of the Charities Act and the Consumer Protection Law. The Charities Act requires that all charitable organizations “must establish and exercise control over fundraising activities conducted for its benefit, including approval of all written contracts and agreements, and must assure that fundraising activities are conducted without coercion.” 10 P. S. §162.13(e).

Board members should also be aware that the Charities Act specifically states the standard of care that they must utilize in their treatment of property received as a result of a charitable solicitation. Section 21 holds that “every person soliciting, collecting or expending contributions for charitable purposes and every officer, director, trustee and employee of any such person concerned with the solicitation, collection, or expenditure of such contribution shall be deemed to be a fiduciary and acting in a fiduciary capacity.” 10 P. S. §162.21, (emphasis added).

To obtain registration forms and other information about registering a charitable organization or professional fundraiser contact the:

Pennsylvania Department of State
Bureau of Corporations and Charitable Organizations:
Charities Section
207 North Office Building
Harrisburg, PA 17120
(717) 783-1720
1(800) 732-0999
www.dos.pa.gov/BusinessCharities/Charities

FUNDAMENTAL CHANGE TRANSACTIONS

The duties of the board of directors of a charitable nonprofit organization extend to all property committed to a charitable purpose. The Nonprofit Law provides that property committed to charitable purposes shall not “be diverted from the object to which it was donated, granted or devised, unless and until the board of directors or other body obtains from the Court an order specifying the disposition of the property.” 15 Pa. C.S.A. § 5547(b). The PEF Code has a similar requirement.

Whenever a nonprofit, charitable organization enters into a transaction effecting a fundamental corporate change which involves a transfer of ownership or control of all or substantially all of its charitable assets, the Office of Attorney General is obliged to review each transaction to ensure that the public interest is fully protected. These transactions may take various forms and include sales, mergers, consolidations, leases, options, conveyances, exchanges, transfers, joint ventures, affiliations, management agreements or collaboration arrangements, or other methods of disposition. The Office of Attorney General reviews such transactions regardless of whether the other party or parties to the transaction are nonprofit, mutual benefit or for-profit entities. Certain transactions which are in the usual and regular course of a nonprofit’s activities will not be reviewed.

In December 1997, the Attorney General issued a Review Protocol For Fundamental Change Transactions Affecting Health Care Nonprofits to facilitate the review of nonprofit healthcare transactions. The Protocol was developed to be used as a guide by attorneys and staff in the Charitable Trusts & Organizations Section, and its

outside experts, in reviewing fundamental change transactions affecting nonprofit, charitable health care entities. The principles underlying this protocol, however are also applicable to non-health care-related nonprofit corporations planning to undertake a fundamental change transaction.

To obtain a copy of the Protocol, please contact the Attorney General's Charitable Trusts & Organizations Section at the address on the back cover of this booklet, or online at www.attorneygeneral.gov.

**Office of Attorney General
Charitable Trusts & Organizations Section
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