

Duties and Responsibilities of a Nonprofit Board of Directors

Presented by Andrew Marietta

VP, Regional Development

amarietta@nycon.org; 800-515-5012 ext. 141

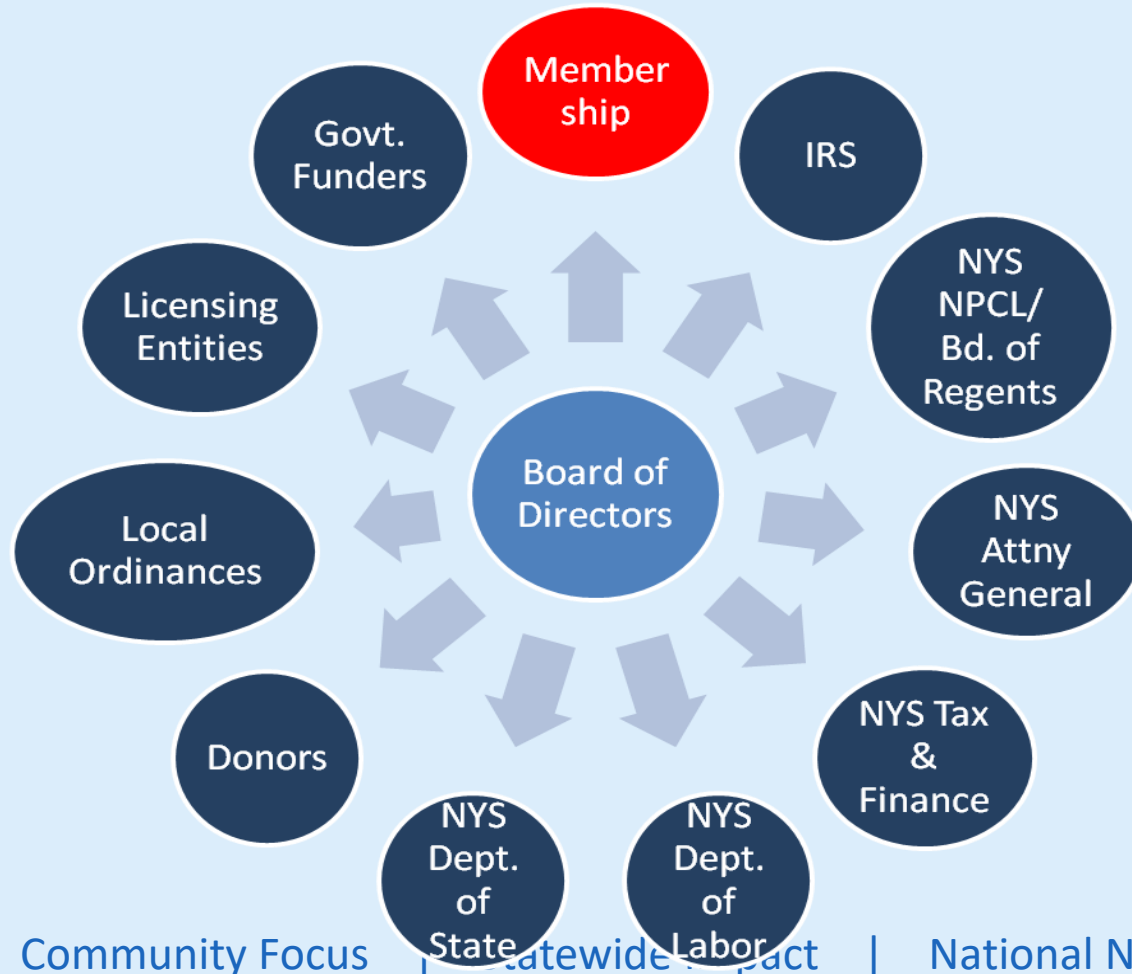
Today's Agenda

- Overview of the Board's legal and fiduciary responsibilities
- Understanding the important role of bylaws
- Defining the Nonprofit Revitalization Act
- Overview of the Board's policy and monitoring functions
- Considerations for building an effective committee structure

The Mission

- The tax-exempt purposes for which resources are to be devoted
 - Exempt activities flow from mission
 - Define scope of activities & who you serve
 - Unrelated Business Income Tax (*UBIT*)
 - Public support test
- Official statement is in your Certificate of Incorporation (*filed with Dept. of State*) and/or Charter (*registered with Dept. of Education*)
 - Check IRS application & IRS Form 990

Board Accountability Landscape



Board Members are Fiduciaries

- Fiduciaries act for someone else's benefit;
- Fiduciary responsibilities exist in connection with the administration, investment & distribution of someone else's assets.
- The duty of the fiduciary 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”

Manage Your Risk: Board Members are Responsible for:

- 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)
- Violations of law, including employment related claims
- Operating outside of the bylaws
- Misappropriation of assets
- Unpaid payroll & other taxes
- Unsatisfied corporate debt



Board Members Are Protected By:

- Immunity Laws: Protect volunteers of 501 (c)(3) nonprofit organizations from lawsuits
 - ✓ No protection for the nonprofit itself
 - ✓ No protection for allegations of gross negligence
 - ✓ Defense expenses still incurred
- Appropriate Insurance Coverage: *Directors and Officers Liability Insurance* provides coverage in case of lawsuits
- Good Risk Management: Includes regular review of bylaws and personnel policies, engaged participation, respecting chain of command, etc.

In Building a Governance Accountability Structure...

Clearly define the decision-making, monitoring, reporting responsibilities at the board & management levels in order to know:

- ✓ *Who is responsible for what,*
- ✓ *Who makes what decisions,*
- ✓ *Who is accountable to whom, and*
- ✓ *How and in what ways?*



Achieving Governance- Management Balance

Bylaws, Policy-
making &
Oversight

*Operating
Policies*

Implementation

Board of Directors

Shared Responsibilities

ED/CEO

Shared Responsibilities

Staff & Volunteers

***Roles that
Board Members
May Play***

- Spectators
- Cheerleaders
- Rubber-Stampers
- Leaders
- Policymakers
- Watchdogs
- Micro-managers

The Bylaws-Policy-Procedure Flow

Bylaws

- **“Sustainable” Legal Obligations Established by Board (and/or Membership)**
- Flows from Certificate of Incorporation or Charter
- Change usually requires advance written notification

Policies

- **Parameters Established by the Board**
- Subject to change without advanced notice (board or executive committee)
- Budgets & Financial, Personnel, Grant Making, Risk Management, ED Job Description, etc.

Operational Policies

Procedures

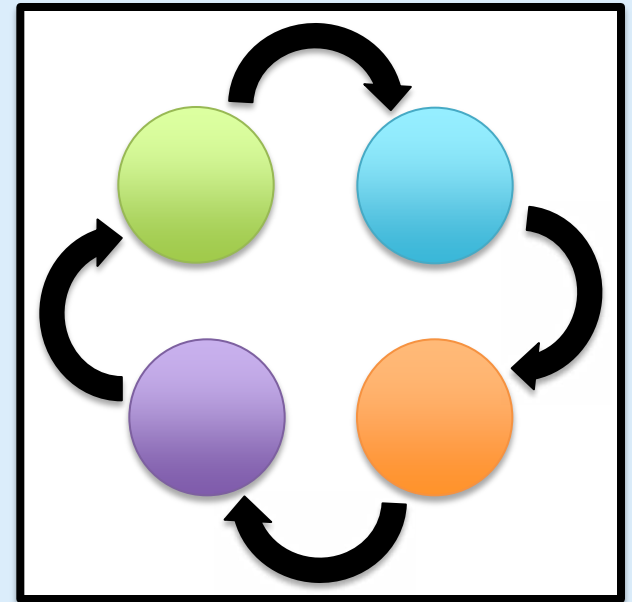
- **Established By ED to Implement the Policies**

Accountability Starts with Your Bylaws

- Is essentially your legislation -the board is legally bound to adhere
- Sets the rules; composition; nomination, election & removal process & procedures for the board & officers
- Distributes duties & powers to officers, committees, & executive leadership/management
- Defines your decision-making process
- Serves as a compliance & risk management document

Nonprofit Leadership is a Process that is...

- Defined by the mission, history, culture & services of your nonprofit
- A team experience where power & roles are distributed
- Influenced by position, personality, style, knowledge, & skills



The Executive Director/CEO

- At-will or contract employee
- Is accountable for all organizational performance & exercises authority as designated by the board
- Accomplishes expectations as established by board policies
- ED's performance is significantly related to organizational performance, at both the board & operational level
- Lasting authority and limitations should be in bylaws
- Job description, performance and salary reviewed and approved annually by the Board

Key NPRA Reforms

Most became effective July 1, 2014

- *Some* electronic age updates for Board, Committee & Membership Meetings and for Filings with AG's Office
- REQUIRED Conflict of Interest Policy – New Definitions & Significantly Stronger Requirements
- Higher Audit Thresholds & Increase Audit Oversight
- Required Whistleblower Policies (20 or more employees and \$1M)
- Improved processes for Certificate Amendments, Mergers, Dissolutions & Consolidations, Real Estate Sales or Transfers
- Greater Authority for the AG
- Redesigned Committee Structures
- Definitions for “Entire Board”
- 2/3 Board must approve if staff serves as chairperson

Conflict of Interest

State Law

- Must have policy & procedures for disclosure
- Must consider alternatives & show that transaction is fair, reasonable & in best interest of org.
- Person with conflict:
 - Cannot be present/participate in deliberations or vote
 - Cannot make any attempt to improperly influence
- Must document disclosure, deliberations, reasons & resolution to approve in minutes
- Must have signed annual disclosures (from Secretary to board chair or audit committee chair)

New Rules on Committees

Committees of the Board

- Can “bind” the Board
- Comprised only Board members (at least 3)
- May include non-Board members in advisory capacity
- Appointed by majority of Board
- Cannot:
 - Fill vacancies
 - Fix compensation of board or committee member
 - Adopt or amend bylaws
 - Amend or appeal board resolution

Committees of the Corporation

- Cannot bind the board
- May include non-board members
- Are to be appointed or elected the same as officers as stated in the bylaws
- Can be accountable to the Board, Membership, or the Executive Director/staff

Voting Without a Meeting: Unanimous Written Consent

- Cannot be combined with voting during a meeting (e.g. voting before a meeting, sending vote to President or Exec. Dir.)
- Questions arising from clarification of meaning may be immaterial, but should be shared with all board members.
- Questions arising from lack of clarity about the impact, outcome, or consequences of a decision may be material and should be considered by all Board Members prior to voting.
 - Best practice: seek input or feedback prior to calling a vote
- Cannot be used to address conflict of interests, including some related party transactions
- If a Board Member wants to take a sabbatical or leave of absence... Best practice: resign

Whistleblower Considerations

- The Act requires nonprofits to protect Directors, Officers, employees & volunteers who, in good faith, report suspected acts that they reasonably, & in good-faith, consider to be illegal, fraudulent, improper, unethical, immoral &/or in violation of any adopted policies/procedures
- Whistleblowers cannot be subjected to intimidation, harassment or other retaliation as a consequence of disclosure

Whistleblower Policies (Consider a Best Practice)

- Required if with 20 employees + *and* over \$1M
- Policy must:
 - Have procedures for reporting suspected violations & preserving confidentiality
 - Designate an employee or, officer directors to administer and report to board or committee with independent directors
 - Be distributed to all directors/trustees, officers, employees and volunteers providing “substantial services”

Major Governance & Policy Areas

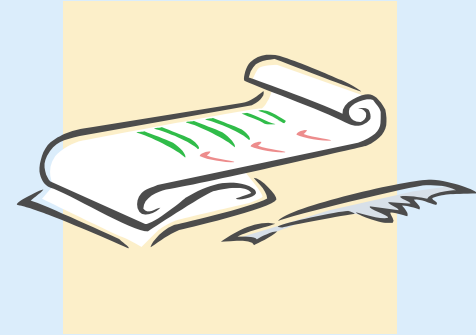
1. Board Management & Development
2. Audit, Finances & Fixed Assets
3. Personnel - HR
4. Resource Development
5. Stakeholder & Community Relations
6. Mission Impact - Programs & Services
 - Quality Assurance (if applicable)
 - Facilities and Collections Oversight (if applicable)
7. Strategically Planning for the Future

Board Development
is the process of creating, maintaining & improving the functioning, effectiveness & productivity of board leadership & governance.



Board Engagement Tools

- Board Meeting & Committee Calendar
- Board Manual
- Board Oversight Calendar
- Annual Retreat
- Routine Board Assessment & Training
- Regular Board Meeting “In-service”
- Strategic Meeting Agenda & Effective Meeting Facilitation
- Keep Well-informed – “No Surprises”



The Board's Role Audit, Finance & Fixed Assets

- Review & approve budget, reviews financial statements and year end projections, and oversees cash flow
- Adopt financial policies & internal controls
- Ensure investments and fixed assets are managed prudently
- Ensure adequate liability insurance coverage
- Must have the full board OR a designated audit committee comprised solely of “independent directors” oversee the accounting, financial reporting processes, conflict of interest, whistleblower policy, and audit

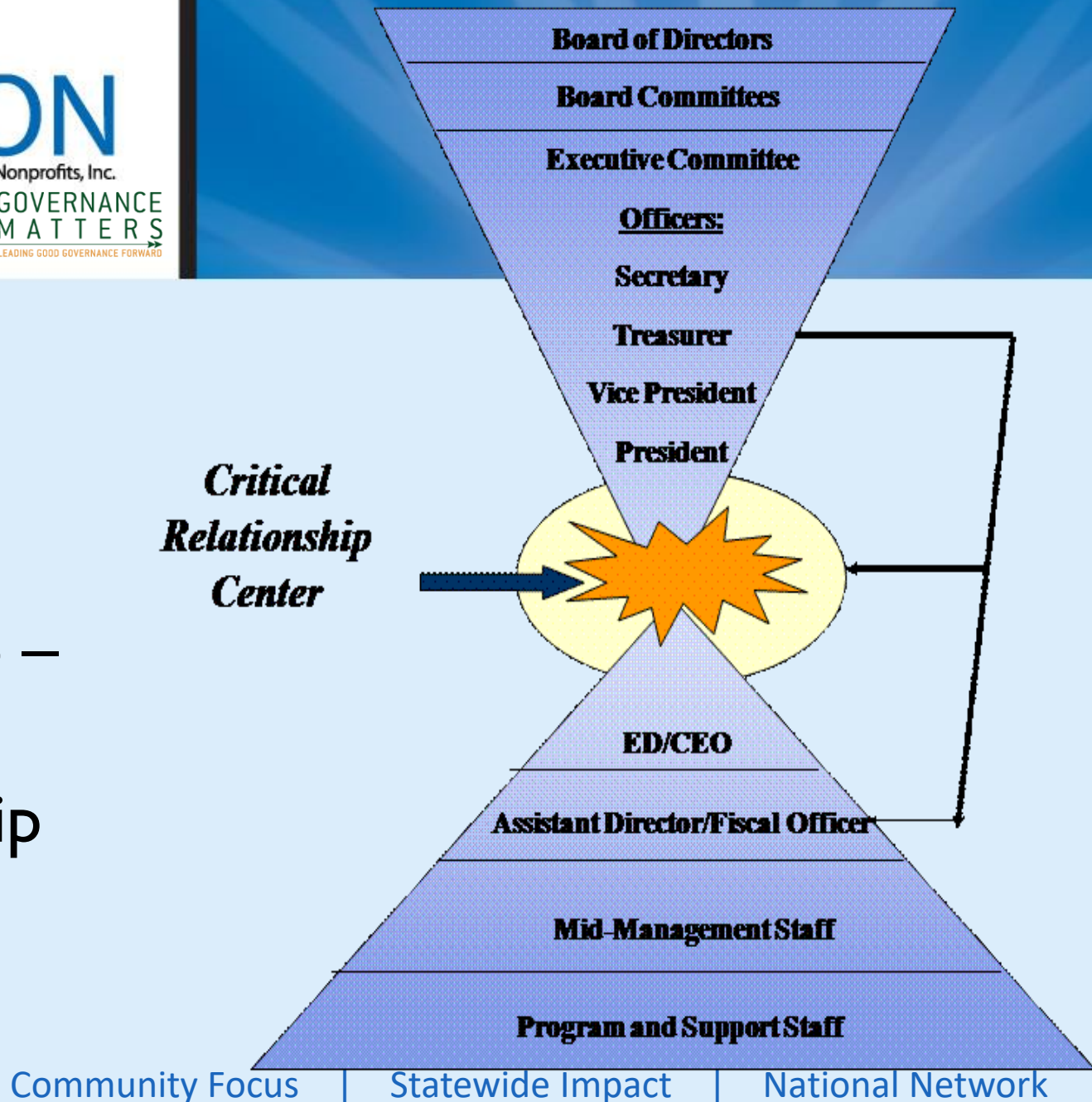
Auditing Requirements if Over \$1M in Revenue (Consider a Best Practice)

- The board, or audit committee must:
 - Review with auditor the scope & plan prior to start
 - Upon completion
 - Annual evaluation performance & independence
 - If committee – report to board on activities
 - Oversee conflict of interest & whistleblower policy (if not delegated to another committee)
 - Controlling/Parent Corporations can perform functions of affiliates

The Board's Role Personnel Oversight

- *Remember* - The Board, as a collective body, is the “employer”
- Ensure compliance with all pertinent laws, regulations & obligations
- Establish & ensure consistent application of personnel policies, including compensation practices
- Establish authority for hire, supervise, evaluate & sets reasonable compensation for ED/CEO
- Follow lines of authority on personnel matters

Delicate Balance of the Board Leadership – ED/CEO Relationship



The Board's Role Resource Development

- Ensure the organization has the resources it needs to meet obligations & pursue mission
- Approve fund development plan & related policies including donor confidentiality, gift acceptance, etc.
- Establish policies regarding board participation, solicitation, compliance confidentiality, etc.
- Represent the organization to funders, donors, government officials & other constituents
- Ensure compliance with NYS Charities Bureau and IRS regulations, notifications, and filings
- Identify how board members can serve as ambassadors, advocates, and possibly askers

The Board's Role Stakeholder & Community Relations

- Serves as “Ambassador” & representative of organization to the community, constituents & other stakeholders
- Brings issues, community needs, opportunities, etc. to the board & ED/CEO
- Works to enhance the organization’s public image
- *Serves as an Advocate* - exercises influence that promotes the organization’s interests

The Board's Role Strategically Planning for the Future

- Create & foster a strategic culture throughout the organization
- Adopt & embrace a positive and achievable “stretch” vision or intent for mission success, sustainability &/or growth
- Develop a plan with strategies & accountabilities for achievement
- Generate enthusiasm for organizing & putting action into the plan
- Monitor ongoing progress on “live” plan and revise course as needed

Strategic Planning is a Tool

- An *internal tool* – To motivate, unify & get everyone on the same page!
- A *creative tool* – To think & strategize out of the box!
- An *external tool* – To improve competitive position & investment in your future!
- A *monitoring tool* – To enhance accountability & demonstrate results!

The Board's Role Mission Impact - Programs & Services

- Prioritize programs in resource allocation/budgeting
- Approve program policies
- Oversee & ensure consumer protection, contractual & regulatory compliance
- Monitor & ensure that services produce demonstrable mission-based outcomes
 - Review programs at least annually
- Ensure quality assurance policies and practices are in place

Committee Fundamentals

- Establish committees when it's apparent that issues are too complex and/or numerous to be handled by the entire board.
- Committees make full use of board members' expertise, time commitment, and diversity of opinion.
- Think one committee per person (officers may serve on more)
- Committees may be relied upon to perform the due diligence functions of the Board but do not supplant the responsibility of each board member.
- Committee authority is prescribed and limited by the Board.
- Committees may expand opportunities to engage experts or stakeholders.

Added Ideas, Comments, Questions?

Disclaimer

This presentation is intended as an information source for members and friends of the New York Council of Nonprofits, Inc. The content should not be construed as legal advice, and readers and participants should not act upon information in this presentation without professional counsel. This material may not be considered attorney advertising.

