

Governance 101 for Foundations and Grantmakers

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Agenda

Corporate &
Tax
Fundamentals

Role of the
Board &
Fiduciary
Duties

Director
Liability
Protections

Best
Practices and
Trouble Areas

Corporate & Tax Fundamentals

Nonprofit vs. Tax-Exempt



Nonprofit and 501(c)(3) Basics

- Nonprofit corporation or charitable trust
 - State law concept
 - No private shareholders
 - Attorney General supervision
- 501(c)(3) tax-exempt organization
 - Federal tax law concept
 - Key principles:
 - Operated primarily in furtherance of mission
 - Operated for benefit of public – private benefit must not be more than incidental
 - Transactions with insiders must be fair and reasonable to organization
 - No campaign intervention
- Public charity or a private foundation
 - IRS classification
 - PFs are subject to additional operating rules and restrictions



Role of the Board and Fiduciary Duties

Role of the Board

The business and affairs of a corporation must be managed by or under the direction of a board of directors.

Participate in plan development

- Focus on mission
- Strategic plans
- Financial plans, budgets

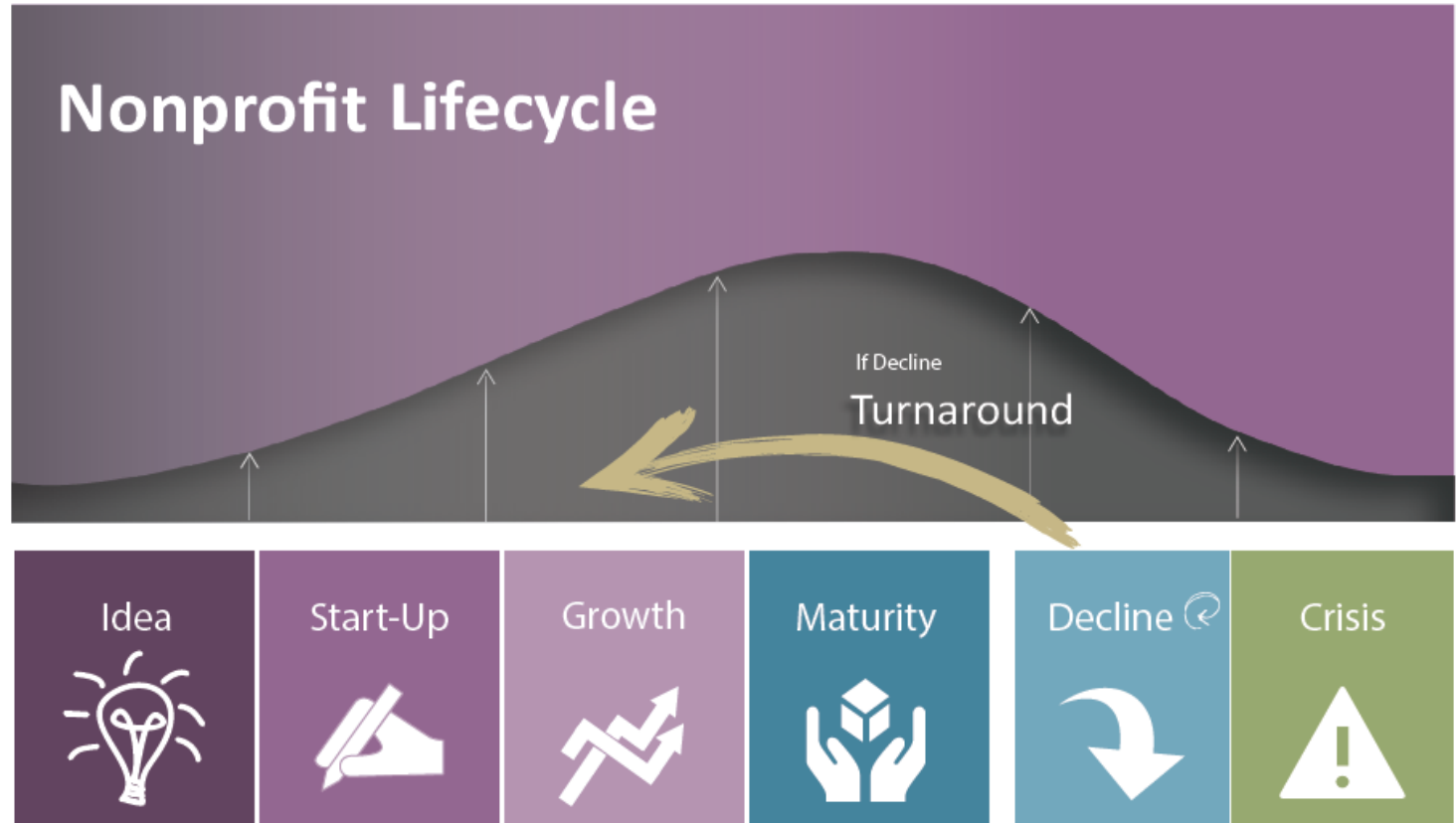
Assess performance

- Regularly review performance against plan
- Regularly review performance against budget
- Both finances and management

Evaluate and approve major transactions

- Material transactions, changes in mission, changes in program, etc.

Role of the Board—Tied to Organizational Life Cycle



Duties of Directors

Care

Loyalty

Obedience

Related Concepts

Reliance

Delegation

Duties of Directors—Care

Directors must discharge the duties of the position with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

Duty of Care

Be reasonably acquainted with matters before the Board

- Attend meetings, actively participate
- Understand the business
- Receive sufficient information
- Review and understand materials

Make reasonable inquiry

- Ask questions
- Question assumptions
- If something does not make sense, inquire

Act with common sense and informed judgment

- Use own judgment
- Balance risks and rewards of each action
- Board actions: Don't agree if you don't agree

Exercise oversight

- Keep informed about operations
- Monitor corporate activities
- Monitor finances, compare actual to budget, audits
- Committees: Authority to act or recommend

Duty of Loyalty

Directors must act in a good faith manner that they reasonably believe is in the best interests of the organization.



Duty of Loyalty

- Cannot:
 - Agree to exercise official duties for the benefit of any individual or interest other than the nonprofit itself
 - Use position for own benefit
- Appropriately address Conflicts of Interest
 - Full disclosure
 - Determination of whether conflict exists
 - Person not involved in voting
 - Board determines if fair and reasonable
 - Documents basis for decision

Duty of Obedience

Directors have duty to follow the organization's governing documents, to carry out its mission and ensure its funds are used for lawful purposes



Duty of Obedience

- Follow own Articles, Bylaws, and policies
- Be familiar with the laws that govern the organization:
 - Nonprofit Corporation Act (Chap. 317A) or charitable trust law
 - Sales tax and property tax
 - FICA and income tax withholding
 - IRS regulations
 - Antitrust
 - Program-specific regulations
- Ensure organization has adequate policies, expertise, resources to comply
- Bring in outside assistance as needed

Related Concepts: Reliance

- In discharging duties, a director may rely on information, opinions, & reports prepared by the following unless director has knowledge that reliance is unwarranted:
 - Employees
 - Legal counsel
 - Accountants
 - Other professionals
 - Board committees

Related Concepts: Delegation

- Delegation is permitted (and expected)
- Directors are not personally responsible for the acts or omissions of officers, employees or agents, if authority has been properly delegated to such individuals.
- Should keep record of extent of delegation
- Delegation must be done with care
 - Don't delegate to someone who cannot perform



Director Liability Protections

Sources of Liability Protection

- Four sources of liability protection for Board members:
 - Corporate veil
 - Directors not personally liable for debts or obligations of the corporation if acting consistent with fiduciary duties
 - Indemnification
 - Corporation is required to indemnify directors
 - Volunteer immunity
 - D&O insurance





Best Practices and Trouble Areas

Debunking Some Common Myths

- Board members cannot vote via proxy
- You cannot “share a seat”
- All Directors must be able to hear each other and converse in making decisions
 - Zoom or teleconference is fine
 - Cannot hold a “meeting” by email
 - Can execute an Action in Writing electronically
- Ex officio doesn’t mean non-voting

Best Practices and Common Trouble Areas

- Transactions with Board Members
 - Private benefit / inurement issue
 - Follow conflict of interest procedure
 - Loans to directors, officers, and family members prohibited unless reasonably expected to benefit the organization
 - If a private foundation, watch for more stringent self-dealing limitations

Best Practices and Common Trouble Areas

- Executive Compensation
 - 501(c)(3) can only pay FMV compensation to executives
 - If excess compensation is paid:
 - Executive must repay “excess” benefit amount
 - Individual officers and directors who approved that amount can have individual liability of up to \$20k each
 - Nonprofit cannot pay the fines
 - To avoid liability, Board can follow “rebuttable presumption of reasonableness” process
 - Directors meet as independent group
 - Consider comparability data
 - Record votes and “contemporaneously” document the decision (~30 days)

Best Practices and Common Trouble Areas

- Review major transactions and relationships with a Nonprofit Eye
 - Charitable Mission
 - Other options?
 - Risks and Rewards
 - Transactions or collaborations with for-profit entities
 - FMV terms
 - No private benefit



Current Issues in Governance

- Clarity of roles of Board, committees, and staff
- Advocacy and public policy
 - Role of Board if embarking on new area of work
- Diversity, equity, inclusion, and anti-racism journey
- Fostering greater connection with communities served
 - Both through conversation and Board representation
- Reframing from “mission driven” to “purpose driven”
 - “What is best for our organization?”
 - “What is best for the outcomes we are seeking?”

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