

Duties of Officers & Directors

Bureau of Commercial Services, Corporation Division

2501 Woodlake Circle, Okemos, MI 48864

2011 Nonprofit Seminar



What every Officer and Director Should know . . .

1. For what purpose was the corporation formed?

The purpose should be stated in the Articles of Incorporation. (It may be broad or very specific.)

- ✓ Who does the corporation serve?
- ✓ Are the corporate activities consistent with the purpose?



2. Accountability and Liability

Everyone answers to someone . . .

- The corporation is an artificial person separate from its officers, directors, shareholders and members.
- Officers, directors, shareholders and members owe a *fiduciary duty* to the corporation; they must act in the best interests of the corporation.
- Officers, directors, shareholders, members and other volunteers *may be personally liable* to the corporation if they breach their fiduciary duty.



3. Standard of Care

§541 of the Nonprofit Act

- A director or officer shall discharge the duties of that position in *good faith* and with the degree of care, and skill that an *ordinarily prudent person* would exercise under similar circumstances in a like position.

4. Duty of Loyalty

Members, shareholders, directors, and officers have a fiduciary obligation to act in the best interest of the corporation.

When you are acting on behalf of the organization, you must do what is best for the organization. **Put the organization first.**

Be aware of and disclose any conflicts of interest or potential conflicts of interest.



5. Director Liability

- Directors who vote for or concur in certain actions are jointly and severally liable to the corporation for the benefits of its creditors, shareholders, or members.
- When contract between corporation and one or more of its directors is questioned, the burden of establishing its validity is upon the party asserting its validity.



6. Indemnification

- ✓ In corporate law, this is the practice by which corporations pay expenses of officers or directors who are named as defendants in litigation relating to corporate affairs.
- ✓ Mandatory and Permissive Indemnification
- ✓ Who may be indemnified?
- ✓ D & O Insurance



§ 317(4) of the BCA

- “Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his or her own acts or conduct.”

There is not a similar provision in the Nonprofit Corporation Act.



§209(c) of the Nonprofit Act

- Articles may eliminate personal liability of volunteer director or volunteer officer for breach of their fiduciary duty.
- If you have a §209(c) provision, then §541(3) provides that the volunteer director is only personally liable for damages to the extent set forth in the provision.



§209(d) of the Nonprofit Act

- If tax exempt under § 501(c)(3), the corporation can assume all liability to any person other than the corporation, its shareholders, or its members for all acts or omissions of a volunteer director on or after January 1, 1988, in the good faith performance of the volunteer director's duties.
- If you have § 209(d) provision any claim for monetary damage for breach of the volunteer director's duty to person other than corporation, its shareholders or members shall not be brought against volunteer director.



§209(e) of the Nonprofit Act

- Corporation may assume liability for all acts or omissions of a volunteer director, volunteer officer or other volunteers occurring on or after the effective date of the provision.
- If you have §209(e) provision, any claim for monetary damages for a volunteer director, volunteer officer or other volunteer's acts or omissions shall not be brought against a volunteer director, volunteer officer or other volunteer. The claim must be brought against the corporation.



An Important Note:



The limitations on liability provided for in section 209 are **ONLY** effective if they are included in the Articles of Incorporation.

7. Meetings – Have them

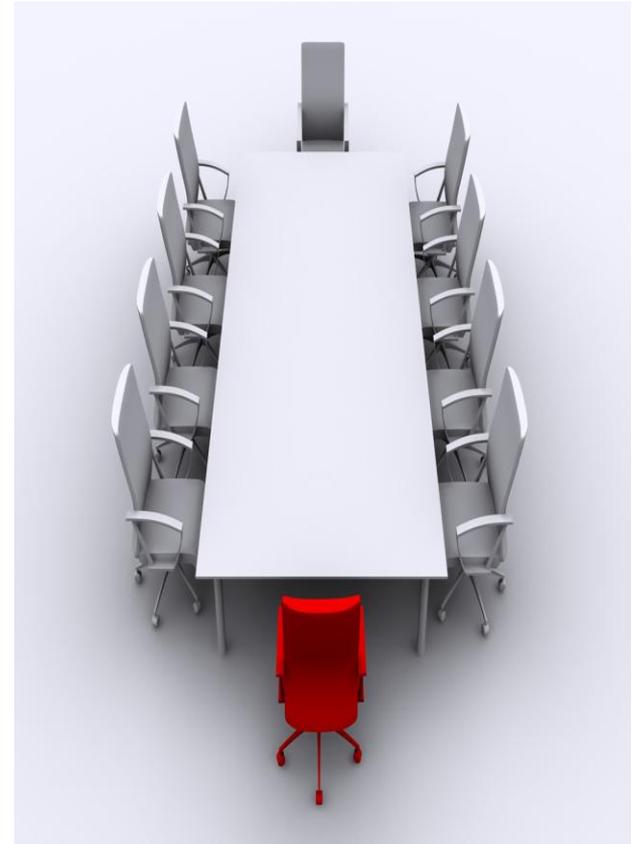
Annual meeting of members

Regular meeting called by board

Committee meetings

Special meeting called by board

Remote meeting



Notice

- Written notice to shareholders or members not less than 10 days or more than 60 days before the date of the meeting.
- Notice may be given in person, by mail or by electronic transmission.
- Attendance (whether in person or by proxy) is waiver of objection to lack of notice or defective notice, unless the shareholder or member objects (at the beginning of the meeting).



Quorum

Shareholder and Members: Unless a greater or lesser quorum in articles, bylaws or the act, shares or members entitled to cast a majority of the votes at a meeting.

Directors: A majority of the members of the board then in office, but articles or bylaws may provide a larger number.

- ✓ If there are more than 7 directors, the articles or bylaws may provide for less than a majority, but in no event less than 1/3 of the directors.



Written Consent

- If unanimous written consent of shareholders or members, then can take action without meeting.
- Articles may provide for action without meeting by less than unanimous written consent of shareholders or members.
- Directors may take action by unanimous written consent without meeting, unless such action is prohibited by articles or bylaws.

8. Assets and Purposes

- A payment or distribution of any part of the assets, income, or profit shall be in conformity with the purposes of the corporation.
- A corporation may pay reasonable compensation to shareholders, members, directors or officers for services.

Charitable Assets

- Assets held for charitable purposes are **not** permitted to be used, conveyed, or distributed for non-charitable purposes.
- No loan to or guarantee of an obligation of officer or director of a charitable purpose corporation, unless the officer or director is also a client of the corporation and the loan or guarantee is necessary to carry out corporation's charitable purposes.



9. Actions Steps

- ✓ Check status of corporation using BES (www.michigan.gov/entitysearch)
- ✓ Check status as a charity with IRS and AG
- ✓ Review reference materials

- ✓ Identify current issues or concerns

- ✓ Schedule and attend meetings

- ✓ Be aware of and disclose any personal conflicts of interest



10. The Devil is in the Details

- Articles of Incorporation
- Bylaws
- Purpose/Mission statement
- Copies of Minutes from meetings of the board
- Books and Records
- Interested Director Transactions
- D & O Insurance Policy
- Procedural Rules
- Retention Policies
- Audit Reports
- Financial Statements
- Tax Returns
- Shareholders, Members and Directors List
- Nonprofit Corporation Act



Questions?



CUSTOMER DRIVEN. BUSINESS MINDED.