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Nonprofit Governance and Tax-Exempt Compliance Assessment Tool

The following is a governance assessment tool created by Exponentum, a national network of business law pro bono providers. The purpose of the assessment is to provide a tool that an attorney can use to determine whether a not-for-profit corporation is complying with state law and IRS requirements. This tool discusses the basic requirements with respect to: the organization's governance documents, in particular the articles of incorporation and bylaws; how the board of directors (the "Board") operates; the Board's role in overseeing the finances of the organization; and whether the organization generally meets its legal requirements for operating a nonprofit organization as well as best governance practices.

After you have had a chance to review the questions below, the nonprofit organization can begin to develop a plan of action to correct any areas where it is not in compliance with the law or good governance standards. Depending on the organization's mission and location, it may be able to access additional help from a [member of Exponentum](#).

Name of Nonprofit Organization	
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Names and Contact Information for Pro Bono Attorneys	
Attorney 1	Name: _____
	Phone: _____ Email: _____
Attorney 2	Name: _____
	Phone: _____ Email: _____
Attorney 3	Name: _____
	Phone: _____ Email: _____



Introductory Questions	Response	Explanation
1) Under the laws of which state is the organization incorporated?		In the United States, a not-for-profit corporation is formed under the laws of a specific state, which does not have to be the state where the organization has its main office. The organization may operate in more than one state, but if it does so, it must obtain authority to do business in in each state in which it operates. The laws and regulations of the state of incorporation will contain requirements pertaining to corporate governance, including what the organization must or may do in terms of size and composition of the Board, quorum and voting, officers, approvals of transactions, and membership.
2) Has the organization confirmed its 501(c)(3) tax exempt status on the Internal Revenue Service’s website?		The Internal Revenue Service (“IRS”) online system, Exempt Organizations Select Check,” allows users to search, by EIN or name, for certain information about an organization’s federal tax status and filings, including whether entity currently has 501(c)(3) tax-exempt status, has had its tax-exempt status automatically revoked for failure to file timely Form 990 returns or notices, or has filed a Form 990-N (e-postcard) annual electronic notice. Visit https://www.irs.gov/charities-non-profits/exempt-organizations-select-check . Donors, the media, and other members of the public may also check. The organization should confirm that it is properly listed and contact the IRS toll-free number at (877) 829-5500 if it is not. The organization also should keep a copy of the organization’s tax exemption determination letter for those who request it.



Introductory Questions	Response	Explanation
3) What is the organization's mission?		In order to receive tax exempt status, a not-for-profit corporation must be organized for a tax-exempt charitable, educational or scientific purpose, such as providing medical services to low income people or educating students. This tax-exempt purpose must be set forth in the nonprofit's certificate or articles of incorporation. In some states, the purpose and activities of the organization may trigger additional requirements. For example, a school may need additional certification or licensing. In addition, a not-for-profit corporation must describe its mission in its Form 1023, the IRS application for exempt status, so that the IRS can make a determination that it is consistent with the requirements of the Internal Revenue Code.
4) What is the organization's annual budget?		Certain federal and state regulatory compliance requirements are triggered when the organization's gross revenues exceed a certain level, including rules related to IRS Form 990s, state charities registration, and governance policies. Best practices may vary depending on budget size and other factors.
5) How many people are employed by the organization?		The size of the organization, based on number of employments, may trigger certain federal, state, and local regulatory compliance requirements. Best practices may vary depending on size of workforce and other factors.

Section I: Corporate Structure and Core Organizational Documents	Yes	No	Unsure	Explanation
1) Do the nonprofit's current activities fall within the scope of its purposes as stated in its articles of incorporation and bylaws, 1023 application, and most recently filed IRS Form 990 / state tax return?				A nonprofit that operates outside of the scope of its exempt status, as stated in its articles and bylaws and state and federal applications for exemption, risks investigation by the IRS, state Attorney General, and state taxing authorities, and possible loss of its tax-exempt status.



Section I: Corporate Structure and Core Organizational Documents	Yes	No	Unsure	Explanation
2a) Has the nonprofit amended its articles of incorporation or made material changes to its bylaws since formation / establishment of exempt status?				Changes to the articles and bylaws must usually be reported to the state secretary of state and/or attorney general, and the IRS.
2b) If so, were the relevant state authorities and the IRS notified of such changes?				
3) Has the nonprofit initially registered with, and kept current on all (non-tax) filings required by, the relevant state and local authorities (e.g. state Secretary of State and Attorney General)?				In addition to receiving federal and state tax-exemption, a not-for-profit corporation usually must file a registration with the state Secretary of State and Attorney General, and typically has ongoing non-tax compliance requirements relating to its nonprofit status. A failure to keep current with such filings can cause a nonprofit to incur fines, may subject it to audit, and can ultimately lead to loss of its tax-exempt status.
4) Has the nonprofit sought exemption from property tax and, if applicable, sales and use tax?				"Tax-exemption" typically refers only to exemption from state and federal income taxation. Nonprofits may qualify for exemption from local property taxes, and in some states from sales and use taxes, but must typically apply separately for such exemptions.
5a) Does the nonprofit operate in more than one state? If so, has it registered to do business under each such state's laws and filed for tax-exempt status in that state (if required)?				Each state imposes different requirements on foreign (i.e. out-of-state) entities operating within its borders, including registering to do business and/or fundraising in that state. See Section IV.5 for information about charities registration, which is a separate requirement.
5b) If so, has it registered to do business under each such state's laws and filed for tax-exempt status in that state (if required)?				



Section I: Corporate Structure and Core Organizational Documents	Yes	No	Unsure	Explanation
6) Does the nonprofit have members?				A not-for-profit corporation is not required to have members, but may choose to in order to further its purposes. Memberships allow a not-for-profit corporation's constituents to play a role in the nonprofit's functioning without elevating those constituents to full board director status. However, formal statutory members have legal rights that can increase a nonprofit's administrative burden and create control issues. If the organization has members, the articles and bylaws should clearly describe the rights and duties of those members. As an alternative to formal statutory members, a not-for-profit corporation also may have honorary, non-voting members that do not give rise to the aforementioned issues.
7) Does the number of authorized board members match the nonprofit's current board roster?				State laws dictate the minimum number of board members a not-for-profit corporation must have; in some states, the minimum is only one director, while in other states, it's three. Generally, state laws do not limit the maximum number of directors a not-for-profit corporation may have. For practical purposes, including IRS expectations, a minimum of three directors is recommended. The bylaws typically set forth the authorized number of directors, or leave it to the Board to set the number (within an authorized range) by resolution adopted by Board. If the number of directors in practice does not correspond to the number set forth in the bylaws, the validity of board actions could be subject to challenge.
8) How many board directors are independent directors without a financial or family connection to the nonprofit?				Some states (such as California) require that no more than 49% of a nonprofit's Board be "interested" persons (generally referring to people compensated for services rendered to the nonprofit other than as a board member, and their families). Even absent a legal requirement, an independent Board minimizes the risk that conflicts of interest will compromise the not-for-profit corporation's decision-making process.



Section I: Corporate Structure and Core Organizational Documents	Yes	No	Unsure	Explanation
9) Does the nonprofit currently have all of the officers required by statute, and is it adhering to any prohibitions on certain offices being held by the same person?				A not-for-profit corporation often is required by law to have certain officers, as specified by the relevant state's not-for-profit corporations code. Some states further specify that certain offices may not be held simultaneously by the same person (e.g. in many states an individual may not be both the president and the secretary of the corporation). Other state-specific restrictions may also apply. For example, New York law prohibits an employee of a nonprofit from serving as board chair / president, unless approved by a supermajority of the board members.
10) Does the nonprofit have any affiliates (e.g. parent or subsidiary organizations)?				A not-for-profit corporation's legal affiliation with other legal entities can raise a number of issues, such as the potential for transactions or arrangements resulting in a prohibited private benefit, as well as possible exposure to the other entity's liabilities.

Section II: The Board in Action	Yes	No	Unsure	Explanation
1) How often does the Board meet?				In general, there is no set number of meetings a Board should have in a year. The Board should meet often enough to effectively carry out its fiduciary responsibilities. However, a Board should consider meeting at least once a quarter, so that it can demonstrate that it appropriately supervised the affairs of the organization.



Section II: The Board in Action	Yes	No	Unsure	Explanation
2) Describe how the organization gives notice of upcoming board and committee meetings:				State nonprofit law and the organization’s own articles of incorporation and bylaws set forth the manner in which notice of upcoming regularly scheduled and specially called board meetings must be given. This includes how many days’ notice must be given and the manner in which notice is given. Generally, email and other electronic forms of communication are acceptable, unless the bylaws state otherwise. Older organizations should check their bylaws to see if they need to be updated to reflect changes in technology. In most states, notice must be in the form of a record that is retrievable in a perceivable form – such as emails, texts, or other written form. A few states will allow notice to be given in person or via telephone, but such a practice can be risky, because there is no written record to prove that proper notice was given. Notice must be given personally to each director – posting it on an electronic bulletin board is not sufficient. Unless otherwise specified by statute or in the bylaws, the notice does not have to state the reason for which the meeting is being called.
3a) What percentage of the Board attends meetings?				Governance experts state that, on average, 90% of the directors should attend board meetings. If the Board fails to reach this benchmark, or cannot always achieve a quorum, it should look at board member attendance, and remove board members who do not attend the meetings. Such board members are not fulfilling their fiduciary duties, and it is incumbent on the Board to address this issue. Some organizations include a provision in the bylaws that if a member misses a certain number of meetings in a row, or within a 12-month period, they are automatically removed from the Board. This relieves the Board of the onus of voting someone off the Board.
3b) Does the organization have trouble getting a quorum?				



Section II: The Board in Action	Yes	No	Unsure	Explanation
4) Does the Board have committees?				Generally, a Board is not required to have committees, but committees help to ensure that the work of the Board is evenly divided among the members.
5) Can the Committee make final decisions without further Board action?				Such committees are called Board committees – as opposed to advisory committees or committees of the corporation. Board committees should be comprised only of directors. If the Board delegates its authority to make decisions on behalf of the nonprofit to non-members, this would be considered improper. A board member’s duties are considered non-delegable, and can only be assigned to another director.
6) Do non-Board members serve on committees?				Non-board members may only serve on advisory committees or committees of the corporation.
7) Does the Board prepare minutes of board and committee meetings, and are they approved at the next meeting?				As a general rule, under state law a nonprofit is legally required to prepare minutes. In addition, the IRS wants nonprofit organizations to prepare b minutes within the later of 60 days or the next board meeting. The nonprofit must disclose whether it contemporaneously prepares its minutes on the Form 990. In determining whether the nonprofit has complied with various IRS requirements, the IRS will give little weight to minutes that were not prepared contemporaneously.
8) Does the Board allow members who cannot attend vote by proxy or vote in advance of the meeting?				The Board may only act at a validly called board meeting. It has no authority to act outside a board meeting, with the exception of a unanimous written consent described below. A director may participate in a meeting by electronic communications equipment, provided the director can hear the other board members, participate in the discussion and vote on any matter brought up for a vote. Such a director is considered present at the meeting.



Section II: The Board in Action	Yes	No	Unsure	Explanation
9) Does the Board vote by email?				A Board may vote on a matter by way of a unanimous written consent. Under a unanimous written consent, all directors entitled to vote on a matter must vote in the affirmative for the matter to be approved. For example, if a Board has 11 members, all 11 must vote to approve the matter in writing, and all must vote yes. If only 10 directors respond, the matter is not adopted, even if the 10 directors all voted yes. The purpose of holding a board meeting is so that directors can discuss a matter and benefit from each other's perspective. The only exception is if the matter is so noncontroversial, all directors vote yes. In some states, the law allows unanimous written consent unless the bylaws provide otherwise, and in some states, the law says it is permitted only if the bylaws so provide. Unanimous written consents are kept with the minutes of the Board, and may be signed in counterparts. Depending on state law, electronic signatures (such as email footers) may be permissible.

Section III: Finances and Fiscal Management	Yes	No	Unsure	Explanation
1) Please describe the organization's accounting system. Does it maintain accounts internally, or does it rely on an outside accountant or bookkeeper?				Fiscal accountability is one of the most important obligations of any nonprofit organization. Government regulators, such as the IRS or the state Attorney General, and private and government funders expect that the organization will keep accurate records of income and expenses and make efficient use of funds.



Section III: Finances and Fiscal Management	Yes	No	Unsure	Explanation
2) Does the organization provide periodic financial statements to the Board at least quarterly? Does it have a finance committee of the Board, or perhaps an outside accountant, review financial statements?				One of the Board's foremost responsibilities is to secure adequate resources for the organization to fulfill its mission. A not-for-profit corporation uses and holds in trust money that is raised for it. Its Board is responsible for assuring funds are used to get the results for which they have been given. Complete, accurate financial statements are important for ensuring that appropriate oversight by the Board. The Independent Sector has issued several suggestions for sound fiscal oversight, including regular reviews of financial statements, as part of its Principles for Sound Governance and Ethical Practice, available at: www.independentsector.org/wp-content/uploads/2016/11/Principles2015-Web-1.pdf
3) Is there an annual audit or review by a certified public accountant? If any audit or review has been conducted, Is there a copy of the report and any "management letter" describing recommended actions available for review?				The organization should periodically examine financial records to determine if they are reasonably accurate. An external independent Certified Public Accounting ("CPA") firm should perform audits. Many states require a charitable corporation, unincorporated association, or trust to prepare financial statements audited by an independent CPA if its annual gross revenue exceeds a certain amount, i.e., \$2 million in California, currently \$750,000 in New York.
4) Is there an audit committee and audit committee charter?				Certain states require a charitable corporation, unincorporated association, or trust if its annual gross revenue exceeds a certain amount, i.e., \$2 million in California, to have an audit committee.



Section III: Finances and Fiscal Management	Yes	No	Unsure	Explanation
5) Do the same individuals serve on the audit committee and finance committee?				Some states require that these committees be separated, and that the audit committee cannot perform finance committee functions and vice versa, while others do not have a specific rule. Factors such as board size, director's independence and expertise, and scale of operations also may affect what is prudent, possible, and legally appropriate for the organization. Some states, including New York, specify that only independent directors can serve on an audit committee.
6) Please describe any internal financial controls (such as check signature requirements, separating logging receipt of checks from entry of deposits).				Internal controls are designed to protect from the loss or misuse of assets. The controls aim to ensure that all transactions are properly authorized and the information contained in financial reports is reliable.
7) Does the organization have a line of credit or any significant loan obligations?				Loans to the organization can be valuable tools for cash flow and financial stability, but the best time to consider a loan is generally when the organization knows how it will use the funds and has a realistic plan for repayment and support from the Board. In contrast, a charitable organization should not provide a loan to directors or officers.
8) Does the organization make certain that it withholds payroll taxes? Does it make timely payments of tax withholdings to the government?				A nonprofit employer must withhold certain taxes from employees' pay checks, including federal income tax, Social Security and Medicare taxes, and federal unemployment taxes.
9) Does the organization have a written investment policy?				A charitable organization should have policies and procedures in place related to the management, investment, and expenditure of organizational funds. A written investment policy should comply with legal requirements and regularly be reviewed by the Board and management to ensure that they are followed.



Section IV: Operational Policies and Best Practices	Yes	No	Unsure	Explanation
1a) Does the organization engage in any lobbying activities?				A 501(c)(3) organization may engage in some lobbying (https://www.irs.gov/charities-non-profits/lobbying), defined as attempts to influence legislation at the national, state, and/or local level. However, lobbying may not constitute a “substantial part” of a 501(c)(3) organization’s activities, and an organization may be subject to excise taxes or loss of its tax-exempt status for violating this limitation. Because there is little guidance as to what constitutes a substantial amount of lobbying, many 501(c)(3) organizations choose to have their lobbying activities measured under an alternative expenditure test called the Section 501(h) election. The 501(h) election is made by filing IRS Form 5768, available at: https://www.irs.gov/pub/irs-pdf/f5768.pdf . Organizations that make the 501(h) election must track the amount of money they spend on lobbying (including paid staff time) and report that information on their Form 990 or Form 990-EZ. Organizations that do not make the 501(h) will have to describe their lobbying activities, including lobbying by volunteers, on Schedule C to the Form 990 or 990-EZ.
1b) If the organization does lobby, has it chosen to have its lobbying activities measured by the amount it spends on lobbying by filing Form 5768, the Section 501(h) election?				
1c) If the organization has made the Section 501(h) election, is the organization tracking the amount it spends on lobbying annually and reporting that amount on its Form 990?				
2) Does the organization participate in or intervene in political campaign activities by supporting or opposing candidates for public office?				A 501(c)(3) organization is prohibited from participating or intervening in any political campaign by supporting or opposing a candidate for public office. Violating this prohibition can lead to excise taxes and loss of the organization’s tax-exempt status.



Section III: Finances and Fiscal Management	Yes	No	Unsure	Explanation
3) Does the organization engage in non-partisan election-related activities, such as publishing neutral voter information guides?				Certain election-related activities, such as publishing neutral voter information guides or conducting get-out-the-vote efforts, are permissible for 501(c)(3) organizations, so long as such activities are conducted in a non-partisan manner. However, a 501(c)(3) organization that is considering engaging in election-related activities would be well-advised to consult legal counsel beforehand, to ensure that its particular planned activities will not run afoul of the political campaign prohibition. Please see IRS guidance on election-related activities at : https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501-c-3-tax-exempt-organizations
4) Does the organization issue legally compliant acknowledgments to donors for cash and non-cash contributions?				Section 501(c)(3) organizations that accept cash or non-cash contributions are subject to certain substantiation requirements. For example, a nonprofit is required to provide a written disclosure to a donor who receives goods or services in exchange for a single payment in excess of \$75. A donor also cannot claim a tax deduction for any single contribution of \$250 or more unless the donor obtains a contemporaneous, written acknowledgment of the contribution from the recipient nonprofit. While it is the donor's obligation to obtain this acknowledgment, good donor relations suggest the organization should automatically generate it. For more on this topic, please see IRS Publication 1771 at https://www.irs.gov/pub/irs-pdf/p1771.pdf .



Section III: Finances and Fiscal Management	Yes	No	Unsure	Explanation
5) Is the organization registered with the appropriate authorities in all states where it solicits donations and where registration is required?				Many states have laws regarding charitable solicitation. Generally, these laws require a nonprofit to: (1) register with a state's Attorney General prior to conducting any solicitation activities in that state, and (2) make annual financial reports to the state. It is important to understand the charitable solicitation laws in any state in which a nonprofit intends to solicit donations, in order to determine whether or not the organization is required to register and report in that state. For more on this topic, please see the National Council of Nonprofits' resources on fundraising regulation at https://www.councilofnonprofits.org/tools-resources/charitable-solicitation-registration
6a) Does the organization use fundraising consultants				Fundraising consultants are outside consultants hired by a nonprofit to assist with fundraising activities. (Note: employees, volunteers, and board members generally do not fall within this category.) Many states have laws regulating fundraising consultants and the nonprofit organizations that hire them. For example, a fundraising consultant may be required to register with the state Attorney General's office before being hired by any nonprofit in that state. Many states also require that there be a written contract between a nonprofit and a fundraising consultant that the nonprofit hires. In some states, a copy of this contract also must be filed with the state Attorney General's office. For more on this topic, please see the National Council of Nonprofits' resources on fundraising regulation at:
6b) If yes, does it have written contracts with such consultants?				https://www.councilofnonprofits.org/tools-resources/charitable-solicitation-registration



Section III: Finances and Fiscal Management	Yes	No	Unsure	Explanation
7a) Does the organization engage in any commercial co-ventures?				Commercial co-ventures (a/k/a charitable promotions or cause-related marketing) are arrangements in which a for-profit entity advertises that a portion of the proceeds from the sale of an item or service will benefit a nonprofit organization. Many states have laws regulating commercial co-ventures. Generally, these laws require a written contract between the nonprofit and the for-profit detailing the terms of the commercial co-venture. In some states, a copy of this contract also must be filed with the state Attorney General's office. For more on this topic, please see the National Council of Nonprofits' resources on fundraising regulation at: https://www.councilofnonprofits.org/tools-resources/charitable-solicitation-registration
7b) If yes, is the organization in compliance with applicable state laws regulating commercial co-ventures?				
8a) Does the organization make grants, award scholarships, or otherwise distribute funds to individuals?				A 501(c)(3) organization may make grants to individuals, so long as such grants are in furtherance of the organization's charitable or educational purposes. A nonprofit organization that wishes to make grants, award scholarships, or distribute funds to individuals should establish objective criteria for determining who is eligible to receive the funds and a process for evaluating potential recipients (for example, an application that is reviewed by a committee). The organization should maintain adequate records and case histories showing the names and addresses of the recipients, the purposes for which they received the funds, the manner in which they were selected, and the relationship, if any, between the recipients and board members or substantial donors.
8b) If yes, does the organization maintain adequate records and case histories for each recipient of such funds?				



Concluding Questions	Response
1) Based on the assessment, what areas of compliance does the organization need and/or want to address?	
2) Does the organization have pro bono and/or paid counsel available to address these compliance issues? If yes, please specify who, and whether pro bono or not.	