

# New Guidance for Charity Boards

02.13.23 | Linda J. Rosenthal, JD



Some of the best information and advice about what 501(c)(3) organizations should and should not do has recently come out of the busy offices of state attorneys general around the United States.

In December 2022, the Commonwealth of Massachusetts published a revised and updated *Guide for Board Members of Charitable Organizations* “... to help board members of charitable nonprofit organizations carry out their important responsibilities.”

The 22-page downloadable document is a valuable new resource for charity directors and trustees both within that Commonwealth and beyond.

## ***Charity Oversight***

Most of us are conditioned to view the Internal Revenue Service, through its statutory authority under the Internal Revenue Code to grant or deny tax-exempt status, as the focus of charity oversight in the United States. In the second half of the twentieth century, that agency’s preeminent power was apparent.

But, in the last two decades, the IRS – including, notably, the exempt-organizations operation – has been beaten down by a Congress intent on imposing draconian budget cuts and otherwise reining it in. Into this space, the *state* officials with long-established authority within their borders for the public protection of charitable assets and funds have stepped up their activities and voices.

Long-established authority?: Yes, several centuries of it. In this blog, we rarely skip an opportunity to throw in interesting tidbits of history.

Across the Atlantic and long ago in late Elizabethan England, lawmakers in Parliament enacted the [Charitable Uses Act of 1601](#). This landmark statute was designed to encourage private donations for the poor and to fund public-works projects. Designated as the chief official to make sure that this money made its way made to the downtrodden and to needy communities was the crown attorney

general.

“When the charitable-trust form crossed the Atlantic, the Attorneys General of the colonies and then the several States inherited this trust-protection responsibility from their Crown counterpart.”

*Encouraging Charity in a Time of Crisis: The Poor Laws and the Statute of Charitable Uses of 1601* (December 14, 2005) James Fishman, Professor Emeritus, Pace University School of Law, *Stanford Social Innovation Review*.

“Now, some five hundred years after enactment of the seminal Statute of Charitable Uses, that legislation continues to be relevant to the jurisprudence of the United States.” See our discussion in *Donor Disclosure Hottest Ticket: Part Two* (June 15, 2021). “The model of an attorney general with responsibility to protect the interests of the general public in connection with charitable trusts, assets, and solicitations is now “firmly rooted” in each and every state, territory and the District of Columbia, according to the National Association of Attorneys General. “While the IRS and the FTC play valuable roles, State Attorneys General remain the chief custodians of the public’s trust in the nonprofit sector.”

### ***Best-Practices Resource***

The *Guide for Board Members of Charitable Organizations*, newly updated from 2015, was released in December 2022 by Maura Healy in her last weeks as attorney general and before she was sworn in as the new governor of Massachusetts in January.

The Guide is “... specifically designed for board members and trustees of those nonprofit organizations (e.g., charitable nonprofit corporations, trusts, unincorporated associations, and LLCs) that are ‘public charities.’” It was written, of course, in connection with the nonprofit laws of the Commonwealth of Massachusetts.

In recent years, there has been notable cooperation and coordination among the state attorneys general, including prosecution of joint enforcement actions. Officials communicate regularly, compare examples of bad behavior, and share ideas about how successful and legally compliant boards should operate. A particular jurisdiction’s laws and rules are generally viewed as a floor, not a ceiling, for good governance. So organizational leaders in other locales can generally benefit from this Massachusetts wisdom as a “best-practices” guide.

### ***Massachusetts Board Guide***

In the Guide’s Introduction, Massachusetts officials explain that a board member has “... both the privilege and the responsibility of participating in the governance of an organization that is operated not for the benefit of private individuals, but for the benefit of the public.”

Attorney General staff are “often asked what they believe “... are the most important things board members can do to best serve their organizations”; in this Guide, they offer their “recommendations in key areas of stewardship.”

Organized in the same nine sections as the 2015 version, the “... newly-revised edition follows a similar format, but with heightened emphasis on board members’ duties to (1) be educated and informed, (2) carry out the organization’s charitable mission, and (3) pay close attention to the

organization's financial matters." It also "emphasizes the importance of diversity and inclusion in all of the organization's actions – from board member recruitment and selection to the conduct of the organization's activities." See *Board Members of Charitable Organizations: Take Note of New Guidance From the Massachusetts Attorney General* (January 4, 2023) Paul Ayoub, Esq. & John McBrine, Esq., Nutter McClennen & Fish LLP.

There are eight substantive sections followed by a final part listing additional resources on the topic.

The first section is an overview of board-member responsibilities; namely, the duties of care and loyalty. "Because a charitable organization exists to further a charitable mission, it is appropriate to view these fiduciary duties as duties you owe to the charitable mission of the organization at least as much as, and in some circumstances even more than, to the organization itself."

The third section stresses that board members have the right to information. "In order to carry out your legal responsibilities as a board member, you must be able to make informed judgments about important matters affecting the organization. The law permits you to reasonably rely on information from the organization's staff, lawyer, auditor, outside advisors, and board committees in making those judgments."

The second, fourth, fifth, sixth, seventh, and eighth sections discuss more specific responsibilities of directors and trustees:

- Educating themselves: "Board members ... should be knowledgeable about their role in the governing process, the mission of the organization, and the unique operational, legal, and financial issues facing the organization."
- Paying close attention to financial matters: "You have primary responsibility for making sure that the charity is financially accountable, that it is not allowing charitable assets to be used inappropriately or diverted to private interests, that it has mechanisms in place to keep it fiscally sound, and that it is properly using any restricted funds it may have."
- Making sure the board is vital and diverse: "To avoid becoming labeled as a closed club for 'insiders only,' choose board members who have an interest in the organization's mission, represent diverse viewpoints and diverse racial and ethnic backgrounds, experiences, and skills."
- Choosing and evaluating leadership carefully: "Board members should actively participate in hiring the organization's leadership and should do so through equitable recruitment, hiring, and compensation practices that encourage a diverse pool of applicants."
- Getting involved in setting executive compensation: "Every board member should know what members of senior leadership are paid, including the value of any non-salary compensation, such as the use of an automobile, retirement funds, etc."
- Being aware of conflicts of interest: "Any conflicted transaction should be scrutinized very closely by the board, both because of the dynamic it creates within the board and because of the predictable skepticism with which the public and regulators will view the transaction, no matter how scrupulously a careful policy is followed."

## ***Conclusion***

The particular value of guidance from state charity officials is their extensive, on-the-ground, experience with some of the over one million 501(c)(3)s in the United States. They have direct knowledge of the way that many charity directors and trustees comply with the laws and succeed in their missions; alternatively, how some inadvertently fail or intentionally violate the rules.

In later posts, we'll link to more advice and guidance from the attorneys general of other states. For now, check out the [Charities home page](#) of the California Attorney General's Office, including links to the [California Attorney General's Guide to Charities](#) (updated June 2021) and other resources. See also the New York Attorney General's [Charities Bureau home page](#), including [NY AG Guides & Publications](#).

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