

Recent Governance and Gift-Giving Guidance from the Non-Profit/Public Charities Division

September 22, 2016

The Non-Profit Organizations/Public Charities Division of the Office of the Attorney General (the “Division”) recently released helpful guidance regarding (i) good governance of charitable organization and (ii) the rules that apply to significant gifts between charities.

Governance Guidance

On May 25, 2016, the Division released a letter to the Board of Trustees of Suffolk University and its then-president Margaret McKenna. Although the letter primarily summarized the findings of the Division regarding a public dispute between the university’s board and president, the letter includes several general observations regarding what characterizes good governance on the part of charitable boards. While the letter to Suffolk University does not purport to replace or supersede the guide to good governance previously published by the Office of the Attorney General, the letter highlights the following as indicative of good governance:

- **Attention to governance best practices.** This includes periodic updating of an organization’s bylaws, regular reviews of board and committee operations, and providing all board members with substantive materials that “summarize [c]ommittee activity and present key information in a clear and concise manner in advance of meetings.”
- **Transparency.** Minutes should be taken at all board and committee meetings. In addition, the board should adopt a transparent process for the nomination and selection of new board members, with attention paid to including diverse perspectives and skillsets on the board. Boards should also take an inclusive approach to the process of searching for key leadership positions.
- **Board Training.** Orientation and training for new board members should include information about fiduciary duties and best practices for nonprofit governance.
- **Good communication.** Clear lines of communication and authority should be established by the board and the chief executive. This should include “protocols for communication between the [chief executive] and the [board], between other key administrators and [board members], and among [board members].”
- **Performance review.** The board should conduct a periodic performance evaluation of the organization’s chief executive.
- **Stakeholder management.** The board should make efforts to establish clear communication and good relationships with stakeholders both within and without the organization.
- **Managing conflicts.** The board should pay careful attention to and make a periodic examination of the organization’s conflict of interest policy.
- **Deliberate delegation.** As stated in the letter, “*all members of [a] Board are fiduciaries* and the Board has an obligation to ensure that its most important actions and decisions...are considered and acted upon by the full Board with the benefit of full discussion by all its members.” (Emphasis added.) For example, the delegation of significant authority to an executive committee is “not consistent with best practice.”

Of particular note is the last item, since an executive committee may be used to relieve the full board of having to convene for more frequent meetings. Although it can be a convenience to convene an executive committee on short notice to take action on certain time-sensitive matters, the letter takes the position that the presence of an executive committee *does not* relieve the full board from being fully informed about and participating in discussions regarding key decisions.

Guidance Regarding Significant Gifts

In July, the Division issued specific guidance, entitled “Attorney General Guidelines on Requirements Imposed by *Massachusetts Charitable Mechanics Association v. Beede*, 320 Mass. 601 (1947)”, regarding the regulatory and judicial requirements related to making “significant” gifts from one charity to another (“*Beede* Guidance”). The guidance follows up on previously issued guidelines regarding the notice requirement in M.G.L. Chapter 180, Section 8A(c).

The prior guidelines outlined the Division’s expectations regarding the notice required when a charitable organization contemplates a sale of all or substantially all of its assets with an accompanying material change in the organization’s activities. These guidelines also described certain transactions for which notice alone was insufficient and court approval would be needed.

The *Beede* Transaction

One such transaction (a “*Beede* Transaction”) occurs when all of the following four conditions are met:

1. The transferor and transferee must both be a public charities;
2. The transaction must involve “a large part” of the transferor charity’s property;
3. The transferor charity must be receiving less than fair value in exchange for the property; and
4. The transferor charity does not control the intended recipient of the assets.

A *Beede* Transaction requires notice to the Division and prior approval of the Supreme Judicial Court (Single Justice Session for Suffolk County).

Although an organization seeking to dissolve and distribute all of its assets to another charity appears to fall under the definition of a *Beede* Transaction, the process of obtaining court approval for a charity to dissolve and distribute all of its assets is different.

Note that the *Beede* Guidance does not provide specific guidelines regarding how to determine whether a particular gift or bargain sale involves a “large part” of a charity’s property. Whether “a large part” is measured by a certain percentage of an organization’s property or by a fixed dollar amount may need to be determined in the context of the facts and circumstances specific to the proposed transaction. The guidance provides that organizations that are not certain whether a given transaction is a *Beede* Transaction should seek informal guidance from the Division.

The *Beede* Petition

The Division must review and assent to an organization’s *Beede* petition before the petition is filed with the court. While the exact contents of a *Beede* petition may vary, the guidance provides that each *Beede* petition must, at a minimum:

- A. Identify the Transferor.** This involves identifying the transferor as the plaintiff, describing its charitable purpose(s), and summarizing its activities and history.
- B. Identify the Transferee.** This involves identifying the transferee as the defendant, describing its charitable purpose(s), and summarizing its activities and history.
- C. Name the Attorney General as a Defendant.** The *Beede* petition must name the Attorney General as a co-defendant pursuant to G.L. c. 12, § 8G.
- D. Identify the Reason(s) for the Transaction.** The petition must provide an explanation as to why the transfer is being made at less than fair value.
- E. Summarize the Transaction.** The petition must summarize the terms of the transaction, identify any liabilities assumed by the transferee, explain why the transferee is the appropriate recipient of the assets, and include a representation that the transferee will use the assets for the same purposes as the transferor.
- F. Identify Whether any of the Transferred Assets are Restricted.** The petition must identify any permanent or temporary restrictions that apply to the property being transferred. If any such restrictions do apply, then the petition must state that the transferee accepts those assets subject to those restrictions.
- G. Include Representations Regarding the Transferor’s Liabilities.** The petition must represent that the transferor will not be left

insolvent by the transfer; specifically, that the transferor either (a) will have no liabilities remaining after the transfer or (b) will retain sufficient assets to satisfy any liabilities not transferred.

- H. **Include a Prayer for Relief.** The petition must include a prayer for relief that specifically states the relief being sought from the Court. The guidance states that this generally is a request for authorization for the transferor to transfer its assets to the transferee, with such assets to be used by the transferee for the same purpose as they had been used by the transferor.
- I. **Include a Motion for Entry of Judgment and a Proposed Judgment.** The petition must include a motion for entry of judgment, which should recite that the transferor, with the assent of the Attorney General and the transferee, move for entry of a judgment in the form attached to the motion. The attached proposed judgment should recite that (i) the matter came before the court on the transferor's motion and (ii) the Attorney General and the transferee have assented to that motion. The court's order as presented in the proposed motion should exactly match the prayer for relief in the *Beede* petition.

Although samples of *Beede* petitions are publicly available, the *Beede* Guidance provides a clear and concise explanation of the rationale for the *Beede* petition requirement and the specific steps required of a charitable organization that is contemplating a significant gift or bargain sale of a large portion of its assets.

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