

CORPORATE GOVERNANCE MANUAL & BEST PRACTICES

NBIF is an independent, not-for-profit corporation that makes venture capital investments in new start-up companies and in applied research in the province of New Brunswick, Canada. For more information about NBIF, visit our website at nbif.ca or call us at 1-877-554-6668.

Introduction

The following document has been developed by the New Brunswick Innovation Foundation (NBIF) in an attempt to provide prospective board candidates, the board of directors of its investee firms and their senior executives with an overview of corporate governance.

For NBIF and its investee firms, good corporate governance is important and a key determinant of long-term viability and success. This document summarizes the principles and practices of corporate governance and is designed to assist NBIF's investee firms to orientate new directors and/or establish a formal corporate governance structure and process. Although it is only intended to serve as a general guideline on corporate governance, respective investee firms may use this document as a framework for developing a corporate governance policy and/or manual going forward.

Corporate governance denotes the structure and process established to oversee, direct, and manage the business and affairs of the corporation with the objective of ensuring its financial stability and enhancing shareholder value. The corporate governance guidelines outlined herein are divided into the following major categories:

1. board of directors Responsibilities
 - I. Selection of Management
 - II. Strategy Determination
 - III. Monitoring and Acting
 - IV. Policies and Procedures
 - V. Reporting
 - VI. Legal Requirements
 - VII. Miscellaneous Requirements
2. Individual director Responsibilities
3. Chair of board Responsibilities
4. President and chief executive officer Responsibilities
5. board Meetings
6. Confidential Information

Please note that these guidelines have been developed more or less for start-up and early stage companies. As a company grows, the corporate governance structure and process must grow and expand as well to account for increasingly greater requirements. Thus, each company must continuously monitor and evaluate its own governance structure and practices to ensure that it suits the individual needs of the corporation.

1. Board of Directors Responsibilities

The shareholders own the corporation, and delegate the supervision of its management to the board of directors. Consequently, it is the board of directors that delegates management responsibility to the managers of the corporation. The objective of the corporation is to conduct its business activities so as to enhance corporate profit and shareholder value.

The primary responsibility of the board of directors is to foster the long-term success of the corporation consistent with its fiduciary responsibility to the shareholders to maximize shareholder value.

The board operates by delegating certain of its authorities, including spending authorizations, to management and by reserving certain powers to itself. Subject to the act of incorporation and by-laws, the articles of incorporation of the corporation, the unanimous shareholders agreement, the board retains the responsibility for managing its own affairs, including planning its composition, selecting its chair, nominating candidates for election of the board, appointing committees and determining director compensation.

A director's responsibility is that of a fiduciary and individually and collectively is founded in legal imperatives. (See Section 2 Individual director Responsibilities). In its fiduciary capacity, the board of directors is responsible for the stewardship of the corporation (preserving and enhancing shareholder value) and as such, is accountable for the success of the corporation by taking responsibility for management. In summary, the board serves as the trustee for the investment of the shareholders.

The directors have determined that the corporation is to be managed by its senior executives and that the role of the board is to oversee their performance. In general, this role consists of selecting a successful corporate management team, overseeing corporate strategy and performance, acting as a resource for management in matters of planning and policy, and ensuring effective shareholder communication.

The principal duties of the board can be generally organized into seven major categories as follows:

I. Selection of Management

The board has the responsibility for:

- A. the appointment and replacement of a chief executive officer (“CEO”), for monitoring CEO performance, approving CEO compensation and providing advice and counsel to the CEO in the execution of his duties;
- B. approving the appointment, replacement and remuneration of all senior corporate officers upon the advice of the CEO, and the recommendation of the Human Resources and Compensation Committee;
- C. ensuring that plans have been made for management succession.

II. Strategy Determination

The board has the responsibility to:

- A. review with management the mission of the business, its objectives and goals;
- B. review and approve management’s strategic & business plans and develop a depth of knowledge of the business, understand & question the assumptions upon which the plans are based, and reach an independent judgment as to whether the plans can be realized;
- C. review and approve the corporation’s financial objectives, plans and actions including significant capital allocations, expenditures, and raising of capital.

III. Monitoring and Acting

The board has the responsibility for:

- A. monitoring corporate performance against strategic and business plans and overseeing the operating results to evaluate whether the business is being properly managed;
- B. approving any payment of dividends;
- C. ensuring the implementation and integrity of the corporation’s internal control and management information systems;
- D. reviewing and approving material transactions not in the ordinary course of business;

- E. ensuring ethical corporate behavior and compliance with all laws & regulations, auditing & accounting procedures, and the corporation's corporate governance processes;
- F. ensuring the fullest communications with the shareholders and approving all proposals to be submitted to the shareholders, including nomination of directors;
- G. ensuring implementation of the appropriate systems to identify and manage the principal risks of the corporation's business;
- H. managing the board's own affairs and assessing the board's own effectiveness in fulfilling these and other board responsibilities.

IV. Policies and Procedures

The board has the responsibility to:

- A. approve and ensure there is monitoring of compliance with all significant policies and procedures by which the corporation is operated;
- B. ensure that policies and procedures are in place so that the corporation operates at all times within applicable laws and regulations, and to the highest ethical and moral standards.

V. Reporting

The board has the responsibility to:

- A. ensure that the financial performance of the corporation is adequately reported to shareholders, other security holders and regulators on a timely and regular basis;
- B. ensure that the financial results are reported fairly and in accordance with generally accepted accounting principles;
- C. ensure the timely reporting of any other developments that have a significant and material impact on the value of the corporation;
- D. report annually to shareholders on its stewardship for the preceding year;
- E. ensure the corporation has systems in place which accommodate feedback from shareholders, customers, employees and the community.

VI. Legal Requirements

- A. The board is responsible for ensuring that policies and procedures are in place and that legal requirements have been met, and documents and records have been properly prepared, approved and maintained.
- B. Canadian law, subject to amendment, identifies the following legal requirements for the board:
 - (i) to manage the business and affairs of the corporation;
 - (ii) to act honestly and in good faith with a view to the best interests of the corporation;
 - (iii) to exercise the care, diligence and skill that reasonable prudent people would exercise in comparable circumstances;
 - (iv) to act in accordance with its obligations contained in the *Securities Act* of each province and territory of Canada, other relevant legislation and regulations, and the individual corporation's act of incorporation and by-laws or articles of incorporation;
 - (v) in particular, it should be noted that the following matters must be considered by the board as a whole and may not be delegated to a committee:
 - a) any submission to the shareholders of a question or matter requiring the approval of the shareholders;
 - b) the filling of a vacancy among the directors or in the office of the external auditor;
 - c) the manner and the term for the issuance of securities;
 - d) the declaration of dividends;
 - e) the purchase, redemption or any other form of acquisition of shares issued by the corporation;
 - f) the payment of a commission to any person in consideration of the purchase or agreement to purchase shares of the corporation from the corporation or from any other person, or procuring or agreeing to procure purchasers for any such shares;
 - g) the approval of management proxy circulars;
 - h) the approval of any take-over bid circular or directors' circular;
 - i) the approval of the interim and annual financial statements and management's discussion and analysis of the financial condition and results of operations ("MD&A") of the corporation;
 - j) the adoption, amendment or repeal of by-laws of the corporation.

VII. Miscellaneous Requirements

The board has the responsibility for the implementation of a policy prohibiting personal loans to executive officers or directors of the corporation.

2. Individual director Responsibilities

There are general duties and responsibilities of directors in common law and in the *Canada Business corporations Act* (the “CBCA”), as well as the corporation’s by-laws.

The relationship of the director to the corporation is a fiduciary one. A fiduciary is defined as a person who in law, by his or her position, is able to affect the legal rights of others and has some power of control over the property of others.

The corporation directors are “trustees” in the sense that in performance of their duties, they stand in a fiduciary relationship to the corporation and are bound by all the rules of fairness, morality and honesty in purpose that the law imposes. From this fiduciary role comes the stewardship responsibility to preserve and enhance shareholder value and as such the board of directors serve as trustees for the investment of the shareholders.

As a group, the board of directors' role is to oversee the performance of executive management. In summary, this consists of selecting a successful management team, overseeing corporate strategy and performance, acting as a resource for management and ensuring effective shareholder communication. Individual directors share this responsibility collectively with the other members of the board of directors.

Also individually, directors must, in connection with the powers and duties of their office, exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstance. Part of this care and diligence is for all directors to attend and participate in board discussion.

The duties of a director as established by the CBCA and as interpreted by the Courts may be summarized as follows:

- A. **Duty of Honesty** - In their dealings with fellow directors, directors must tell the whole truth and in good faith. Secret profits are forbidden to directors.
- B. **Duty of Loyalty** - A director is required to give individual loyalty to the corporation. Each director must exercise his or her powers honestly and for the benefit of the corporation as a whole.
- C. **Duty of Care** - A director is required to exercise prudence and diligence. The duty of care requires prudence based on common sense.

- D. **Duty of Diligence** – The statutory requirement of diligence involves making those inquiries, which a person of ordinary care in their position or in managing their own affairs would make.
- E. **Duty of Skill** - Originally in common law a director was required to exercise no greater degree of skill than could be reasonably expected from a person with their knowledge and experience. The CBCA now requires every director to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- F. **Duty of Prudence** – The duty of prudence requires directors to use common sense. Acting prudently is acting carefully, deliberately, cautiously, trying to foresee consequences. directors must also keep the following guidelines in mind in the exercise of their individual responsibilities:
- a. to exercise powers properly for the purpose for which they are conferred;
 - b. to be sensitive to any sort of conflict of interest whether real or perceived. Where conflict cannot be avoided, declare the conflict and, based on the specifics of the conflict either refrain from voting and/or be excused from the meeting.
 - c. not to misuse information or position;
 - d. to ensure that appropriate records are kept and maintained and that proper distributions or payments are made;
 - e. with regard to corporation goals and objectives, to fulfill legal requirements and obligations of a director, represent the interest of all shareholders in the governance of the corporation, participate in review of Corporate policies and strategies and monitor their progress;
 - f. with regard to board activity, to exercise good judgment and act with integrity, use abilities and experience and influence constructively, be an available resource to management and board, respect confidentiality, govern rather than manage, be aware of potential conflict areas, evaluate the CEO and corporation performance, assist in maximizing shareholder value;
 - g. with regard to preparation and attendance, to read mail-out materials, maintain good attendance record, acquire adequate information for decision making;
 - h. with regard to communication, to participate fully and frankly in meetings, encourage free and open discussion, ask probing questions;
 - i. with regard to independence, demonstrate interest in long term success of the corporation, speak and act independently;
 - j. establish an effective, independent and respected presence and a collegial relationship with other board members;
 - k. with regard to committee work, become knowledgeable about the purpose and goals of the committee, understand the process and the role of management and staff supporting the committee;

- I. with regard to business, corporation and industry knowledge, remain knowledgeable of the corporation's services, facilities and industry, understand the corporation's role in the community, understand regulatory, legislative, business, social and political environments of the corporation, become acquainted with corporate officers. Be an effective ambassador of the corporation.

This is a very brief summary of the duties of a director. Further information can be found on-line at the Institute on Governance website, www.iog.ca.

The following is a handy checklist of items designed to assist individual directors to manage some of the risks to which they are exposed as a director in fulfilling their responsibilities which have not necessarily been addressed elsewhere in this manual:

- A. Attend board meetings as frequently as possible, read the minutes carefully.
- B. Ask probing questions of management.
- C. Any dissenting opinion should be recorded in writing.
- D. Make certain that the corporation's affairs are run according to its constitution.
- E. Keep abreast of the activities of the corporation and be well versed in the industry.
- F. Be aware of the various statutes and the provisions pertaining to corporate offences.
- G. Ensure that any delegation of power to management is constrained within reasonable limits, particularly administrative management.
- H. Refrain from voting on questions where your independence could be called into question.
- I. Review resolutions passed and actions taken in your absence.
- J. Retain the right to advice from outside experts where warranted.
- K. Ensure that there is follow up on resolutions passed by the board.
- L. Obtain assurance of timely payment of employee wages, source deductions, income tax installments, GST, PST (possibly annual officers' certificates).
- M. Ensure that the corporation is in compliance with all environmental legislation, has an up-to-date environmental policy and reports to the board frequently.

3. Chair of the board Responsibilities

The Dey Report, written by the Dey Committee in 1994, provides a general description of the chair of the board's role as responsible for managing the processes of the board and for ensuring the board discharges its responsibilities. More specifically, the following are the responsibilities of the chair of the board of directors:

- Provide leadership to the board;
- Ensure the board can function independently of management;

- Establish procedures to govern the board’s work, working with the Corporate Governance Committee;
- Ensure the board’s full discharge of its duties;
- Schedule meetings of the full board and work with committee Chairs to coordinate the schedule of meetings for committees;
- Ensure the appropriate agenda for regular or special board meetings based on input from directors and the CEO;
- Ensure proper flow of information to the board, reviewing adequacy and timing of documented material in support of management’s proposals;
- Ensure adequate lead time for effective study and discussion of business under consideration;
- Oversee the preparation and distribution of proxy material to shareholders, customers, employees and the community;
- Help the board fulfill the goals set by assigning specific tasks to members of the board where necessary;
- Act as liaison between the board and management;
- In support of the CEO, and when requested by the CEO or the board, represent the corporation to external groups as required;
- Working with the Corporate Governance Committee, ensures proper committee structure, including assignments of members and committee Chairs;
- Chair regular and special meetings of the board of directors;
- Carry out other duties as required by the CEO and the board as a whole, depending on need and circumstances.

4. President and chief executive officer Responsibilities

The corporation’s by-laws define the duties of the CEO (President) as exercising general control of and supervision over the corporation’s affairs. More specifically, the following are the responsibilities of the CEO:

- Fosters a corporate culture that promotes ethical practices, encourages individual integrity and fulfills social responsibility;
- Maintains a positive and ethical work climate that is conducive to attracting, retaining and motivating a diverse group of top-quality employees at all levels;
- Develops and recommends to the board, a long term strategy and vision for the corporation that leads to the creation of shareholder wealth;
- Develops and recommends to the board, annual business plans and budgets that support the corporation’s long term strategy;
- Determines the appropriate use of technology;
- Develops and recommends to the board, the allocation of capital necessary to achieve the corporation's business plan;

- Ensures that the day-to-day business affairs of the corporation are appropriately managed including evaluation of the corporation's operating performance and initiating appropriate action where required;
- Consistently strives to achieve the corporation's financial and operating goals and objectives;
- Ensures fair presentation of the financial condition of the corporation in continuous disclosure documents, and oversight and assessment of internal and disclosure controls of the corporation;
- Ensures that the corporation builds and maintains a strong positive relationship with its customers;
- Ensures continuous improvement in the quality and value of the products and services provided by the corporation;
- Ensures that the corporation achieves and maintains a satisfactory competitive position within the industry;
- Ensures that the corporation builds and maintains a strong positive relationship with its employees;
- Ensures that the corporation has an effective management team below the level of CEO and has an active plan for its development and succession;
- Ensures, in cooperation with the board, that there is an effective succession plan in place for the CEO position;
- Formulates and oversees the implementation of major corporate policies;
- Serves as the chief spokesperson for the corporation;
- Builds and maintains strong relationships with the corporate and public community;
- Ensures management support for board Committees.

5. Board Meetings

The frequency with which a board meets will vary from one corporation to the next. Most companies schedule their full board meetings at regular intervals, such as each quarter, often coinciding with the need to deal with matters such as quarterly financial information.

All directors are entitled to receive notice of all meetings of the board and no director may be excluded from such meetings. Notices are usually distributed that specify such matters and include considerable detail and background. Unless notice is given in accordance with the corporation's by-laws or statutory requirements, the board meeting is not duly constituted and the business conducted at the meeting is of no effect. For this reason, where a board meeting must be called quickly and there is not sufficient time to give the required notice, the corporation may ask directors who were not present at the meeting to sign a waiver of notice. A director's presence at the meeting constitutes waiver of the notice requirements. A quorum must be present at any board meeting for business to be conducted at the meeting.

A director must always act with independence, objectivity, and impartiality and be free of bias. Where a director is conflicted on a particular resolution, they should disclose the conflict and recuse themselves (i.e., not participate in the discussions) and offer to exit the boardroom when the concerned matter is under discussion.

The corporation is required to keep minutes of the board meetings and directors are entitled to see the minutes. The minutes will provide evidence of who was present and what was done at a meeting. It is important that they accurately reflect the meeting and be circulated promptly after a meeting has been held. This allows directors who were present to confirm the accuracy of the minutes while the meeting is still fresh in their minds and permits directors who were absent to register their dissent, if necessary, as promptly as possible. Minutes are seldom an exhaustive record of everything said at a meeting. However, some description of the nature of the discussion is necessary for the minutes to provide evidence that the board's consideration of an issue was thorough and thoughtful. If the board received advice from experts or advisors, this should be noted in the minutes.

6. Confidential Information

Directors must not appropriate an opportunity that belonged to a corporation. If directors take advantage of an opportunity of which they became aware by virtue of their position as directors and that opportunity is one in which the corporation might conceivably have had an interest, the directors have acted counter to their fiduciary duty to the corporation.