



Corporate Governance Checkup

National Trust Closely Held Business Association

September 30, 2025

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Governance Checkup

- A. Who should do it?
- B. What are the risks for ignoring it?
- C. Can issues flagged be addressed or mitigated?

Step One: Know Your Entity Basics

- Type of entity ---> State law governs
 - Corporation (Corp)
 - Limited Partnership (LP)
 - Limited Liability Company (LLC)
- Federal income tax classification ---> IRC governs
- Applicable jurisdictions
 - Jurisdiction of formation
 - Other jurisdictions where transacting business

Step Two: Confirm Governance Structure

➤ Ownership

- Shareholders (Corp), Partners (LP), Members (LLC)
- Majority v. Minority
- Voting Rights ---> Statutory and contractual

➤ Management

- Directors (Corp), General Partner (LP), Members/Managers (LLC)
- Officers ---> What authority and safeguards?
- Any special appointment rights for certain owners?

Step Three: Conduct Compliance Survey

- Internal governance requirements
 - Meetings of management and/or owners ---> Policies and procedures
 - Reporting to owners ---> Includes governance, financial, tax, etc.
 - D&O insurance ---> Is existing coverage in place (and adequate)?
- Filings with federal/state/local authorities
- Other regulatory filings (assumed names, licenses/permits, etc.)
- Corporate Transparency Act?

Step Four: Identify Problem Areas

- Are governance formalities being followed?
- Are governing documents up to date?
- Are the proper hats being worn?
- Who has authority and/or accountability?
- Are conflicts of interest being properly addressed?
- Are creditors and other third parties being considered?

Step Five: What did we forget?

Ownership Considerations

- Existing cap table ---> Clean-up work often needed
- Applicable transfer restrictions ---> Permitted transfers?
- Facilitating entry/exit for owners ---> Built-in or ad-hoc?
- Charging order concerns ---> Any buyout options?
- Securities law compliance ---> Did anyone think of this before?

Fiduciary Duty Considerations

- Who has them? ---> Management
- What are they? ---> Duties of obedience, loyalty, care
- Who benefits from them? ---> Entity (not owners)
- Can they be waived/modified? ---> Depends on source of duty
- Do they overlap with other duties? ---> Possible

Business Judgment Rule

- Requires showing that director made an informed decision (diligence) and believed he/she was acting in corporation's best interests (prudence)
- Examined when decision made (not in hindsight)
- Decision may be unwise, inexpedient, imprudent, or even negligent (grossly?)
- Analysis is process oriented; balancing of factors

Recordkeeping Considerations

- Guidelines for meeting minutes
- Documenting ownership transfers
- Records regarding dividends/distributions
- Preparation of financials statements and tax returns
- Consolidated entity reporting

Transitional Considerations

- Continuity of ownership and/or management
- Management removal scenarios
- Deadlock scenarios and veto/blocking rights
- Exit opportunities for existing owners
- Accommodating trust beneficiaries
- Winddown procedures

Additional Business Considerations

- Contracts
- Employees v. Independent Contractors
- Benefits
- Insurance
- Intellectual Property
- HIPAA
- Data/Privacy
- Cybersecurity

Questions?

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