

Governance/Corporate Structure Streamlining: The Elements of Project Process

- 1. Working Group:** This involves an identification of the advisors, executives and board members who will be involved in the project on a regular basis, who will have the information that will be relevant to the evaluation, what attorney-client privilege issues arise and who will want to be kept “in the loop” on project progress.
- 2. Goals and Objectives/Specific Issues:** This is a two-pronged point. The *first* relates to the need to confirm what part of the board’s focus is on streamlined governance, and what part is on streamlined corporate structure. The *second* relates to the presence of any particular issues, laws, decisions, statutes, legal barriers, political considerations, *etc.* that the advisors need to take into particular consideration as they conduct their analysis.
- 3. Documents:** This is the “document dump”. The advisors will request the organizational documents and governance policies from all of the corporations in the system, as well as the partnership and related formation agreements for any relevant joint venture investments. Advisors may also ask for board and key committee meeting minutes going back a certain period of time. These documents may prompt follow up questions to members of the working group or executive leadership, and will form the basis for the eventual analysis and recommendations. It is painstaking but necessary.
- 4. Interviews:** With the core information in hand, the advisors will turn to interviews with key corporate personnel; certainly leading members of the executive leadership team as well as knowledgeable and long serving board members. What the advisors are looking for is not only an understanding of specific reorganization opportunities and benefits that might arise with respect to specific corporate entities, but also the history, or “lore” associated with particular corporations. The advisors will also ask questions relating to the effectiveness of the current governance structure and processes.
- 5. Prepare Evaluation Grid:** At this point, the advisors would prepare a grid intended to serve as the basis from which they would evaluate the opportunities and feasibility associated with board and corporate reorganization as it may relate to each individual corporation or joint venture investment in the system. The grid would reflect consideration of all of the principal identified legal, mission and political issues and barriers that their effort to date has identified as critical to be considered.
- 6. Review Documents v. Grid:** This would be the analysis—in which the advisors evaluate the potential for each corporation to be a candidate for corporate and board reorganization or consolidation. The advisors would essentially “grade” the various entities and their board structures according to the extent of feasibility associated with their potential reorganization. From this analysis would come a very preliminary recommendation on a corporate reorganization/streamlining.
- 7. Discuss Initial Observations with Group:** This would be the “here’s what we’re thinking” portion of the project, in which advisors would share their preliminary corporate restructuring and governance streamlining perspectives with the Working Group and take their feedback.
- 8. Report to board:** After consideration of the Working Group feedback, and review of the draft by executive and governance committee leadership, advisors would present their recommendations on corporate and governance reorganization to the full board for its consideration, in advance of a board meeting to discuss the report. Board feedback and comment would follow.
- 9. Guidance from Board:** This would be the formal action of the board with respect to the advisors’ report, in which the board would take action on whatever recommendations on corporate structure and governance are ultimately presented in the report.
- 10. Implementation Plan:** This would be the logical follow up; *i.e.*, the development of an “action plan” intended to implement the specific recommendations contained in the report, as adopted by the board. Depending upon the scope and nature of the board’s action, this could be, of course, a fairly involved process focusing on corporate actions and regulatory filings.

Governance Streamlining: Legal Issues Checklist

ACTION ITEMS

DONE?

1	<p>Basic Goal: preservation of the board as a body capable of exercising independent oversight of management and operations and informed business judgment—these standards as defined by state nonprofit corporate law.</p>	✓
2	<p>Independence (corporate law): satisfaction of state corporate law (if any) and/or governance best practices standards of director independence so that the board is controlled by a majority of members who meet the appropriate definition of “independence”.</p>	✓
3	<p>Exempt Organization Tax Law:</p> <ul style="list-style-type: none"> a. Satisfaction of relevant IRS standards of director independence (which may be different than the corporate law standards) b. Satisfaction of appropriate nonprivate foundation status test as it applies to board structure c. Satisfaction of “disinterested director” definition for satisfaction of rebuttable presumption of reasonableness safe harbor under intermediate standards requirements (e.g., executive compensation decisions) d. Application of conflict of interest policy and procedures consistent with IRS template e. Board size appropriate for needs of organization f. Attribution of activities of taxable affiliate arising from board overlap 	✓
4	<p>State Corporate Law:</p> <ul style="list-style-type: none"> a. Requirements, if any, regarding board size, composition/ independence, terms and qualifications b. Delegation of board authority to standing committees c. Ability to include non-board members as voting members of committees with board delegated powers d. Ascending liability issues (e.g., direct participant, alter ego) arising from overlapping director service e. Restrictions, if any, on ability to “bifurcate” responsibilities of board members (i.e., designate certain board members as specifically responsible for governance matters and allow others to contribute by other means, e.g., philanthropy) f. Other relevant issues re: officer and director conduct and participation, meeting requirements, etc. as may arise under state law g. Fiduciary duty standards of care and loyalty as interpreted by state courts h. State corporate law provisions addressing director compensation 	✓
5	<p>Governance Best Practices:</p> <p>Application of leading corporate governance best practices (e.g., ABA, The Business Roundtable, Panel on the Nonprofit Sector, IRS) on issues such as:</p> <ul style="list-style-type: none"> a. Board size b. Qualifications of members c. Number and types of committees (e.g., size, structure, charter, composition as may be appropriate given the size and sophistication of the organization) d. Committee composition e. Board and committee meeting frequency f. Role of executive officers serving as staff to the board and key committees g. Executive session practice of board and committees h. Lines of governance authority between board, committees and management 	✓

NOTE: Corporate governance structures are a byproduct of the application of specific state and federal tax laws. The particular details of any individual board streamlining initiative should be examined in consideration with these and related laws and applicable agreements. The above list is not intended as an all-inclusive list of applicable laws and regulations.