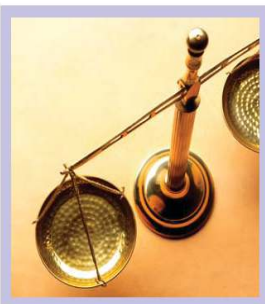




Pro Bono Partnership of Atlanta



General Guidelines for Operating a 501(c)(3) Nonprofit Corporation in Georgia



PROBONO[™]
PARTNERSHIP / ATLANTA

Originally Prepared By:

Tax Subcommittee of Pro Bono Partnership of Atlanta, chaired by Ed Manigault of Jones Day and Tim Phillips of American Cancer Society

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The information contained herein is intended as general guidance for the operation of a Georgia nonprofit corporation with IRS recognition as a Section 501(c)(3) public charity. The specific facts involved in a particular situation could raise other issues and call for different analysis. Please consult periodically with an accountant (especially since compliance matters are the subject of frequent changes), and seek legal counsel if there are specific questions.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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1 Corporate Governance

A. Basic Practices

A well-run tax-exempt organization should strive to follow “best practices” of corporate governance. Although many corporate governance practices apply equally to for-profit and nonprofit corporations, some guidelines have been proposed specifically for tax-exempt organizations. (See “Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations” by the Panel on the Nonprofit Sector at <http://www.nonprofitpanel.org/>.) For many small and community-based tax-exempt organizations, some of those guidelines will be largely aspirational, as resources may be limited and many of the contemplated risks may not be relevant. All organizations, however, should follow some basic governance practices, some of which are set forth below.

- **Read and be familiar with articles and bylaws.** This is a critical but often overlooked first step of governance. All of the officers and directors¹ should read and be familiar with the governing instruments of the organization, which are most often the articles of incorporation and bylaws. These documents not only create the entity, but also set forth the goals and purposes of, and restrictions on, the operation of the organization – as well as the more practical processes and procedures as to how the organization is run.
- **Know and understand fiduciary duties.** Officers and directors of nonprofit corporations are subject to important fiduciary duties, such as the duty of care and duty of loyalty.² The duty of care requires that a Board member act in a manner that he or she believes in good faith to be in the best interest of the organization and with the care an ordinary prudent person in a like position would exercise under similar circumstances. The duty of loyalty requires that a Board member act in the best interest of the organization and not for personal gain. There may

¹ Nonprofit corporations typically only have officers and directors, but directors are sometimes called trustees. For purposes of this brochure, “director” shall include trustees of nonprofit corporations.

² See Official Code of Georgia Annotated (O.C.G.A.) §§ 14-3-830 and 14-3-842.

be state law repercussions if an officer or director violates these duties.

- **Plan for leadership succession.** Although you may have founded the organization and serve as an officer and director, the organization has a perpetual life and plans need to be made for its future. Steps should be taken to develop and educate new leaders who will serve as successor officers and directors.
- **Have regular and well-planned meetings – and keep minutes.** All nonprofit corporations are required to have an annual board meeting.³ (Check the organization’s bylaws for the specific requirements.) It is better practice, however, to have more frequent meetings so that the directors are aware of ongoing projects and any problems or issues that may arise. These meetings, if well-planned and well-run, will help the directors meet their duty of care. It is best to have an agenda that is circulated before the meeting, preferably along with any relevant materials that will aid the directors in making any decisions at the meeting. In addition, the Secretary should take minutes of the meeting and circulate these minutes at or prior to the next meeting for review and approval. The minutes need not (and often should not) recite each and every comment or statement of a meeting, but they should at least record important items and all votes and resolutions.
- **Keep good records.** Records (corporate minutes, donor contributions and acknowledgments, accounting and financial statements, contracts, etc.) should be maintained in a safe place. Some of these records (such as financial statements) should be reviewed by the Board, and others (such as the Form 990) must be made available to the public upon request (see Public Disclosure Requirements in Section 2.B below for more details).
- **Implement financial controls.** The organization should have “controls” in place to make sure the assets of the organization are being used properly. It is beyond the scope of this brochure to go into much detail, but examples include requiring two people to sign checks above a certain dollar amount and not permitting a person to review and approve his or her own expense reimbursements.
- **Obtain insurance.** Exempt organizations should obtain insurance against various risks, such as property and casualty insurance. Seek out the guidance of a competent and reputable insurance broker with experience working with nonprofit organizations. Although volunteers of tax-exempt organizations may be provided some legal protection against certain types of liability, the organization should consider “directors & officers” (“D&O”) insurance to protect the officers and directors from personal liability.

³ Nonprofit corporations with members are required to have an annual meeting of the members.

2 Compliance

A. Code § 501(c)(3) Exemption – Maintaining the Organization’s Most Valuable Asset

If you are reading this pamphlet, your organization should have obtained a determination letter stating that it is recognized as exempt from federal income tax as a charitable organization that meets the requirements of §501(c)(3) of the Internal Revenue Code (the “Code”). Tax-exempt status is often an organization’s most valuable asset, so it should be monitored, reviewed, and protected in the same manner as any other valuable asset, including by educating directors, officers, staff, and volunteers.⁴

- **Monitor Operations.** The organization obtained tax-exempt status based upon two criteria: (1) the structure of the organization (as shown in its articles of incorporation and bylaws); and (2) the information provided to the IRS about how the organization would be operated. The first criterion is often called the “organizational test,” as it relates to how the organization is formed. The second criterion is referred to as the “operational test,” as it deals with how the organization actually functions. It is important to monitor how the organization operates, to make sure operations are consistent with federal and state requirements, and to notify the IRS and the Georgia Secretary of State of significant operational changes (such as amendments to the articles of incorporation) in the organization’s annual filings.
- **Review the Form 1023.** Organizations should take care to operate as required by the federal tax rules. To do so, it is good practice to educate directors and officers. As explained above, *all* directors and officers should

⁴ Consider purchasing a tax-exempt organizations reference book, such as “Tax Planning and Compliance for Tax-Exempt Organizations: Rules, Checklists, Procedures” by Jody Blazek. Two other excellent sources of information for maintaining tax-exempt status are provided by the IRS: Publication 4221-PC “Compliance Guide for §501(c)(3) Public Charities” (<http://www.irs.gov/pub/irs-pdf/p4221pc.pdf>) and the free online workshop – “Stay Exempt – Tax Basics for §501(c)(3)s” (found at <http://www.stayexempt.org/>).

review and be familiar with the organization's governing documents. In addition, they should also review Form 1023 – Application for Recognition of Exempt Status (the “Form 1023”). Form 1023 is what the organization supplied to the IRS to obtain tax-exempt status, so it is important to know what was said in the form. In Form 1023, the organization made representations as to how it would be operated, and the IRS granted the organization's tax-exemption based upon those representations. If the actual operations differ from those described in Form 1023, notice of the variation may need to be given to the IRS. In some instances, significant differences between actual and projected operations can threaten the tax-exempt status of the organization.

- **Review the Form 990.** Directors and officers should review the Form 990 (the organization's annual information return to the IRS) annually to make sure they are familiar with the financial information and important disclosures contained therein. As indicated on the Form 990, variations in activities and certain changes to the organization's structure (including changes to the governing documents) need to be disclosed to the IRS.⁵

B. Other Steps to Preserving Exempt Status

In addition to the requirements described above, there are other steps that should be taken as well as certain activities that should not be carried out by the organization in order to preserve the tax-exempt status of the organization.

- **Politics.** Politics, in this case, refers to two separate areas: (1) political campaigning and (2) lobbying. Tax-exempt organizations **are not** permitted to engage in **any** amount of campaigning for or against anyone running for political office. Tax-exempt organizations are, however, allowed to engage in **some** activities related to endorsing or opposing legislation (often called “lobbying”). These rules are complicated, so the organization should seek professional advice before participating in actions that support or oppose legislation. Note that under Georgia law, a “lobbyist” generally must register with the Georgia Government Transparency and Campaign Finance Commission.⁶
- **Private benefit and private inurement.** Tax-exempt organizations are

⁵ Additional information can be found on the IRS website, including the “Life Cycle of a Public Charity,” at <http://www.irs.gov/>.

⁶ A “lobbyist” is defined as persons, including employees, who are paid to promote or oppose Georgia legislation, certain ordinances, and agency regulations, or who spend more than \$1000 to promote or oppose Georgia legislation or certain ordinances. A person compensated for lobbying activities must register with the Georgia Government Transparency and Campaign Finance Commission if such activities are a substantial part of that person's duties or make up at least 10% of that person's working hours in a single month.

required to serve public, rather than private, interests. Thus, they must not allow their income or assets to benefit, more than insubstantially, a private person or entity. Tax-exempt organizations are also not permitted to distribute or transfer assets to “insiders” (basically, directors, officers, key employees, and immediate family members thereof), other than in exchange for fair market value. This is the prohibition of “private inurement.” The most common example is the payment of excessive compensation. Other examples could include the payment of an officer’s personal expenses by a tax-exempt organization or allowing an insider to use the organization’s assets without proper compensation (for example, allowing an officer’s business to use the organization’s office without payment of sufficient rent). If the organization carefully follows the conflict of interest policy requirements (described below in Section 2.C.), private inurement should not pose a problem.

- **Unrelated business income.** A tax-exempt organization under §501(c)(3) is exempt from income tax so long as its business activities are related to its tax-exempt purposes. There are, however, rules that require even tax-exempt organizations to pay federal income taxes – essentially when they carry on trades or businesses that are unrelated to their tax-exempt purposes. For example, assume a community organization teaches English as a foreign language to poor immigrants as a tax-exempt activity. If the organization expands and offers for a fee these classes to executives of foreign corporations, those fees might be subject to the “unrelated business income tax” (“UBIT”). Even if the activity is designed to raise money for the organization to use to accomplish its charitable purposes, if the activity is unrelated to those charitable purposes, the income could be subject to unrelated business income tax. These rules are complicated and include numerous exceptions, so you should seek professional advice if you are unsure whether items of income are subject to UBIT.⁷
- **Public disclosure requirements.** Tax-exempt organizations are obligated under federal law to make certain information available to the public. The most recent three years of annual information returns (Form 990) and schedules filed with the Form 990 (other than Schedule B) must be provided to anyone upon request. In addition, the organization must provide copies of its Form 1023 and its IRS determination letter. These items generally must be provided the day requested or, in some instances, within two weeks. The organization may charge reasonable copying expenses. As an alternative, these items may be posted on the organization’s website. However, paper copies must be made available for anyone who wants to inspect them rather than visit the website. There are

⁷ See also <http://www.stayexempt.org/VirtualWorkshop/UnrelatedBusinessIncome.aspx>.

penalties for failing to comply with these requirements.⁸

- **Donor contributions and acknowledgment.** Once an exempt organization receives a donation, it should take several steps to acknowledge the donor's contribution. These acknowledgments are extremely important to the donor, as they permit the donations to be tax deductible.
 - a. An exempt organization must provide a written acknowledgement to the donor of any contribution of \$250 or more. Although multiple gifts made in one year that separately are less but together total more than \$250 are not subject to this rule, it is advisable for the organization to acknowledge *all* gifts.
 - b. The acknowledgment should be sent to the donor soon after the donation is made, but not later than January 31 of the following calendar year.
 - c. The acknowledgment should state the amount received, and (assuming it is accurate) that the donor received no cash, goods, services, benefits or privileges from the organization in return for the donation.
 - d. If the donor receives goods or services in return for a donation of \$75 or more (a so-called "quid pro quo" contribution), the acknowledgment generally also must give a description and good faith estimate of the value of those goods and services. Some quid pro quo items and amounts are essentially ignored: "token benefits" (in 2011, those worth less than \$9.60); up to 2% of a donation (but not more than \$96 in 2011); and certain types of customary membership benefits offered for a membership (like discounts on parking and gift shop items).⁹
 - e. If the donation is or includes goods or property, the organization must describe the goods or property and state that the donor received nothing in return for the donation. The organization should *not* put a value on the goods or property it received from the donor.

If the organization receives a plane, boat, or vehicle valued over \$500 and then sells it, the organization must use Form 1098C, Contributions of Motor Vehicles, Boats or Airplanes to report its

⁸ For more information, visit <http://www.stayexempt.org/VirtualWorkshop/Required-Disclosures.aspx>

⁹ IRS Publication 1771, *Charitable Contributions-Substantiation and Disclosure Requirements*, available on the IRS website at www.irs.gov.

receipt and sale.¹⁰

C. Conflicts of Interest

Tax-exempt organizations are governed by rules that limit and in some cases prohibit related persons from engaging in certain transactions with the organization.

- **Georgia law.** Georgia law requires that certain procedures be followed before transactions can occur between a nonprofit corporation and related persons.¹¹ These procedures are similar to, but not as stringent as, the procedures described as IRS rules below.
- **IRS rules.** Federal tax law contains what are generally referred to as the “Intermediate Sanctions Rules.” The Intermediate Sanctions Rules are designed to prevent “disqualified persons” (basically, persons that exercise substantial influence over the organization’s affairs, such as directors, officers, key employees and related persons or entities) and the tax-exempt organizations with which they are affiliated from engaging in transactions that yield a benefit, directly or indirectly, to the disqualified person in excess of the value or consideration received by the exempt organization (“excess benefit transactions”). Severe penalties can be imposed if a disqualified person engages in an excess benefit transaction. A penalty can be imposed on any officer, director, or other person who approves such a transaction on behalf of the organization if he or she knows the transaction is improper. A much higher penalty is imposed on the disqualified person participating on his or her own behalf. *These penalties can be imposed on the disqualified person even though he or she did not have any knowledge that the transaction was improper.*

Example # 1: Assume that a Georgia nonprofit organization (“Public Charity”) purchases a building from ACME Company. Public Charity pays \$1,000,000 without researching the fair market value. The husband of Public Charity’s Board Chair was an owner of 35% of ACME, and the building was only worth \$900,000. The IRS may impose excise taxes upon the Board Chair and the other officers and directors who approved the transaction.

Example #2: Assume Public Charity pays its Executive Director \$100,000 per year but that the Executive Director has no experience

¹⁰ The IRS has several publications with details for handling such donations: IRS Publication 4302, “A Charity’s Guide to Vehicle Donations,” and Publication 4303, “A Donor’s Guide to Vehicle Donations,” which are available on the IRS website at www.irs.gov.

¹¹ See O.C.G.A. §§ 14-3-860 to 14-3-865.

operating an organization and others in a similar position are paid only \$60,000 per year. The IRS might assess excise taxes upon the Executive Director and the officers and directors who approved the salary.

- **Conflict of interest policy.** Because of the Intermediate Sanctions Rules and their associated penalties, tax-exempt organizations should maintain a conflict of interest policy to protect both the organization and its employees, officers, directors, and volunteers.¹²
- **Best practices.** In addition to being aware of the conflict of interest rules and maintaining a conflict of interest policy, tax-exempt organizations should take affirmative steps to meet the requirements and avoid problems.
 - a. **Rebuttable presumption.** If a “disqualified person” engages in a transaction (including receipt of compensation) with the organization, the Board should make sure that the transaction meets the “rebuttable presumption of reasonableness” as described in the sample conflict of interest policy on the IRS website. In other words, the organization should make certain (1) the transaction is at arm’s length, (2) comparability data is reviewed and considered, and (3) the transaction is approved and documented in advance by Board members, not including any disqualified persons.
 - b. **Annual questionnaires.** The organization should ask directors, officers, and key employees each year if they are familiar with the conflict of interest policy and whether they (or related persons) have engaged in any transaction with the organization.
 - c. **Professional advice.** Most importantly, the organization should obtain professional advice if there is ever a question about a conflict of interest. Professionals can guide an organization through the necessary procedures.

¹² A sample conflict of interest policy is available at the IRS website - <http://www.irs.gov/instructions/i1023/ar03.html>.

3 Tax Reporting (Georgia and Federal)

A. Annual Filings

Most exempt organizations will be required to file information returns each year, and some will be required to file more than one. These returns are due by the 15th day of the 5th month after the close of the organization's taxable year. (For many organizations, returns will be due May 15th, as most will have a December 31 year-end.)

If an organization fails to file a required return by the due date (including any extensions of time), or it files an incomplete return, it must pay a penalty of \$20 a day for each day the return is late or \$100 per day if the organization has gross receipts of over \$1 million for the year (in both cases, subject to certain maximum penalty amounts).

Exempt organizations should consult with a CPA to assist in preparing and filing these returns, but some of the important information is set forth below.

- **IRS Form 990.** Exempt organizations are generally required to file an annual return (Form 990) with the IRS. This return is an informational return and includes receipts, expenditures, and additional information, including the compensation of the five most highly paid employees other than officers or directors.
- **Form 990-EZ.** If an organization's gross receipts during the year are less than \$200,000 and its total assets at the end of the year are less than \$500,000, it may choose to file the Form 990-EZ short form.
- **Form 990-N (e-Postcard).** Exempt organizations with annual gross receipts of \$50,000 or less are required to file Form 990-N (commonly called the "e-Postcard").¹³
- **IRS Form 990-T.** While an exempt organization is generally not subject to federal income taxes, if the organization engages in certain business activities (see Unrelated Business Income in Section 2.B. above), it will be liable for tax on its "unrelated business income." If the organization has

¹³ See the IRS website for more information - <http://www.irs.gov/charities/article/0,,id=169250,00.html>.

\$1,000 or more of gross income from an unrelated trade or business, it must file Form 990-T. (Estimated taxes will also be due if the tax for the year is projected to be \$500 or more.) The obligation to file Form 990-T is separate from the obligation to file the annual information return (Form 990, 990-EZ or 990-N).

B. Georgia Filing Requirements

Georgia requires that a copy of the Form 990, 990-EZ, or 990-N be filed with the Department of Revenue. If an organization also files a Form 990-T, Georgia requires that the organization also prepare and file the Georgia Form 600-T, along with a copy of the Form 990-T.

C. Other Filings

Payroll

All exempt organizations with full or part-time employees who receive compensation (wages, tips, or other income) are required to file the usual employment-related tax returns. The organization must determine whether individuals providing services to the organization are properly classified as employees or independent contractors because withholding and payment of employment taxes is not required for independent contractors. The determination of whether a worker is an employee or an independent contractor is based on a number of factors and is very fact-specific.¹⁴

The organization must file Form 941 (Employer's Quarterly Federal Tax Return) quarterly to report any wages paid, tips received, federal income tax withheld, the employer's and employee's shares of Social Security and Medicare taxes, and advance earned income tax credit (EITC) payments. Organizations exempt under § 501(c)(3) do not need to pay federal unemployment (FUTA) tax.

The organization generally must furnish a copy of Form W-2, Wage and Tax Statement, to each employee who received compensation during the year by January 31 following the end of the calendar year covered. The organization generally must file Form W-3, Transmittal of Wage and Tax Statements, to transmit Copy A of Forms W-2 to the Social Security Administration by the last day of February after the calendar year for which the Forms W-2 are prepared. The organization must also provide a Form 1099-MISC if in any calendar year it pays an unincorporated individual or an entity \$10 or more in royalties or \$600 or more in rents; services (including parts and materials); prizes and awards; other income payments; medical and health care payments; cash paid from a

¹⁴ Guidance in making the determination is available at www.stayexempt.org/course3green/index.html and at www.dol.gov/elaws/esa/flsa/scope/er13.asp.

notional principal contract to an individual, partnership, or estate; or proceeds to an attorney.

Exempt organizations are subject to the same penalties as other taxpayers for failing to file a tax return or pay their taxes, including failing to properly report and pay employment taxes.¹⁵

Georgia also has payroll filing requirements. Employers are required to register for withholding with the Department of Revenue. Depending on the amount of tax required to be withheld, the employer must pay withholding taxes either semi-weekly, monthly, quarterly, or annually. Employers are required to submit copies of W-2s, 1099s, and other statement of income subject to Georgia income tax withholding. Interest and penalties may be applied for late filed returns, underpayment of withholding, and late payment. In Georgia, 501(c)(3) nonprofit organizations with at least four workers in twenty different weeks in a calendar year are also liable for unemployment tax.¹⁶

Sales and Use Tax

Georgia provides no blanket sales and use tax-exemption for tax-exempt organizations, but there are a number of specific exemptions allowed for certain transactions with certain tax-exempt organizations. The specific exemptions are contained in O.C.G.A. § 48-8-3, which can be found at www.legis.state.ga.us. If sales and use tax is required to be collected, the organization must report and remit the taxes on Form ST-3, Sales and Use Tax Report Form.

Real Property

The Georgia Code allows several exemptions from property tax for certain tax-exempt organizations. The exemptions are contained in O.C.G.A. § 48-5-41 and listed on the Georgia Department of Revenue's website at <http://www.etax.dor.ga.gov/ptd/adm/taxguide/exempt/property.aspx>.

¹⁵ For more information, see IRS Publication 15, Circular E, Employer's Tax Guide, which is available on the IRS website at <http://www.irs.gov/publications/p15/index.html>.

¹⁶ For more information on Georgia payroll requirements, consult the Employer's Tax Guide available on the Georgia Department of Revenue Website at <http://www.etax.dor.ga.gov/>.

4 State Filings

A. Annual Corporate Registration

Georgia nonprofit corporations are required to complete an annual registration (renewal). The first registration is due within 90 days of incorporation, and then each year thereafter between January 1 and April 1. The corporation may change officer, registered agent, or address information via the annual registration.

B. Charitable Solicitation Registration

Exempt organizations that solicit contributions from the public for charitable purposes are required to register with the Georgia Secretary of State by submitting an initial filing fee along with a completed Form C-100, which must include certain financial disclosures and other information relating to the organization. “Solicit” is defined broadly under Georgia law and includes requesting or accepting, directly or indirectly, money, credit, property, financial assistance, or any other thing of value to be used for any charitable purpose.¹⁷ This filing is separate from the annual corporate registration described in section 4.A. above. If funds are solicited in other states, those states’ laws should be reviewed to determine if registration is required.¹⁸ Exempt organizations soliciting contributions from the public for charitable purposes should contact legal counsel for assistance.

¹⁷ Visit the Georgia Secretary of State website for more information and the form that must be filed. www.sos.georgia.gov/securities/forms/charit_org.htm

¹⁸ See www.multistatefiling.org – many states requiring registration accept the Unified Registration Statement.

HELPFUL LINKS FOR NONPROFIT LEGAL QUESTIONS

Pro Bono Partnership of Atlanta

www.pbpatl.org

Department of Labor:

www.dol.gov/compliance (U.S.)
www.dol.state.ga.us/em/ (Georgia)

Foundation Center:

<http://foundationcenter.org/>
(Library and resources on fundraising)

Georgia Center for Nonprofits:

[http://www.gcn.org/Learn/NonprofitKnowledgebase/
PublicationsStartupPacket/StartingaNonprofitOrganizationinGeorgia.aspx](http://www.gcn.org/Learn/NonprofitKnowledgebase/PublicationsStartupPacket/StartingaNonprofitOrganizationinGeorgia.aspx)
(Starting a Nonprofit in Georgia)

Georgia Secretary of State:

www.sos.state.ga.us/firststop/default.htm
(First Stop Business Information Center)

www.sos.state.ga.us/corporations/faq.htm
(Frequently Asked Questions for Corporations)

www.sos.georgia.gov/securities/paid_solicitor.htm
(Charitable Solicitation Registration)

Internal Revenue Service:

www.irs.gov/charities
www.stayexempt.org

Nonprofit Risk Management Center:

www.nonprofitrisk.org
(Insurance questions)

Pro Bono Partnership (New York Law):

www.probonopartnership.org

Texas C-Bar (Texas Law):

www.texasbar.org/legal_library/



Our Services Include:

- Revising Bylaws and Drafting Board Policies
- Drafting and Reviewing Contracts and Leases
- Registering Trademarks and Copyrights
- Drafting and Reviewing Employee Handbooks
- Classifying Workers

Eligibility Requirements:

In order to become a client of Pro Bono Partnership of Atlanta, an organization must:

1. Be a 501(c)(3) nonprofit organization.
2. Be located in or serve the greater Atlanta area.
3. Serve low-income or disadvantaged individuals.
4. Be unable to afford legal services.

For More Information

Visit our website at www.pbpatl.org.

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53 PERIMETER CENTER EAST, SUITE 400

ATLANTA, GA 30346

Direct: 770-804-4824

Tel: 770-551-3270

Fax: 770-551-3289

Email: feh@hains.com

www.hains.com



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