



Keeping Corporate Minutes for Nonprofits

The DC Nonprofit Corporation Code (the “Nonprofit Code”) provides that a nonprofit must keep minutes of its Board of Directors meetings as part of its permanent records. In addition, IRS Form 990 requires each nonprofit organization to provide certain information about its governance practices. In particular, Item 8 of Part VI of the IRS Form 990 requires the nonprofit to disclose whether it “*Contemporaneously document[s]* the meetings held or written actions undertaken during the year by” the board of directors and any committee authorized to act on behalf of the board.

The IRS has indicated that if a nonprofit organization is unable to answer affirmatively to questions such as Item 8, its management controls may be suspect, and it will be more likely to be audited. It is important for each nonprofit organization to review its recordkeeping practices so that it can answer affirmatively with respect to Item 8 when it files its Form 990.

What’s more, an organization that follows best practices with respect to the keeping of minutes is also ensuring that it is in compliance with the Nonprofit Code and has documentation of corporate actions.

This legal alert discusses the IRS requirements for contemporaneous documentation and provides additional guidance for keeping accurate and timely minutes of board and committee meetings.

IRS Definition of “Contemporaneous Documentation”

The instructions to Form 990 indicate that minutes or other documentation of board or committee actions will be considered contemporaneous if they are prepared before the *later* of the next meeting of the body or 60 days after the action is taken. Indeed, it is always in the interest of accuracy to prepare minutes as soon as possible after any meeting, while the minute taker’s memory is fresh.

Purpose of Minutes

Most actions relating to the operation of a nonprofit organization are taken by its board of directors, which bears the primary responsibility for protecting the organization’s assets and carrying out its mission. If the articles of incorporation or bylaws allow it, the board may form committees, such as finance or audit committees, and may authorize them to carry out certain functions of the board.

December 2007
Updated July 2015
Updated August 2018

Delegation to a committee does not, however, relieve the board members of their responsibility to the organization.

The board acts by voting at its regular or specially called meetings. Unless otherwise provided in the articles of incorporation or bylaws, a majority of the board members constitutes a quorum for transacting business. A Board action is validly adopted if it is approved by a majority of the Board members at the meeting, provided a quorum is present at the time of the vote. The articles of incorporation or bylaws may permit meetings to be held via telephone conference or other electronic means. Each director has one vote and voting by proxy is not permitted. The articles of incorporation or bylaws will specify how much advance notice of meetings must be given to board members and the means by which notice must be given.

The minutes of board and committee meetings document the actions taken at the meeting and provide an official record that the formal requirements for action (notice, quorum, etc.) have been satisfied. In general, the minutes will include:

- the name of the organization;
- the date, time and place of the meeting;
- members present and absent (including, where necessary, which ones qualify as independent directors);
- who called the meeting to order and who kept the minutes;
- all motions made and the results of all voting; and

- when the meeting ended.

They will be prepared by the secretary or other authorized member and presented for approval at the next meeting.

Matters to Be Covered in Minutes

Aside from the factual matters specified above, the actual substantive content of the minutes require judgment, because meetings may be lengthy and include discussions of many issues. In general, it is not desirable to create a detailed record of all discussions, but rather to include only information sufficient to show that the members acted reasonably in coming to decisions.

A sample form of board of directors meeting minutes is included in the appendix to this alert.

Executive Sessions

Boards of Directors often meet in executive session – meaning that only Board members and invited guests are present at the Board meeting. Executive sessions are used to discuss sensitive or confidential matters, such as personnel performance issues, executive compensation, or potential litigation.

Just as with any Board meeting, the Board must keep minutes of its executive sessions. However, given the sensitive nature of the discussion, the minutes should be even more circumspect. Moreover, the minutes of the executive session should only be shared with directors and others who were present during the executive

December 2007
Updated July 2015
Updated August 2018

session. If the topics discussed in executive session involve potential litigation, it may also be advisable to have legal counsel review a draft of the minutes before they are finalized.

Minutes for Special Transactions

While minutes should be brief and state only what is necessary, there are occasions where more extensive minutes are necessary. In these instances, principles of good governance and IRS requirements require a detailed description of what decisions were taken at the meeting; who participated in the decision making; and on what information the decision makers relied. In addition, it is especially important that the nonprofit produce the minutes contemporaneously with the meeting (i.e., within 60 days or by the next meeting, whichever is later). The IRS has indicated that it will give little weight to minutes that are not contemporaneously prepared.

Executive Compensation

The first case where detailed minutes are necessary involves executive compensation. The Internal Revenue Code provides that the amount paid to a senior executive cannot exceed what is customarily paid to an executive in a comparable position at a comparable organization. The Internal Revenue Code also includes what is known as a “safe harbor” by which the nonprofit can demonstrate that the compensation the organization pays to its top executives is consistent with the requirements of the Internal Revenue Code. In order to meet

the requirements of the safe harbor, the Board of Directors must adequately document the basis for setting the compensation. The documentation must include the following information:

- The terms of the compensation and the date it was approved;
- The members of the Board who were present when the compensation was debated;
- The data obtained and relied on by the Board in order to determine that the compensation was fair and appropriate and how the data was obtained; and
- Any actions taken by a board member who had a conflict of interest with respect to the transaction (e.g., did the director recused himself or herself from the meeting?)

Again, the organization must prepare minutes before the Board’s next meeting or 60 days after the final action was taken, whichever occurs later. The Board also must, within a reasonable period of time, review the records and find that they are reasonable, accurate, and complete.

Conflict of Interest Transactions

In a similar vein, if the organization is going to enter into a financial transaction with an officer or director (a conflict of interest transaction), it must demonstrate that the transaction was fair to the nonprofit, and that the officer or director did not benefit from the transaction at the expense of the nonprofit.

December 2007
Updated July 2015
Updated August 2018

The minutes of the meeting at which the conflict of interest is discussed should contain the following information:

- Identify who was present at the meeting, and specifically identify the member with the potential conflict of interest and the nature of the conflict (i.e., the director owns a building the nonprofit is interested in buying);
- State whether the director was present at the meeting at which the transaction was discussed and to what extent the director participated in the meeting (i.e., the director met with the Board to answer questions about the property and the potential conflict, and then left the meeting);
- State whether the Board determined that a conflict of interest existed (i.e., the director owned a part interest in the building and would benefit financially from the sale, or the director owned stock in a publicly traded corporation that was selling the building, and the Board determined that the director's ownership interest was sufficiently small so there was no conflict of interest.);
- If there is a conflict of interest and the Board decides to proceed with the transaction, state the basis for the decision (i.e., the Board looked at several comparable buildings and determined that, based on the location, condition of the building, and purchase price, it was fair to the nonprofit and the best deal when

compared to the alternatives.) The minutes should state explicitly what data the Board relied on in making its determination; and

- State how the members voted with respect to the transaction.

As always, the minutes should be kept contemporaneously – meaning by the next Board meeting or 60 days, whichever is later.

Additional Resources

You may find the following information helpful in reviewing your organization's recordkeeping policies:

- IRS Publication 4221, Compliance Guide for 501(c)(3) Public Charities <https://www.irs.gov/pub/irs-pdf/p4221pc.pdf>
- Keeping Track – A Primer on Writing and Retaining Board Minutes <http://www.lawhelp.org/dc/resource/keeping-track-a-primer-on-writing-and-retaining-board-minutes>
- Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations (October 2007) <https://www.independentsector.org/principles>

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December 2007
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SAMPLE BOARD MINUTES FOR 501(c)(3) ORGANIZATIONS

NAME OF ORGANIZATION

Board Meeting Minutes

[Month] [Day] [Year]

[Time][Location]

Board Members:

Present: [List names]

Absent: [List names]

Quorum present? Yes/No

Others present: [List names and titles]

Notice of meeting:

Sent on: [Date]

Notice waived by: [List names]

Proceedings:

Meeting called to order at [time] by [Chair].

Minutes of previous meeting were reviewed. A motion to approve the minutes was made and seconded. Motion passed

Executive Director's Report. []

The Chair then recognized [Name] to give the report of the [Finance] Committee. [Finance Committee minutes are attached, including latest financial report of the not-for-profit organization.] [Name] reported that the [Finance] Committee recommended that []. [Name] reviewed the recommendation for the Board. After a brief discussion of the issues, a motion to [] was made and seconded. Motion passed.

Old Business:

New Business:

Meeting adjourned at [time].

Respectfully submitted,

[Name]

[Recording Secretary]