Keeping Track- A PRIMER ON WRITING AND RETAINING BOARD MINUTES

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Today’s webinar

- Why keep minutes?
- Committee meetings and executive sessions.
- What should minutes look like?
- Dealing with conflicts of interest, executive compensation and other issues.
- Alternatives to holding Board meetings and how to record the actions taken.
- Record retention.
Why Do You Need Board Minutes?

- When an officer or employee takes any action on behalf of the organization, the minutes document that the Board has authorized the individual to do so.

- For example, when you go to a bank to open a bank account in the name of the organization, the bank wants proof that the individual has permission to open the account.
Why Do You Need Board Minutes?

- Minutes also demonstrate that the directors exercised their fiduciary duties with proper care.

- For example, in the case of the organization’s annual budget, the minutes would state that the Treasurer presented the budget in detail for the Board’s review and that the directors properly reviewed the budget, including asking questions about the budget.

- In addition, on Form 990, the IRS asks if your organization keeps minutes of Board and committee meetings.
Why Do You Need Board Minutes?

- In the case of any related party transaction, the minutes document that the Board followed all the appropriate steps for approving the transaction.

- For example, suppose the organization was considering hiring a company to perform some work for the organization, and the company was owned by the spouse of one of the directors. The minutes would document that the director disclosed the potential conflict of interest, and then left the meeting; that the Board reviewed the transaction to determine whether it was the best deal for the organization and otherwise in its best interests; and that the transaction was approved by a majority of the disinterested directors.
Committee Meetings

- The DC Nonprofit Code provides that there are two types of committees – advisory committees, which do not have the authority to act on behalf of the Board and Board committees.

- A Board committee can exercise the same authority as the Board in its subject area. For example, the finance committee or the executive committee will typically have the authority to approve changes to the budget, without requiring further Board action.

- You should take minutes of all Board committee meetings. You should do so even if no Board-type action is taken at a particular meeting.
Minutes Should be Contemporaneous

- It is a best practice to complete minutes as soon as practicable after a meeting. The IRS wants minutes to be prepared contemporaneously.

- On the Form 990, the IRS asks if the minutes were prepared within the later of 60 days or the next Board meeting. This is the IRS’s definition of contemporaneous.

- In several instances, the IRS makes clear that minutes that are not contemporaneous will be given little or no evidentiary weight when trying to prove that the organization acted appropriately. (i.e., when approving a conflict of interest transaction.)
How to Take Minutes

- Minutes should be succinct.
- Minutes are designed to show that an action was authorized by the Board and that the Board exercised due care in carrying out its duties.
- Minutes should give just the basic information necessary to serve this function.
- Minutes are not intended to be:
  - A transcript of the meeting;
  - A history of the organization; or
  - A public document.
How to Take Minutes

- Minutes are discoverable if you are sued. Do not record your meetings.
- Someone should be designated to take notes at the meeting. It does not have to be, the secretary. The secretary oversees the process or preparing minutes. If you ask someone else, this person is called a recording secretary.
- The recording secretary’s notes help in the preparation of the minutes. Keep the notes until the minutes are prepared and approved by the Board. Then, make it a practice to destroy the notes systematically. (Don’t wait until your organization is sued or investigated–then you cannot destroy the notes.)
- A director’s vote should not be recorded by name, unless the director asks that it be so recorded.
Executive Sessions

- Executive sessions are meetings or portions of meetings at which only directors, or a limited number of staff are present.

- A Board is entitled to meet in executive session, and should do so when discussing sensitive matters, such as personnel and compensation.

- These sessions allow the Board members to have frank discussions in general, without the presence of staff or other members of the public.

- Minutes should be kept of these sessions. In such case, there are two sets of minutes – the open session and the executive session. They should be kept in separately.
Special Situations

- There are special situations where the rules about keeping minutes are more specific.

- In each of these situations, the Board must follow certain steps in order to properly approve a transaction. If these steps are not followed, the approval may not be legally valid. Therefore, the minutes should reflect in detail that these steps were taken.

- These types of transactions include:
  - Approving executive compensation;
  - Approving conflict of interest transactions; and
  - Authorizing the indemnification of directors.
Special Situations

- Under the Internal Revenue Code, a nonprofit organization must use its assets for the exclusive benefit of the organization’s charitable mission, and not for the private benefit of insiders. If it violates the exclusive benefit rule, the organization is at risk of losing its tax exempt status.

- Insiders include officers, directors, high-ranking employees and their families.

- In addition to the loss of exempt status, any insider who receives a financial benefit from the organization that exceeds what the insider gives in return (i.e., sells a building to the organization for a price that exceeds its fair market value) is subject to financial penalties, as are the other insiders who approved the transaction.
Executive Compensation

- In particular, the IRS is concerned that nonprofit executives do not receive excessive compensation.

- In order to ensure that executives receive appropriate compensation, the IRS encourages nonprofits to use the compensation safe harbor set forth in the Internal Revenue Code.

- If the nonprofit uses the safe harbor, the burden will be on the IRS to demonstrate that the compensation is excessive. Otherwise, the burden is on the nonprofit to show that the compensation paid to the executive is not excessive.

- On the Form 990, the IRS asks if the safe harbor was followed.
Executive Compensation

- The Safe Harbor provides:
  - The compensation must be reviewed and approved *in advance* by the Board or a compensation committee.
  - The Board or committee must base its decision on compensation data for similarly qualified persons in comparable positions at comparable organizations.
  - The Board or committee must document its decision contemporaneously.
  - In addition, the compensation must be properly reported to the IRS.
Executive Compensation

- The contemporaneous documentation must set forth:
  - The terms of the compensation approved and the date approved,
  - The members of the Board or committee present during debate and those who voted,
  - The comparability data relied on and how it was obtained, and
  - Any actions taken by a member of the Board or committee who had a conflict of interest with respect to the transaction.

- Well drafted minutes of the meeting would satisfy this requirement.
Conflict of Interest Transactions

- Conflict of interest transactions must be documented in a similar fashion.

- A conflict of interest transaction includes any transaction involving the nonprofit and an officer, director, key employee or their family.

- Under IRS and state law requirements, the nonprofit should not engage in a conflict of interest transaction unless:
  - the person with the conflict discloses his or her interest in the transaction;
  - The transaction is in the best interests of the nonprofit, and
  - It is approved by a group of disinterested directors.
Conflict of Interest Transactions

➢ There must be a record demonstrating that these steps were taken, which includes the following:

• The name of the person with a potential conflict of interest and the nature of that interest,
• The board’s decision as to whether a conflict of interest existed,
• The names of the persons who were present for discussions and votes relating to the transaction,
• The content of the discussion, including any alternatives to the proposed transaction, and
• A record of any votes taken in connection with the proceedings.
In the event a director is sued because of his or her service on the Board, the director may be entitled to indemnification.

Indemnification means that the nonprofit will reimburse the director for any expenses he or she incurs because of the lawsuit.

A director is eligible for indemnification if he or she acted in good faith for a purpose that he or she reasonably believed to be in the best interests of the Corporation.

The decision of whether a director is entitled to indemnification is made by the directors who do not have an interest in the decision.
As with any decision where a director has a potential conflict of interest, there must be a record demonstrating what steps were taken, which includes the following:

- The name of the person seeking indemnification and the reason why,
- The board’s decision as to whether the director is entitled to be indemnified,
- The names of the persons who were present for discussions and votes relating to the transaction,
- The content of the discussion, and
- A record of any votes taken in connection with the proceedings.
What Constitutes Minutes

- There is no specific format that minutes must take.
- They must be in writing, but the document can be in hard copy or electronic form. They can be included in an email.
- However, there is certain information that must be included:
  - the name of the organization;
  - the date, time and place of the meeting;
  - members present and absent;
  - 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.
Unanimous Consent of the Directors

- If the directors are unable to meet in person, they can agree to take action by a unanimous written consent.

- The consent must be in writing, and state the name of the nonprofit, the action being taken, and the effective date of the resolution.

- It must be signed by every director. For example, if there are nine people on the Board, it must be signed by all nine individuals. It is not sufficient if seven sign, and two do not respond.

- The consent should be physically signed. It can then be scanned and emailed.
Unanimous Consent of the Directors

- Electronic signatures are generally acceptable in D.C. and other states, but the signature must be identifiable to a specific individual and must be tied to a specific action.

- This should be acceptable:
  
  I consent to the proposed action set forth in this email.
  
  Regina Hopkins
  Assistant Director
  D.C. Bar Pro Bono Center
  1101 K Street N.W.
  Washington, DC 20005
  rhopkins@dcbar.org

- This is not acceptable:
  
  Fine by me. Regina

- The unanimous consent should be stored with the minutes of the organization. This includes all of the responses from the directors.
Storing Records

- The nonprofit should have a record retention and destruction policy. The policy should identify documents by category and list how long they should be retained. Once a document has served its purpose, it should be destroyed.

- Minutes should be kept permanently. Include with the minutes any attachments referenced in the minutes.

- Minutes should be stored in a central location, and not in the personal files or on the personal computer of a Board or staff member.

- Keep back-up copies. Paper copies should be stored in a fireproof file cabinet. Electronic copies should be stored on the cloud. Make sure that more than one person has the user name and password.
Sample Minutes

BOARD MINUTES FOR THE VERY HELPFUL NONPROFIT
JUNE 24, 2015
WASHINGTON, DC

Board Members:
Present: [List names]
Absent: [List names]
Others present: [List names and titles]

Proceedings:

At 12 noon the Chair called to order the meeting of the Board of Directors of Very Helpful Nonprofit.

1. Approval of Minutes

The Board then reviewed the minutes of previous meeting (Exhibit “A”). A motion to approve the minutes was made by Jane Doe and seconded. There being no further discussion, the motion was passed unanimously.
Sample Minutes

#. Review and Approval of Budget

The Chair then recognized the Treasurer for the purposes of approving the Fiscal Year 2015-2016 budget (Exhibit “B”). The Treasurer reviewed for the Board the projected income for the year and the specific sources of such funds, and the projected expenses. The Treasurer then stated that the Finance Committee had also reviewed the proposed budget in detail and recommended its adoption. The Chair then open the meeting for questions.

Following the questions, the Treasurer moved that the FY2015-2016 budget be adopted. The motion was seconded. After discussion, the question was called for a vote, and the budget was approved by a vote of 7 in favor, 2 against, with 1 abstention.
Special Circumstances

# Approval of Building Purchase

The Chair then recognized John Doe, the chair of the site selection committee of the Board, for the purpose of discussing the purchase of the new facility. Before the discussion began, Regina informed the Board that she had a 50% ownership interest in the building under consideration. Because the Board determined this was a conflict of interest, Regina left the meeting and did not participate in the discussion or vote.

John then reviewed for the Board the process for recommending Regina’s building for purchase. He stated that, with the assistance of a real estate broker, the site selection committee had looked at five buildings in the neighborhood (Exhibit “C”). He stated that the committee used four factors when deciding which building to recommend: cost, size, condition and proximity to public transportation. He stated that Regina was not present for any of the committee discussions, and that the committee had Regina’s building appraised by an independent appraiser who said the asking price was fair.
Special Circumstances

John then stated that Regina’s building scored highest in terms of cost, condition and size, and scored second highest in terms of proximity, as set forth in Exhibit C. He stated that the site selection committee recommended that Regina’s building be purchased at the price determined by the appraiser.

The Chair then opened the meeting for questions. After answering the Board’s questions about the building and the process used to select the building, John moved that Regina’s building be purchased at the terms set forth in the independent appraisal. The motion was seconded. John, David, Darryl, Paul, Keisha, Emily, Mac, Anne and Marcia were present for the vote. Eight members voted in favor and one abstained.
Questions?

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