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Board Meeting Minutes – Part II

By Emily Chan (<http://www.nonprofitlawblog.com/author/emily-chan/>) on February 25, 2011

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The content and retention of board meeting minutes are also important in part because of who may inspect the minutes and why such inspection may occur.

DIRECTORS

Under the California Corporations Code, every director of a nonprofit public benefit or mutual benefit corporation “shall have the absolute right at any reasonable time to inspect and copy all books,

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records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director." *C.C.C. Sections 6334, 8334*. This is an unqualified right, meaning the director does need to give the organization a reason for inspecting the minutes in order to do so. This may be of concern when, for example, certain directors recuse themselves from a discussion due to a conflict of interest or if directors are addressing the removal of a current director. In such situations, the sensitivity of the discussion as documented in the minutes should reflect a similar if not the same rationale of the actual practices taking place at the meeting. For example, depending on the situation and content of the discussion, it may be recommended to remove any attribution of names to certain statements or may be advisable to paraphrase the discussion. This by no means suggests that minutes should be fabricated, inaccurate, or incomplete.

(Note, the director inspection right is more limited for a California nonprofit religious corporations in which every director "shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director for a purpose reasonably related to such person's interests as a director." C.C.C. Section 9513.)

MEMBERS

In California, if a nonprofit public benefit or mutual benefit corporation is a membership organization meaning it has members as defined by the California Corporations Code, those members also have a right to inspect meeting minutes. Under the California Corporations Code, the meeting minutes of the members, the board, and committees of the board of a nonprofit public benefit or mutual benefit corporation "shall be open to inspection upon the written demand on the corporation of any member at any reasonable time, for a purpose reasonably related to such person's interests as a member." *C.C.C. Sections 6333, 8333*.

Membership inspection rights reiterate the importance of having minutes that are prepared with an awareness of third parties. Minutes are not simply used to refresh the memories of those individuals who were in attendance at the meeting. In some cases, minutes are being read by individuals who were not in the room during the meeting but who are now reading the minutes and trying to understand what happened. Unclear, careless, or poorly documented minutes can create unnecessary suspicion or problems for an organization such as undermining what was actually a validly approved action or destroying privilege of confidential communications.

(Note, the membership inspection rule is also slightly different for a California nonprofit religious corporation in which members also have the right to submit a written demand to inspect the minutes at any reasonable time, for a purpose reasonably related to such person's interest as a member, "[e]xcept as otherwise provided in the articles or bylaws." C.C.C. Section 9512.)

IRS

Meeting minutes are generally some of the first documents requested by the IRS from an organization during an audit. In addition to the IRS's concerns regarding potential tax code violations, in recent years, the IRS has taken a more active role in nonprofit governance. Thus, meeting minutes content as well as documentation practices seem to have increasing importance to the IRS.

IRS Audit

IRS agents can exam the books and records of an organization, including its minutes, during an IRS examination to "establish whether an organization is both organized and operated for tax-exempt purposes, what related returns have been or need to be filed by the organization, and whether any tax reported is reasonably correct." *Internal Revenue Manual (Part IV, Section 4.75.11.9, Examination of Books and Records) (08-30-2010)* (http://www.irs.gov/irm/part4/irm_04-075-011.html#d0e849). It is possible for minutes to be one of the records used to establish key information such as substantiating or expanding upon information about the organization's activities, verifying the accuracy of the return, and determining whether any taxes are accurately reported. *Id.*

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The look-back period and volume of review can vary. An IRS agent is directed to review minutes for the year under examination, prior years, and subsequent years: "At a minimum, coverage should include at least the year before and the year after the return under examination. The examiner will expand the review as circumstances warrant." *Internal Revenue Manual (Part IV, Section 4.75.11.9.3, Minutes) (08-30-2010)* (http://www.irs.gov/irm/part4/irm_04-075-011.html#d0e849). Additionally, the agent is directed to review subcommittee minutes (e.g., executive, audit, finance, and compensation committees). *Id.*

The content of the minutes can also affect the level of inquiry. For example, the Internal Revenue Manual states: "The examiner should consider all attachments, exhibits, and reports as part of the minutes. If they are not provided with the minute book, they should be requested as an integral part of the minutes. This would also include correspondence referred to in the minutes." *Internal Revenue Manual (Part IV, Section 4.75.11.9.3, Minutes) (08-30-2010)* (http://www.irs.gov/irm/part4/irm_04-075-011.html#d0e849). The Internal Revenue Manual additionally states that "[d]ates listed in the minutes will help to identify possible timeframes to be used for document sampling." *Id.*

Thus an IRS agent can cast quite a broad net with his or her request for minutes and failing to have adequately document minutes will likely only create more work for the organization and trigger more scrutiny.

Tax Code Compliance

There are commonly known concerns of the IRS for which the IRS will look to meeting minutes should the organization be called into question on such issues. This includes proposed or past activities that may violate exempt purposes or constitute unrelated trade or businesses; transactions which may serve the private interests of the trustees, directors, officers or private individuals; and transactions with related entities. See *Internal Revenue Manual (Part IV, Section 4.75.11.9.3, Minutes) (08-30-2010)* (http://www.irs.gov/irm/part4/irm_04-075-011.html#d0e849). Therefore, for board actions that may implicate these common concerns of the IRS, it could be especially important to assure the meeting minutes have been accurately, sufficiently, and properly documented.

Governance

Recently, the IRS has shown an interest in governance issues (generally understood as a state law issue) for which meeting minutes also play a role. At a Continuing Legal Education event on Nonprofit Governance in 2009 (http://www.irs.gov/pub/irs-tege/ingram__gtown__governance_062309.pdf), Sarah Hall Ingram, (then) Commissioner of the Tax Exempt and Government Entities (TE/GE) of the IRS, explained the IRS's increased attention on governance as related to "a number of key organizational and operating principles that the IRS has already articulated, and that find their origin in the Internal Revenue Code. They are not expressly laid out in the Code, nor do they need to be, but the principles of governance that are of concern to the IRS should derive from the requirements for tax exemption, and should aid an organization in meeting them." One identified principle of governance by Ingram was transparency. Ingram stated "board decisions should be reflected in minutes, that records supporting decisions should be retained for reasonable periods...." Thus, the quality of an organization's practices with respect to meeting minutes can affect the IRS's conclusion about the governance of the organization.

In 2009, the public got a closer look at how the IRS looked at nonprofit governance when it released the Governance Checklist (http://www.irs.gov/pub/irs-tege/governance_check_sheet.pdf) used by IRS agents during examinations. Similar to Form 990, the Governance Checklist addresses documentation practices, asking the agent to indicate "how often the board of the organization contemporaneously documents its meetings and retains this documentation" (Question 25). Again, there is no isolated penalty connected with a lack of contemporaneous meeting minutes documentation alone, but it may be a factor against the organization for alleged violations such as executive compensation issues in establishing the rebuttable presumption of reasonableness (please see previous post, "Executive Compensation (http://www.nonprofitlawblog.com/home/2006/12/executive_compe.html)").

The Governance Checklist also suggests that meeting minutes affect other governance concerns

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such as director participation and organizational control. As Jack Siegel of Charity Governance pointed out >, the Governance Checklist asks how often the voting board members met during the primary year under the examination (Question 11(a)) and how often the full board met (Questions 11(b)). Thus, failing to document simple information such as names and titles of attendees and the date of the meeting can negatively affect a larger concern of whether directors are meeting their fiduciary duties in actually attending meetings and with enough frequency for proper oversight.

Additionally, Siegel noted that the IRS asks whether there is "a single individual or small group of individuals whom the board typically defers" (Question 17). He went on to state "We suspect agents will be asking questions and reading minutes in an effort to answer that question." Thus, depending on the organizational culture and/or nature of the action, documenting votes that were against or abstained might be appropriate if this can be a perceived concern.

(http://www.charitygovernance.com/charity_governance/2009/12/pulling-back-the-curtain-irs-audit-check-sheet.html)

STATE OFFICIALS & COURTS

In California, the Attorney General is charged with the authority to regulate nonprofit corporations. At a minimum, the California Corporations Code requires nonprofit corporations to keep "minutes of the proceedings of its members, board and committees of the board" in "written form or in any other form capable of being converted into clearly legible tangible form or in any combination of the foregoing" and for which may be admitted as evidence for all accepted purposes. See *C.C.C. Sections 6320, 8320, 9510*. For nonprofits, considerations about documentation practice should extend beyond what is minimally required as meeting minutes can be important evidence in defending against lawsuits such as allegations against a director of a failure to fulfill fiduciary duties.

(http://www.charitygovernance.com/charity_governance/2009/12/pulling-back-the-curtain-irs-audit-check-sheet.html)

Furthermore, as Michael W. Peregrine and Elizabeth M. Mills contemplated in (http://www.charitygovernance.com/charity_governance/2009/12/pulling-back-the-curtain-irs-audit-check-sheet.html)The Exempt Organization Tax Review (Feb. 2010) (http://www.mwe.com/info/pubs/TaxAnalysts_0210.pdf), "[i]t is also conceivable that the new [IRS] governance examination guidelines may be used by state charity officials to support their own evaluation of charity compliance with state nonprofit law principles, given the degree of cooperation between these officials and the IRS. This is especially true as state charity officials become more aggressive in their scrutiny of allegedly problematic governance practices (for example, the Stevens Institute litigation)." Thus, although the IRS and state Attorney General are different regulatory bodies, organizations will play it most safe if they make efforts to address the strictest concerns.

The previous post, "Board Meeting Minutes – Part I" can be viewed here (<http://www.nonprofitlawblog.com/home/2011/02/board-meeting-minutes.html>).

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[...] in recent years, both state and federal regulators have taken a keen interest in corporate minutes. In the current Form 990, [...]



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