FPLG: BLOG

It Seemed like a Good Idea at the Time...

09.04.14 | Linda J. Rosenthal, JD

In "Next Time, Let's Just Text in our Votes," the fictional charity board members were looking for a way to avoid the time, expense, and inconvenience of monthly board meetings. "Why don't we just put a few issues on an agenda," one of them suggested, "email it out, circulate it online for comments and questions, and then vote by text message?"

Although a shortcut like this may be a widespread practice, it's not legal (yet) in California and in many other jurisdictions. Here's why: The California Corporations Code requires that there be in-person meetings or the electronic equivalent of them — e.g., conference calls or videoteleconferences.

We explained that there may be a legal alternative to a full-blown meeting: a "unanimous written consent." And because the definition of "written" can sometimes include email messages and signatures, emailing the necessary written consent may do the trick. What about a written consent or vote by text message? So far, this is beyond California's foray into the electronic age.

But is this a good idea — even if technically allowable? Should you conduct some of your business via the unanimous written consent method?

Your organization should use this method sparingly, and you should develop policies and safeguards ahead of time.

Just because that gallon of Rocky Road ice cream is on sale, doesn't mean you should take it home and eat it all of it.

Key Objection: No Chance to Effectively Deliberate

There are two very good reasons to have regularly scheduled, in-person, meetings.

First, there's the democracy angle. This practice may prevent one faction on the board from holding secret meetings or otherwise stifling dissent. The "written consent" option is allowable in states including California precisely because it includes the dual requirement of a writing and unanimity. At ordinary meetings, the board can pass a measure with just majority approval.

But a second objection to bypassing in-person meetings is just as compelling: a written consent in lieu of an in-person vote prevents "deliberation" by the entire board.

The American legal system already recognizes the importance of group discussion and consideration of important matters; deliberation is the key feature of jury proceedings. It's widely recognized — and long experience validates — that when people meet together and freely discuss an important topic, the group decision at the end of the proceedings is ordinarily better than if is there is simply a vote. "The point of meeting and discussing something in a room together is that better ideas emerge in the course of such discussions and pitfalls are more likely to be identified."
This model has been adopted as the best method for corporate boards to carry out their duties and to act in the best interests of the corporation.

Governing any corporation — for-profit or nonprofit — is a complicated matter. There are many routine – even trivial – decisions to make as well as key, critical choices that will determine the future and viability of the organization.

Whether by intent or by accident, conducting a great deal of the corporation's business via written consents may effectively restrict or eliminate the rigorous discussion necessary for critical matters. And while it may be clear that certain items are important enough to require in-person, comprehensive discussion, sometimes it may not be obvious.

Here's an example:

> Nonprofit X learned that another organization in town had decided to opt out of a government-funded program. That opened up a slot for Nonprofit X to take its place. But timing was crucial: the papers had to be signed right away for Nonprofit X to secure its place.
> Government money in an era of funding scarcities? Here and now; no hoops to jump through? This was a no-brainer, right? The Executive Director contacted the Board Chair, who emailed the board members, requesting an email vote, to be followed by written consents. The directors agreed, without discussion or further investigation. It turned out that the program was a bad fit, and Nonprofit X didn't have the resources or expertise to complete the program competently.

Sometimes, corporations restrict the "unanimous written consent" method to matters where there's no opposition. But it's not always apparent ahead of time that a matter has no opposition. All of the board members may, in good faith, believe there is full agreement. But, through discussion, reasonable objections emerge. Experience in the board room and in the jury room proves this over and over again.

This Option could Lead to Liability

While foregoing a formal meeting on certain matters may be perfectly legal if the proper consents are obtained, there could be a problem with regulators later second-guessing this method and the resulting decision.

Directors of California nonprofit public benefit corporations have explicit duties.

Failing to adequately investigate and discuss a major corporate action may be considered inadequate board oversight and could, in some cases, be determined to be a breach of the directors' duties of care "to ask questions, raise serious issues, and consider alternatives."

This is especially true in the case of transactions between the organization and one or more directors.

What about Other Alternatives to In-Person Meetings?

Under California law, certain alternatives are explicitly allowed, when the board members can hear each other. This type of option – including conference calls – is considered to be the equivalent of a face-to-face board meeting, requiring only majority approval for agenda items.

So is this a better idea than the written-consent method of getting board approval when an in-person meeting is not convenient?

The answer may be yes, but with certain reservations. According to some observers, the ability to hear the other participants' discussion is valuable, but still lacks a key element: visual cues. "…There is no way to see body language, interpret silence or get a sense of the group." This is particularly true if the participants have never met before. And face-to-face meetings facilitate creating friendliness and trust that helps a board succeed.

Of course, if an organization has a widely dispersed board, then face-to-face meetings on a regular basis may be impractical, so conference- calling may be useful. But taking the extra step of using videoconference technology or sites (instead of conference calls) may be worth the extra effort because the participants can see – as well as hear – each other.

Establish Safeguards and Policies

Use alternatives to in-person board meetings only occasionally. They may be appropriate for routine, noncontroversial matters, but not for key decisions.

In any event, create and follow procedures – in advance – like these minimal precautions:

- Write a cover letter for the email asking for written consent, explaining it fully, and making clear that replies should be unambiguous, and that the measure will not be approved unless the vote is unanimous;

- Print out all responses and file them with the board's minutes; and
- Send a follow-up email informing directors if the measure was approved unanimously.