



perspectives

MY BENESCH MY TEAM

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Coplan & Aronoff LLP

Trends and topics in not-for-profit management

Not-for-Profit Spotlight

Marion Family YMCA



Helping individuals, families and the public improve their health and well-being is central to ensuring a strong community. This work, along with developing the potential of youth and providing opportunities for the people of Marion to give back to their neighbors, has been a central focus of the Marion Family YMCA (the "YMCA") since its founding in 1892.

The YMCA believes that young people need caring adults to provide support, guidance and encouragement as they grow; that wellness in spirit, mind and body strengthens our very being and enhances our interactions with others; and that together we can harness our individual strengths and bring about positive change. These beliefs and a commitment to the Marion community have kept the YMCA a vital not-for-profit organization in Marion for nearly 120 years and have enabled it to serve an increasing number of people through three facilities over its history. The current facility opened in 2004 and includes 88,000 square feet of program and service space.

The YMCA's mission is all about strengthening the community. More than 14,000 people each year are positively affected by its youth development, healthy living and social responsibility initiatives. With programming and facilities for children, teens, adults and seniors, the YMCA builds the spirits, minds and bodies of a variety of people and provides opportunities for them to succeed.

Please click [here](#) to learn more about the Marion Family YMCA.

Direct Purchase of Tax-Exempt Bonds Offers Not-For-Profits a Cost-Effective Financing Alternative

Tax-exempt bond financing is a tool commonly used by not-for-profit organizations to lower borrowing costs for capital projects. If a project is financed with tax-exempt bonds, the purchaser of the bonds is willing to accept a lower interest rate because interest on the bonds is excluded from the investor's income for federal (and in some cases, state) income tax purposes. This results in a lower interest rate for the not-for-profit organization.

Recent turmoil in the credit markets, declines in the credit ratings of banks, and increased reserve requirements for banks, however, have made it increasingly difficult for not-for-profit organizations to obtain tax-exempt financing through traditional financing structures. As a result, not-for-profit organizations have had to find innovative methods to finance and refinance their capital projects.

The Marion Family YMCA (the "YMCA") recently found itself in this situation. In 2002, the YMCA used the proceeds of tax-exempt bonds to finance most of the construction costs of its new multi-purpose facility in Marion, Ohio. The bonds were issued as variable rate bonds backed by a letter of credit issued by a bank. Due to market conditions, this structure was no longer viable and the YMCA needed to pursue alternatives to refinance the outstanding 2002 bonds. Additionally, the YMCA had incurred taxable debt to finance some additional construction costs and also wanted to finance the cost of recent capital expenditures, such as fitness equipment.

To combine all of these capital needs into a single financing, the YMCA worked with a financial advisor to explore various financing options and structures. After considering the available options, the YMCA determined the structure that best suited its needs was the "direct purchase" structure, in which a bank would purchase the tax-exempt bonds issued for the benefit of the YMCA and hold them for its own account. The direct purchase structure allowed the bank and the YMCA to directly negotiate the terms of the transaction, such as the principal amount of the loan, the interest rate, the amortization schedule and the financial covenants with which the YMCA would have to comply. It also allowed for a stream-lined transaction with fewer issuance costs than traditional financing structures since the transaction did not involve a public offering. Because the bonds were still issued on a tax-exempt basis, the interest rate that the bank was able to offer the YMCA was significantly lower than it would have been able to offer through a conventional taxable bank loan.

The direct purchase structure gave the bank and the YMCA the flexibility to structure the transaction in a way that was mutually beneficial to both parties and allowed the YMCA to satisfy its financing and refinancing needs.

For more information on how your organization can take advantage of tax-exempt financing, including a direct purchase structure, please contact [Susan Price](#) at sprice@beneschlaw.com or (614)223-9377.

Benesch Continues to Expand its Not-for-Profit Focus



Benesch continues to expanded its existing focus on servicing not-for-profit clients. The firm's Not-for-Profit Team, lead by **Marty J. Sweterlitsch**, includes attorneys from many of

the firm's practice and industry groups, including Health Care, Public Law, Real Estate, Public Finance, Tax, Labor & Employment, Corporate & Securities, Business Reorganization, School Law and Intellectual Property. The team offers not-for-profit and tax-exempt clients with a broad array of services, including creation and qualification of not-for-profit corporations; federal tax exemption application preparation; charitable solicitation and fund-raising; establishment of foundations; state property tax exemptions; licensure and certification; reimbursement and compliance matters; and mergers and acquisitions.

"We are excited to be providing our not-for-profit clients with a cross-functional team to service their needs," Marty said. "We've had long-standing relationships with many not-for-profits, and look forward to continuing to build those relationships and also make new ones."

Benesch's experience in working with not-for-profit clients also resulted in the firm ranking first in the city of Columbus in the area of Non-Profit/Charities Law by the 2010 and 2011 editions of *The Best Lawyers in America*, a referral guide of U.S. attorneys.

For more information, please visit www.beneschlaw.com/notforprofit

Dangers and Best Practices of E-mail Voting by Not-For-Profit Boards of Directors

"We need to move quickly on this. There's no time to call a meeting. Let's just shoot out an e-mail and get everyone's vote!" How many times have time-starved non-profit directors ("directors") thought or spoken similar words? The speed of electronic communications sometimes lures busy directors to push for decision-making without a meeting. Voting on a proposal by e-mail may appear to save directors some time; however, under Ohio law, such votes can cause problems and expose the board to liability.

Ohio law authorizes directors to take action without a formal meeting in some limited circumstances. Under Ohio Rev. Code § 1702.25, directors have the same authority acting without a meeting as they would in a meeting. For such actions to be valid, a not-for-profit's articles or regulations must not prohibit the authorization or taking of action without a meeting. Moreover, in the absence of a meeting, actions must be authorized by the, "affirmative vote or approval of ... all of the directors ... who would be entitled to notice of a meeting for that purpose." Ohio Rev. Code § 1702.25(A). Put simply, any vote taken outside a formal meeting must include every director and must be unanimous. Now the question becomes how can the vote be taken.

Regarding e-mail voting, directors can conduct votes by e-mail, but e-mail voting is not the best practice in most situations for two reasons.

1. Directors Must Act With Authority

The directors must have clear authority and precisely follow the Ohio Revised Code and the not-for-profit corporation's regulations regarding the e-mail voting process. Before voting begins, directors must ensure that the not-for-profit's articles and regulations do not prohibit action without formal meetings. A vote taken without authority subjects the corporation and its directors to actions for liability based on lack of authority. Ohio Rev. Code § 1702.12(I)(1).

The resolution must be sent to each director. Ohio Rev. Code § 1702.25 permits voting by "authorized communications equipment," which includes, "any electronic means [] from which it can be determined that the transmission was authorized by, and accurately reflects the intention of, ... the director involved." This definition clearly covers signed e-mails. Once received, e-mails reflecting each director's assent must be filed with the corporation.

Importantly, though, an e-mail vote must be unanimous and must include all directors. A corporation's regulations cannot supersede this requirement—for instance, by allowing for a simple majority vote—as regulations must be, "consistent with law and the articles." Ohio Rev. Code § 1702.10. Even in emergency situations, which must be designated by the governor's proclamation following a disaster, Ohio law envisions a meeting for conducting a vote pursuant to special quorum requirements. See Ohio Rev. Code §§ 1702.11(G), 1701.11(F), and 1701.01(U). So, for an e-mail vote, even a single missing approval could prove difficult and costly if it later becomes necessary to demonstrate the validity of all corporate actions. For instance, in preparation for a loan closing, the non-profit's attorney usually must certify that all corporate proceedings have been "duly and validly taken." If the directors took action with less than full unanimity, or if an e-mail was lost or never filed with the corporation, no meeting minutes will reflect the directors' decision. Demonstrating ratification of such an action may be expensive and time-consuming, defeating the initial purpose of the e-mail vote.

Fair Housing Enforcement in Western Ohio

Benesch's Not-for-Profit Team has recently become aware that the Miami Valley Fair Housing Center ("MVFHC") has been sending out "testers" to independent living facilities in the Miami Valley area to determine whether the facility's are compliant with the provisions of the Fair Housing Act in their application and admission process. It is the position of the MVFHC that independent living facilities, including those within a CCRC, meet the definition of a "dwelling unit" as contemplated by the Fair Housing Act ("Act"), and, therefore, the facilities must comply with the terms of the Act. Please click [here](#) for more information.

How Not-for-Profits Can Use Social Media to Spark Change

Online social media can be powerful tools for spurring social change. And increasingly, both fledgling not-for-profits and long-established charities are taking up those tools in issue advocacy. The trick, say not-for-profit advocacy experts, is to pair virtual campaigns with flesh-and-blood action. Please click [here](#) for the full article in *The Chronicle of Philanthropy*.

Dangers and Best Practices of E-mail Voting by Not-For-Profit Boards of Directors (continued from page 2)

2. Directors Must Fulfill Their Statutory Duty to Serve "In Good Faith"

E-mail voting limits directors' ability to demonstrate fulfillment of their statutory duty to serve, "in good faith . . . with the care that an ordinarily prudent person in a like position would use under similar circumstances." Ohio Rev. Code § 1702.30(B). The same utility of speed that makes e-mail tempting for time-sensitive decisions works against the deliberative role the law envisions for directors. Would an "ordinarily prudent" director vote without discussion to authorize a \$15.00 expenditure? Maybe. Would an "ordinarily prudent" director vote without discussion on a \$1500.00 or \$15,000.00 expenditure? Maybe not. Accordingly, the best practice for directors is to limit the use of e-mail voting to situations that truly prevent convening a meeting.

So are directors left with no options for making quick decisions? Not at all.

Ohio Rev. Code § 1702.31 allows directors to meet, "at any place . . . including by means of authorized communications equipment" unless the corporation's articles or regulations prohibit such a meeting. This language permits directors, upon two days' notice (which may be served by e-mail), to conduct meetings via technology that, "allows all persons participating in the meeting to contemporaneously communicate with each other." The use of telephone conference calls and video conferencing falls under this definition.

Using technology that allows for contemporaneous communication gives directors a full opportunity to deliberate upon proposed actions. Also, technology-assisted meetings provide legal advantages not available by e-mail voting. Most important among these is that, once a quorum for the meeting is established (a majority of the authorized number of directors), the Directors may approve action upon majority vote. Unlike e-mail voting, actions approved in meetings do not require unanimity. Moreover, the secretary or designate can record deliberation and votes in official minutes, evidencing directors' good faith and adherence to their duties.

E-mail voting for directors may appear to save the time and resources. But best practices call for a different process in all but the more extreme circumstances.

For more information about conducting technology-assisted meetings and voting by e-mail, or for help updating your not-for-profit's articles and regulations to allow directors to utilize such technology, please contact **David R. Mayo** at dmayo@beneschlaw.com or (216)363.4647, or **James L. Ervin, Jr.** at jervin@beneschlaw.com or (614) 223.9325. *

**Benesch summer associate Sean Cooke also contributed to this article.*

Events

OANO Webinar: July 28, 2011 | 1:00–2:30 P.M.

Nonprofit Risk Management – Is Your Organization Protected?

Does your organization own automobiles and hire drivers? Do you rely on volunteers who have access to clients? Are your special events protected? What kind of safeguard do you offer against allegations of sexual harassment or wrongful termination? Because of limited time and numerous items on the daily “to-do list”, it can be easy to let an annual review of your organization’s possible risks and solutions slide. However, not managing your organization’s risks on a regular basis could be costly.

During this webinar:

- Hear about true case studies from nonprofit organizations with risk management issues
- Learn lessons from others’ mistakes
- Gain additional knowledge about measures and safeguards that can be implemented to protect your organization from unnecessary risk.

Please click [here](#) for more information and to register.

August 22, 2011 | Indianapolis, IN Art With A Heart’s 3rd Annual Golfing for Kids Event



with a heart

Indianapolis-based Art with a Heart (AWAH) is a community benefit organization which provides hands-on-visual arts experiences that educate and inspire at-risk children in Indianapolis. Benesch is a proud supporter of AWAH.

Business Reorganization Practice Group

associate Krista Taggart served a two year

term on AWAH’s Board of

Directors as Secretary from 2008-2010.

Currently, Taggart and Business Reorganization

Partner Sam Hodson

serve as pro bono

counsel for AWAH. The

firm is also title sponsor



of AWAH’s 3rd Annual Golfing for Kids Event and would like to invite clients and friends of the firm to join us in supporting AWAH through your participation or sponsorship. Proceeds from the 3rd Annual Golfing for Kids Event, which will be held Monday August 22, 2011 at Eagle Creek Golf Course, will directly benefit the children who participate in AWAH’s programming. To participate in the 3rd Annual Golfing for Kids Event as a golfer or sponsor, please click [here](#).)

For more information about AWAH, visit its website at

www.artwithaheart.us.

October 26 & 27, 2011 | Columbus, OH

OANO & the Ohio Attorney General’s Joint Nonprofit Conference

This conference is **THE** place to network, engage around the latest issues facing the nonprofit sector, find resources to benefit your organization, and learn from first-rate speakers about hot topics.

This year at the conference, OANO will release a *Nonprofit Sector Report*. The report provides concrete evidence of the size, scope and impact of Ohio’s vital nonprofit sector as well as Ohio’s place within the national nonprofit sector.

Breakout sessions corresponding with the report will include:

- Ohio Nonprofits: A Major Economic Force (A deeper review of the report’s numbers)
- So, We’re An Economic Force...Now How Do I Get My Legislator and the Media to Pay Attention?
- The Ohio Donor: How Does He/She Compare to Other States & What Do the Numbers Mean for You?

The Ohio Attorney General’s Charitable Law section will offer **live demonstrations** of how to register online to conduct your **annual filings** with their office.

Other timely regulatory sessions including:

- Solicitation Challenges and New Technologies
- Bingo, Fundraising & Casinos
- Bankruptcy, Mergers & Entity Changes
- Board Governance, State Registration & The IRS

Please click [here](#) for more information and to register.



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