

March 2020



Legal Alert: Nonprofit Board Operations During Coronavirus Containment – Leveraging Electronic Alternatives

Restrictions on travel and in-person gatherings related to the COVID-19 pandemic will limit the ability of nonprofit boards to operate normally and hold in-person meetings. As a general matter, binding actions by nonprofit boards and board committees may only be taken by vote during a duly noticed meeting of the directors at which a quorum is present. Fortunately, boards can use electronic platforms to meet and conduct business during the affected period and/or take actions via unanimous written consent.

Holding Board Meetings Electronically

In D.C., as in most other jurisdictions, nonprofit boards and their committees are permitted to hold meetings via teleconference or other electronic medium, including online telemeeting/conferencing platforms (e.g. Zoom, Skype for Business, GoToMeeting, Cisco Webex, Microsoft Teams, etc.)

The D.C. Nonprofit Code allows boards to meet using “any means of communication by which all directors participating may simultaneously hear each other during the meeting.” To facilitate discussion and voting, all directors should also be able to speak and ask questions during the meeting. Directors participating in an electronic meeting are

considered “present” for attendance, quorum, and voting purposes.

A standard voice vote can be taken during an electronic meeting. Some meeting applications have built-in polling features that can also be used to facilitate voting. This ensures that the Secretary (or other designated recorder) can view and record the poll results during the meeting. Some platforms, such as Zoom, also provide the option of downloading polling results after the fact.

As with in-person board meetings, under no circumstances may a director vote by proxy (i.e. convey their vote via another individual while not being personally present at the electronic meeting) or by ballot (i.e. conveying their vote in writing or electronically without having been personally present at the electronic meeting, either during or after the meeting itself). Only directors who are personally present at the meeting may vote on matters which are presented and discussed therein.

If your board must convert a scheduled in-person meeting into an electronic meeting, note that this can be considered a location change that will trigger the notice requirements in your Bylaws. Ensure that

directors are given adequate notice of the new electronic procedures.

Finally, your nonprofit's Articles, Bylaws, or committee charters may have additional requirements or restrictions with respect to electronic meetings. Conversely, your governing documents may explicitly allow the board to meet electronically. Check these documents to ensure that there are no special requirements in this area.

Acting by Unanimous Written Consent

In D.C., directors may also act via unanimous written consent as an alternative to in-meeting votes. Unanimous written consents are especially appropriate for routine or non-controversial decisions of the board, or to ratify past board actions.

For a valid action to be taken via unanimous written consent, the following requirements must be satisfied:

1. The matter being voted on and the consent of the directors to the action **must be in writing**. The proceedings can be conducted via email. Other electronic mediums can also be used (e.g. online messaging) so long as all records are retrievable in a perceivable form and all participants can be clearly identified. Text or SMS conversations that automatically expire/are automatically deleted or communication platforms that mix written and voice communications cannot be used for unanimous written consent actions.
2. A written notice to all directors **must state with specificity the action being taken, that the vote will be taken by written consent, and that**

the vote must be unanimous to pass. Typically, the Secretary will attach a written resolution and/or other documentation describing the matter and the action being considered.

3. A written consent to the action **must be signed and submitted by every director on the board** (i.e. if there are nine directors on the board, a written consent must be signed by all nine directors). It would not be sufficient for seven directors to consent and for two to not respond. A response ballot may be attached to the original notice/resolution and be remitted by each director via mail or email, or the directors may simply respond to the original notice clearly indicating their consent to the specific action. Responses sent via email must clearly identify the director, such as by including a full email signature.

Each director's written consent and any related notices/resolutions should be stored with the minutes of the nonprofit. Again, check your nonprofit's governing documents to ensure that there are no organization-specific restrictions or requirements with respect to actions via unanimous written consent.

For more resources on nonprofit board governance and procedures, visit our online collection on LawHelp:

www.lawhelp.org/dc/resource/serving-on-the-board-of-directors

The D.C. Bar Pro Bono Center's Nonprofit Legal Assistance Program will continue to operate during COVID-19 containment efforts.

Email cedinfo@dcbar.org, if your nonprofit has questions, concerns, or requests for assistance.

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