



March 25, 2020

Annual Meetings During the COVID-19 Pandemic: Proxy Voting and Use of Communications Equipment

The COVID-19 pandemic poses a unique challenge for many Massachusetts nonprofit organizations at a critical time in their annual work and governance cycles. Nonprofits are being forced to reschedule or cancel annual fundraising galas, reassess their grantmaking and, most challenging of all, drastically ramp down or halt altogether the valuable work they do and support they provide.

One governance detail that may not be top of mind right away, but which can pose unexpected challenges once it comes into focus, is how to hold an annual meeting given the substantial restrictions on the ability to gather and communicate. March through May is a very busy period for Massachusetts nonprofits' annual member and director meetings. These meetings are used to complete organizations' director and officer election processes, among other important tasks. Unfortunately, Massachusetts law governing how members can congregate and meet is outdated at best.

The purpose of this alert is to summarize the current state of the law as it relates to how nonprofits organized under Massachusetts law may hold their annual meetings, and to offer some practical approaches to addressing these issues given today's circumstances. These rules apply to nonprofits incorporated in Massachusetts only; nonprofits incorporated in other states will need to check those states' requirements.

Voting in Person or by Proxy; Meetings by Remote Communication

Under Massachusetts nonprofit corporation law, members may only vote at member meetings in person or by proxy.

To meet the quorum requirements, member organizations must therefore ensure that at least a majority of the members physically attend the meeting or submit a valid proxy. It is important to keep in mind that nonprofit organizations are not required to have members. In fact, many nonprofits forego the membership governance structure, choosing instead to operate with their boards as their sole governing bodies.



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Boards of directors meetings, on the other hand, may be held by conference telephone or similar communications equipment so long as all persons participating in the meeting can hear each other at the same time.

This stark contrast between member and director meeting requirements has been the subject of substantial debate given the many recent technological advances. The situation we all find ourselves in now only lends additional fuel to the fire. Where a large portion of the Massachusetts workforce is forced to log in from home and is relying heavily on remote meeting equipment and software, it only seems reasonable that nonprofit governance meetings be adapted similarly. Yet, as of today's date the distinctions described above still apply.

Organizations should review their current articles of organization and bylaws to determine the necessary steps to holding and taking action at a valid member or board meeting.

Before making any decisions, organizations should review their organizational documents carefully and ensure that they understand the requirements around meeting notice, quorums and voting thresholds. It is important to bear in mind during the course of the review that bylaws can only allow what is otherwise permissible by law. For example, a provision purporting to permit a member organization to hold electronic member meetings would be contrary to the current statutory law, as outlined above. Such a provision should be treated as ineffective for now, and the bylaws should be amended to correct it once things return to a relatively normal state. Organizations can also determine whether their organizational structures incorporate members by reference to their articles of organization and bylaws.

What to Do if COVID-19 Interferes with a Scheduled In-Person Meeting

As a threshold matter, is the meeting an annual board meeting or member meeting?

This distinction has become all the more important in the past few weeks. As mentioned above, board meetings may be held using remote communications equipment so long as all attendees can hear one another. It is well accepted in the nonprofit community that virtual meetings offered through software such as Zoom, GoToMeeting and Skype meet this requirement.



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If the meeting is a member meeting, members must vote in person by actually physically attending the meeting or by proxy. Given the current status of restrictions on gathering, a proxy vote is in many cases the only viable option.

If the meeting is a member meeting, can the actions to be taken be delayed or taken by unanimous written consent?

While keeping to a yearly meeting schedule is important, there are typically some flexibilities built into organizations' governance structures to address the scenario where a meeting cannot be held. For example, many organizations' bylaws provide that directors and officers will serve until the next annual meeting, or until their successors are duly elected and qualified. The "until their successors are duly elected and qualified" language is key, as it allows directors and officers to remain in their positions past the date of the organization's annual meeting in the event no meeting is held, thus maintaining the *status quo*.

Another option is to take the necessary votes by unanimous written member consent, so long as the organization's member base is small enough to allow the organization to obtain the written consent of all members.

What if the actions to be taken at the member meeting cannot be delayed?

Then the meeting will need to move forward as prescribed by law in the organization's bylaws, with enough members voting by proxy to meet the quorum requirements.

One strategy is to have an informal conference call or virtual meeting with members to inform them of the requirements described above and the matters that are the subject of the vote, then to follow that call or virtual meeting with distribution of the proxy that members are being asked to complete and a meeting notice. While the conference call or virtual meeting itself will not qualify as a duly called meeting, it will hopefully be sufficient to gain the necessary support and make the proxy process more of a formality. So long as nothing in the organization's bylaws provides otherwise, the proxy and meeting notice can be distributed by email. Similarly, so long as nothing in the organization's bylaws provides otherwise, proxies may be signed and returned electronically. Only the one person who has been designated as the proxy needs to be physically present to convene the meeting and count the proxies to ensure that the threshold number of affirmative votes are received.



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Is anything being done to address the fact that member meetings cannot be held virtually?

Yes, members of the tax-exempt organizations bar and other interested parties are actively working to ensure that the issue is legislatively prioritized and addressed at least on a temporary basis. This would likely be in the form of temporary relief that would allow for member meetings to be held virtually in the case of emergencies, including public health emergencies such as the one we find ourselves in today.

The COVID-19 pandemic continues to present unheralded challenges in nonprofit organizations' daily and yearly activities and processes. Hemenway & Barnes LLP's Nonprofit Practice Group is here and ready to help as your needs arise.

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