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Legal Governance Challenges for Associations During a Pandemic

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Agenda

- Focus of webinar is on the impact of a pandemic on association governance practices and practical ideas and solutions to adapt.
- Bylaw requirements for an annual meeting in the event of a cancelled or postponed conference.
- The options for virtual meetings and/or electronic voting (outside of a meeting) by the association's membership.
- State actions to allow for increased flexibility in association governance.
- The need to (sometimes) amend articles of incorporation to allow for additional flexibility in governance.
- Consequences of not following governance procedures or state law.
- Board action through proxies and/or electronic voting.

Overview of Association Governance Guidance

- Associations must first look to the nonprofit corporation statute of the state in which the association is incorporated – not the bylaws – as the ultimate arbiter of governance-related issues.
- Hierarchy of association governance documents; each document must be consistent with what is “above” it in the hierarchical order or it will be without force and effect:
 - the state nonprofit corporation statute
 - articles of incorporation
 - bylaws
 - board-approved policies
- American Bar Association Model Nonprofit Corporation Act
 - Keep in mind that every state is different, and your association’s state of incorporation will control.

Annual Meeting Considerations

- Most state nonprofit corporation statutes provide that the failure to hold an annual or regular membership meeting “will not affect the validity of any corporate action.” Therefore, the failure to hold one in a given year generally will not have any material adverse legal consequences.
- Any actions that may need to happen without delay – such as the election of officers and directors – generally can occur via electronic ballot without a meeting.
- If elections do not take place virtually, most nonprofit corporation statutes provide that, “Despite the expiration of a director’s term, the director shall continue to serve until the director’s successor is elected, appointed, or designated and until the director’s successor takes office, unless otherwise provided in the articles of incorporation or bylaws.”

Virtual Membership Meetings and Voting

- While most state nonprofit corporation statutes permit members, in lieu of voting at a meeting, to vote by written ballot (via electronic or mail ballot), the path to getting to permissibility can sometimes be tricky.
- Some states allow electronic voting if the association's articles of incorporation or bylaws do not *prohibit* it.
- Some states allow virtual membership meetings – different from mere electronic voting, but rather an actual (virtual) meeting – as long as the association's articles of incorporation or bylaws do not *prohibit* it. (Can the polling feature in virtual meeting platforms be utilized to take membership “voice votes”? In most states, likely yes.)
- Some states/jurisdictions – such as the District of Columbia – only permit such virtual online meetings if the articles of incorporation or bylaws *expressly authorize them*. Some states do the same for electronic voting (outside of a meeting) as well.
- Some state statutes require permitting virtual meetings to be contained in the *articles of incorporation* specifically in order to be permissible.
- Some states – such as New York – do not permit virtual membership meetings at all.

Virtual Membership Meetings and Voting (cont.)

- Membership voting by ballot vs. by proxy: Almost all state nonprofit corporation statutes permit membership voting in connection with an actual (in-person or virtual) meeting to occur by *proxy* (which can generally be given electronically), but the state statutes differ more when it comes to membership voting by electronic (or mail) ballot *outside of a meeting*.
- Most state nonprofit corporation statutes provide that the same quorum and approval requirements for membership meetings also apply to membership voting outside of a meeting.
- Focus on statutory provisions that require the “unanimous written consent” of all members versus those that just require a quorum of voting members; this is a critical distinction, as obtaining unanimous written consent of *all* members is practically impossible in most every association.
- Distinguish *membership* voting from *board of director* voting (by electronic ballot or by proxy); such board voting is prohibited under most state nonprofit statutes unless the action is taken by unanimous written consent.

State Modifications to Nonprofit Corporation Statutes

- As previously noted, some states do not allow for virtual membership meetings at all.
- However, during pandemics, such as COVID-19, those states may allow for the virtual meetings through executive orders or other executive actions.
- For example, New York Governor Cuomo issued an executive order to allow membership meetings for New York not-for-profit corporations to be held “remotely or by electronic means.” Also, the CA Attorney General issued guidance for CA nonprofit corporations permitting more flexible notice of board meetings and allowing officers present at a board meeting to be deemed directors for purposes of satisfying a quorum.
- While all states may not go this route, it’s important to keep an eye out for executive actions regarding the nonprofit corporation statute in your association’s state of incorporation.

Should We Amend Our Articles of Incorporation?

- While the nonprofit statute in your state of incorporation may require that some of these more permissive provisions be contained in the association's articles of incorporation, sometimes it can be hard to effectuate that change.
- Virtually all state nonprofit corporation statutes require that amendments to the articles of incorporation be approved by the voting members of the organization.
- So, if your association decides that it wants to amend its articles of incorporation for a purpose like this, then the issues described previously regarding the permissibility of virtual member meetings and voting may come into play.

Consequences of Not Following the Governance Hierarchy

- If something is mandated or prohibited by state law or your association's own articles of incorporation or bylaws, any action taken that is inconsistent with them will have no legal force or effect.
- Any such action could later be challenged by an aggrieved board member, member or even the state attorney general for the state of incorporation.
- It may be possible for the membership or board, as the case may be, to ratify the action at a future meeting held in compliance with the association's governing documents in order to legitimize further reliance on the actions.

Virtual Board Meetings and Board Voting

- In general, state nonprofit corporation statutes treat *board of director* meeting and voting issues much differently than *membership* meeting and voting issues.
- While most state nonprofit statutes allow both boards and members to meet virtually – subject to the previously noted caveats – most such statutes do not permit either board voting by electronic or mail ballot outside of a meeting (with the exception, in some statutes, of action taken by unanimous written consent), and most do not permit board voting by proxy at a meeting.
- This stems from the fiduciary duties that board members owe to the nonprofit corporation, including a duty to carefully consider and deliberate about actions.

Virtual Board Meetings and Board Voting (cont.)

- Unless prohibited by the association's own articles of incorporation or bylaws, most state nonprofit corporation statutes permit boards of directors to hold meetings virtually as long as all directors can hear each other at the same time.
- Such virtual meetings are subject to the same notice, quorum and voting approval requirements as in-person meetings, can be combined with in-person meetings, and have the same legal force and effect as in-person meetings.

Questions?

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