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Voting by Proxy: Prohibitions on Nonprofit Directors

As the COVID-19 pandemic continues on, and with recent waves of increased transmission, board members may be asking whether they can perform their duties, and vote on issues within their purview, “by proxy.” Proxy voting occurs when the voting member of an organization assigns their vote to another individual. The California Corporations Code specifically defines proxy voting as, “a written authorization signed by a member or the member’s attorney in fact giving another person or persons power to vote on behalf of such member.” (Corp. Code, § 5069.) Importantly, voting by proxy does *not* mean voting from a remote location, though physical limitations on travel and movement may be part of the reason a person would want to assign their vote to someone else. Under California’s Nonprofit Corporation Law, voting from a remote location (via phone or virtual meeting) is generally permissible. However, voting by proxy is not.

The Corporations Code explicitly prohibits members of a nonprofit’s board of directors from voting by proxy. Under the Code, each nonprofit corporation shall have a board of directors and each director shall have one vote on each matter presented to the board of directors for action. However, a director *shall not* vote by proxy. (Corp. Code, §§ 5210, 5211, subd. (c).) Thus, a nonprofit director may not appoint a substitute or alternate person to act, and vote, in their place – regardless of their availability to appear for a meeting. The prohibition stems from the board of directors’ fiduciary duty to the nonprofit. Since the directors’ owe a fiduciary duty to the nonprofit, they simply cannot delegate the exercise of their duties, including voting, to another person.

This no-proxy rule has created some confusion during the COVID-19 era because of the influx of remote/virtual meetings, and concerns that this implicates proxy voting. However, meeting virtually (via Zoom or teleconference, for example), does not implicate a proxy vote in California since a director appearing at a board meeting via remote means does not constitute the substitution of another person in their place. Put simply, a virtual vote is not a proxy vote under the laws applicable to nonprofit corporations.

In California, remote board meetings are permitted by statute, unless the nonprofit’s governing documents provide otherwise. (Corp. Code, § 5211, subd. (a)(6).) Thus, a board of directors has the ability to take board action, and vote, via remote means. Accordingly, as long as directors are appearing on their own behalf at a virtual board meeting, they may vote as though they were physically present at the meeting, unless their nonprofits’ governing documents prohibit this

action.

In the event that a board is unable to conduct a remote meeting because of logistical issues or because the board's governing documents do not permit remote meeting, the board may take action without a meeting if its members unanimously consent to the action in writing and the number of directors in office constitute a quorum. (Corp. Code, § 5211, sub. (b).)

Thus, in order to continue fulfilling their governance obligations remotely, board members may explore options available to them under state law. However, nonprofit board of directors cannot govern or take any action via proxy vote, i.e., after giving someone else power to vote on behalf of a director.

As an aside, nonprofits should not confuse section 5211, prohibition on proxy voting, with California Corporations Code section 5613, which governs—and permits—proxy voting for the members of membership organizations unless otherwise precluded in an organization's governing documents. The Code only prohibits directors from voting by proxy.

Newsbreak: Nonprofit Relief Program is Extended!

The California Small Business COVID-19 Relief Grant Program has been extended with \$1.5 billion in additional funding. The relief program is also open to nonprofits with three additional funding rounds:

Round 7: August 3-September 16 for waitlisted applicants from certain previous rounds

Round 8: August 27-September 8 for nonprofit cultural institutions, only

Round 9: September 9-September 30 for new applicants and waitlisted applicants from certain previous rounds.

The grants will range from \$5,000 to \$25,000. For more information, please visit <https://business.ca.gov/office-of-the-small-business-advocate-announces-new-funding-rounds-for-the-california-small-business-covid-19-relief-grant-program/> and <https://carelifegrant.com/>

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