

Charity Governance During the COVID-19 Pandemic



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California Department of Justice
Charitable Trusts Section

CHARITY GOVERNANCE DURING THE COVID-19 PANDEMIC

During this worldwide COVID-19 pandemic and State's shelter-in-place order, charitable organizations are called upon more than ever to meet critical needs of our communities. This publication is intended to inform nonprofit corporations of the State laws that allow them to fulfill some of their governance obligations remotely to adhere to social distancing requirements. This publication also briefly covers endowment funds and releasing restrictions on the funds.

EMERGENCY PROVISIONS FOR PUBLIC BENEFIT CORPORATIONS

In California, there are provisions in the Corporations Code that provide leeway in an emergency. Unless prohibited by the nonprofit's emergency bylaws, the following actions can be taken to conduct the corporation's ordinary business operations and affairs during an emergency:

- Notice of director meetings can be given in any practicable manner. (Corp. Code, § 5140, subd. (n)(2)(A).)
- For quorum requirements one or more of the officers present at a board meeting can be deemed a director, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum. (Corp. Code, § 5140, subd. (n)(2)(B).)
- The board may relocate the principal office, designate alternate principal officers or authorize officers to do so. (Corp. Code, § 5140, subd. (n)(1)(B).)
- Modify the lines of succession to accommodate the incapacity of any director, officer, employee or agent. (Corp. Code, § 5140, subd. (n)(1)(A).)
 - Note that the board cannot take action that requires the vote of members or take action that is not in the corporation's ordinary course of business, unless the required vote of the members was obtained before the emergency. (Corp. Code, § 5140, subd. (n)(3).)
- Directors may participate in the board meeting through telephone conference calls, video conference calls, or through electronic transmission provided that each director can communicate with other directors concurrently and has means of participating in all matters before the board. (Corp. Code, §§ 20, 21, 5211, subd. (a)(6).)
 - Note that minutes of meetings are required. (Corp. Code, § 6320.) For clarity in record keeping, all directors should state their names for the record at the beginning of the meeting and each time they speak.

TAKING BOARD ACTION WITHOUT A MEETING

Directors of public benefit corporations can take action without a board meeting if all directors consent in writing and the quorum requirement is met. (Corp. Code, § 5211, subd. (b).) The written consent of the directors must be kept with the minutes of the proceedings of the board. (Id.) Note that directors cannot vote by proxy. (Corp. Code, § 5211, subd. (c).)

VIRTUAL MEETINGS OF MEMBERS OF NONPROFIT PUBLIC BENEFIT CORPORATIONS

Unless prohibited in the bylaws, and when authorized by the board of directors, members of a nonprofit public benefit corporation may hold meetings, in whole or in part, and vote through electronic transmissions or through electronic video screen communication. (Corp. Code, § 5510, subd. (a), see § 20 for definition of electronic transmission.)

For a meeting of members to be conducted through electronic transmission or through electronic video screen communication, the nonprofit corporation must implement measures to provide the members with a reasonable opportunity to participate and to vote on matters, including an opportunity to read or hear the proceedings of the meeting and keep records of the votes and actions taken at that meeting. (Corp. Code, § 5510, subd. (f).)

EMERGENCY PROVISIONS FOR NONPROFIT MUTUAL BENEFIT CORPORATIONS

Meetings of board of directors of a nonprofit mutual benefit corporation may be conducted through the use of conference call, electronic video screen communication, or electronic transmission. (Corp. Code, § 7211, subd. (a)(6).) See Corporations Code 7211 for further guidance. Mutual Benefit Corporations also have flexibility in an emergency unless their emergency bylaws provide otherwise. During an emergency the following actions can be taken to conduct ordinary business operations:

- Notice of director meetings can be given in any practicable manner. (Corp. Code, § 7140, subd. (m)(2)(A).)
- For quorum requirements one or more of the officers present at a board meeting can be deemed a director, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum. (Corp. Code, § 7140, subd. (m)(2)(B).)
- Relocate the principal office during an emergency, designate alternative principal offices or authorize the officers to do so. (Corp. Code, § 7140, subd. (m)(1)(B).)
- Modify the lines of succession to accommodate the incapacity of any director, officer, employee or agent. (Corp. Code, § 7140, subd. (m)(1)(A).)
 - Note that the board cannot take any action that requires the vote of the members or take any action that is not in the corporation's ordinary course of business, unless the required vote of the members was obtained before the emergency. (Corp. Code, § 7140, subd. (m)(3).)

EMERGENCY PROVISIONS FOR NONPROFIT RELIGIOUS CORPORATIONS

Meetings of board of directors of a nonprofit religious corporation may be conducted through the use of conference call, electronic video screen communication, or electronic transmission. (Corp. Code, § 9211, subd. (a)(6).) See Corporations Code 9211 for further guidance. Religious Corporations

also have flexibility in an emergency unless their emergency bylaws provide otherwise. During an emergency the following actions can be taken to conduct ordinary business operations:

- Notice of director meetings can be given in any practicable manner. (Corp. Code, § 9140, subd. (n)(2)(A).)
- For quorum requirements one or more of the officers present at a board meeting can be deemed a director, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum. (Corp. Code, § 9140, subd. (n)(2)(B).)
- Relocate the principal office during an emergency, designate alternative principal offices or authorize the officers to do so. (Corp. Code, § 9140, subd. (n)(1)(B).)
- Modify the lines of succession to accommodate the incapacity of any director, officer, employee or agent. (Corp. Code, § 9140, subd. (n)(1)(A).)
 - Note that the board cannot take any action that requires the vote of the members or take any action that is not in the corporation's ordinary course of business, unless the required vote of the members was obtained before the emergency. (Corp. Code, § 9140, subd. (n)(3).)

MODIFICATION OF ENDOWMENT FUNDS TO TACKLE EMERGENCIES

Many nonprofit organizations have endowment funds, which are donor-restricted funds that are intended to be invested and used in perpetuity to support the nonprofit's charitable programs. Endowments are subject to the requirements of the Uniform Prudent Management of Institutional Funds Act (UPMIFA) (Probate Code § 18502, et seq.)

Nonprofits need to be cautious on how much they spend from their endowment funds. Spending more than 7 percent of the fair market value of an endowment fund may create a presumption of imprudence. (Prob. Code, § 18504, subd. (d).)

While your organization may be tempted to look to endowments as a means of addressing unanticipated costs and budget shortfalls, before your organization decides to invade principal or borrow against the principal, which is not permitted, the board should contact the donors to inquire whether they are willing to release or modify restrictions to allow for more spending authority. (Prob. Code, § 18506, subd. (a).)

Charitable organizations that hold endowment funds that are more than 20 years old, and the total value of the funds is less than \$100,000, may release or modify the restrictions on the endowment funds after 60 days' written notice to the Attorney General and the donor's last known address. (Prob. Code, § 18506, subd. (d).) In the notice to the Attorney General, the nonprofit must show how the endowment has become unlawful, impossible, impracticable or wasteful to operate with the restrictions. The notice should also propose an alternate use that is consistent with the charitable purposes expressed in the gift instrument. (Prob. Code, § 18506, subd. (d).)

For endowment funds over \$100,000, charitable organization may seek court approval to modify restrictions in endowment funds. The Attorney General must be given notice of the petition. The organization should be prepared to demonstrate either the purpose of the restriction has become unlawful, impracticable, impossible to achieve or wasteful, or that restrictions in the gift instrument regarding management or investment have become impracticable or wasteful, or that due to circumstances not anticipated by the donor, a modification on the restriction will further the purposes of the fund. (Prob. Code, § 18506.)

Notice to the Attorney General can be made to the following addresses:

For Petitions related to Northern California:

Office of the Attorney General, Charitable Trusts Section
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004

For Petitions related to Southern California:

Office of the Attorney General, Charitable Trusts Section
300 South Spring Street
Los Angeles, California 90013-1230

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