E-Mail Voting: A Simple Trap for Nonprofit Boards

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E-mail, Facebook, Twitter . . . these and other diverse modes of electronic communication have exploded over recent years. We are now able to communicate faster, cheaper, and with more people simultaneously than ever before.

The busy schedules of nonprofit board members make face-to-face meetings seem like a luxury. Consequently, a new trend has surfaced that may run afoul of the law—the vote by e-mail option. Responding to the difficulty of wrangling a geographically diverse and time-crunched board, many nonprofit organizations are now allowing directors to "vote" by e-mail. This seems like the perfect solution. An issue or opportunity arises that calls for a quick response. Directors are reluctant to attend an extra meeting. Why not circulate an e-mail, ascertain that there is general agreement, and take action?

E-mail voting is seductively simple and fast, but that ease and speed is a trap: a board that relies on e-mail voting fails to comply with legal requirements for a proper vote and exposes its decisions to attack. Nonprofit corporate statutes typically provide for board action to be taken either at a meeting (including by phone or video conference) or by unanimous written consent. Since an e-mail vote technically does not fit either category, it is quite possible that a court would consider an e-mail vote nothing more than an "informal action," which is not legally valid. Even more likely, an attorney representing a nonprofit organization in a loan transaction might not be able to issue the "opinion of counsel" typically required by a lender, and this could delay or derail the entire deal.

Let's take an example.

Playball (PB) runs a youth baseball program. A local business owner offers to donate land for playing fields, and arranges for a loan to cover construction costs. As interest rates are rising, PB needs to lock in the rate quickly. PB's president tries to schedule a special meeting of the board to approve the loan, but can't find a time when a quorum of four of the seven directors can meet. So, she sends an e-mail seeking approval for the loan. Five directors respond "Sure," while two object. With a majority vote in hand, PB's president signs the commitment letter and pays a commitment fee.

The closing approaches. PB's attorney prepares the required opinion, which must state, "All corporate proceedings required by law or the provisions of PB's Certificate of Incorporation or bylaws to be taken by PB in connection with the transaction have been duly and validly taken."

"Let me see the minutes of the meeting approving the loan," says PB's attorney. "We couldn't call a meeting, so we voted by e-mail," responds PB's president.

"Okay," says the attorney. "You need a unanimous written consent, or to ratify the vote at a meeting or by teleconference." Unanimous consent is unattainable because two directors object. Meanwhile, one of the five original consenting directors has changed his vote to "No." Of the remaining four consenting directors, two are traveling in Asia and cannot meet even by teleconference. With five of seven directors available— but only two who will vote in favor of the loan—PB's attorney can't deliver the opinion, the bank won't make the loan, there is no deal, and PB forfeits its commitment fee.

While far-fetched, this scenario illustrates the danger of relying on informal board action.

Prohibition on Proxy Voting

In most states, directors may not vote by proxy. The theory behind this prohibition is that the discussion and interchange of ideas that occur at board meetings are essential to the informed exercise of the directors' fiduciary duty to the corporation.

An e-mail vote—that is, a proposal circulated and responded to by e-mail— is essentially a proxy vote delivered electronically.

The prohibition on proxy voting by directors originated in case law developed over many decades (what is known as "common law") and was eventually codified in statutes. The law regarding proper board action is substantially the same under the common law and under most statutes governing business corporations and nonprofit corporations. In fact, most of the law developed in the business (or stock) corporation arena, but is applicable to nonprofit (or nonstock) organizations as well. But nonprofit organizations, whose directors are usually uncompensated volunteers, may be particularly prone to allowing their directors to vote by e-mail. The following principal case in Connecticut on the issue of proxy voting by directors is a fairly typical one. In the 1956 business corporation case *Greenberg v. Harrison*, the court invalidated the repayment of a loan by a corporation to its lender. The loan was to continue for one year unless earlier repayment was approved by unanimous consent of the directors. Finding that there was no unanimous consent because one director gave a proxy to another director but did not attend the board meeting, the court explained:

The affairs of a corporation are in the hands of its board of directors, whose duty it is to give deliberative control to the corporate business. This requires the physical presence of a director at directors' meetings, and he cannot act by proxy.

Alternatives In our PB example, the attorney tried to implement the typical statutory exceptions to the requirement that directors meet in person. These exceptions can be easily adapted as modern technology progresses, and should be incorporated into an organization's bylaws. State statutes do differ. It is crucial to verify the specific statutory requirements in the state in which an organization is incorporated.

Teleconference

Typical state statutes allow meetings to be conducted by "any means of communication by which all directors participating may simultaneously hear each other during the meeting." This provision allows teleconferences, and should permit web conferencing that combines voice or video communication with document sharing.

Unanimous Consent

Closer to the concept of e-mail voting, most statutes also permit a board to act by unanimous written consent, if each director signs "a consent describing the action taken or to be taken." This protects a director's right to question the action or insist that the board discuss the matter, as a director may compel a meeting simply by withholding consent.

Combining the formality of unanimous written consent with the simplicity of e-mail, an organization's staff member or officer may circulate the proposed resolution as a formal consent attached to an e-mail. The organization must then collect all of the directors' signatures. In many states, the consent may be signed electronically—\\John H. Smith\\—for example, and delivered electronically as a PDF attached to an e-mail.

E-mailed Resolution

An organization might also send an e-mail containing the full text of the resolution, and ask each director to specifically respond and sign electronically. However, this procedure increases the risk that a technicality will be overlooked, and it is no simpler than attaching a formal consent to an e-mail.

The distinction between a formal consent circulated as an attachment to an e-mail and an e-mailed poll of the board may seem inconsequential. But there are three important differences. Most important, all directors must vote unanimously. The directors must also receive a complete description of the proposed resolution, and they must "sign" the consent.

E-mail is a useful tool for taking the pulse of a board. An organization may informally poll its directors and then ratify the decision with a formal inperson or teleconference meeting, or by unanimous written consent.

The risk that an informal e-mail vote will prove problematic is small if the decision is unanimous, if no one litigates to pursue an objection, or if no opinion of counsel is required. Nonetheless, directors should protect the integrity of their decisions by adhering to the statutory procedures and ensuring that through active and meaningful participation they stay informed and comply with their fiduciary duty of care.

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