

Taking Action Without a Meeting: Electronic Voting and Other Options for Members and Directors of a Michigan Nonprofit Corporation

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The Michigan Nonprofit Corporation Act (the "Act") specifies how the members and the board of directors of a nonprofit corporation may take action. This article focuses on ways to take action without holding a meeting. It also discusses the ability to hold meetings remotely. Although this article focuses on board and member action, the rules for action by shareholders are largely the same as the rules for action by members.

Member Action Without a Meeting

Member Action by Written Consent or Electronic Transmission

The Act provides a fair amount of flexibility for members to take action without a meeting. Members are automatically permitted under the Act to take any action without a meeting that may otherwise be taken by the members at a meeting if, before or after the action, all members of the corporation consent to the action in writing. MCL 450.2407(3). In addition, the members may also take such actions with less than unanimous consent of the members, but only if the articles of incorporation specifically permit action by less than unanimous consent. If permitted by the articles, such members may take any action without a meeting by the written consent of that number of members that would be required to authorize the action at a meeting where all members entitled to vote are in attendance and voted. MCL 450.2407(1). As discussed below, in lieu of a signed and dated written consent, members may also give consent by electronic transmission.

Member Action by Ballot Voting

In 2015, the Act was amended to permit additional methods of member action without holding a meeting. The Act now permits

members to take any action that may be taken at an annual or special meeting, including the election of directors, without a meeting by using ballot voting. MCL 450.2408. To take such action, the corporation must distribute a ballot to each member who is eligible to vote on the matter. The ballot must set forth each proposed action, provide the option to vote for or against each action, and specify a time by which the corporation must receive the ballot in order to be counted as a vote by the member (no less than 20 days and no more than 90 days from date the ballot was provided). MCL 450.2408(2). Additional procedural requirements may be set forth in the corporation's articles of incorporation or bylaws. MCL 450.2408(5). The action will be deemed to be authorized if the number of ballots timely cast equals or exceeds the quorum needed to approve such action at a meeting of the members and the number of ballots cast in favor of the action is equal to or exceeds the number of votes needed to approve such action at a meeting of the members. MCL 450.2408(3). For example, if there are 50 voting members, a majority of voting members constitutes a quorum, and an action may be taken by a majority of the members present at a meeting at which there is a quorum, then at least 26 members must cast a ballot and a majority of such ballots must be in favor of the action for the action to pass.

Member actions taken by ballot voting are distinguishable from member actions taken by written consent in multiple ways. First, members may act by ballot voting only if specifically permitted by either the articles of incorporation or the bylaws. Second, unlike actions by written consent, members may only take action by ballot voting if the ballots are provided in the manner required for providing notice under MCL 450.2404. MCL

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450.2408(1). Finally, if a corporation permits ballot voting in its articles of incorporation or bylaws, as few as 10% of the members may compel the issuance of a ballot on any proposed action. MCL 450.2408(6).

Member Action at Polling Place

The 2015 amendments also now permit members to take any action that could otherwise be taken at a meeting by casting a ballot at a polling place, but only if such procedures are specifically permitted in the corporation's articles of incorporation or bylaws. MCL 450.2409. Prior notice must be given to the members entitled to vote with respect to the underlying action within the same time and in the same manner as would be required for a meeting of the members. The notice must include a description of the proposed action and the location and timing of the polling, which must be reasonably accessible to the members. MCL 450.2409(1).

Polling place voting has the same voting standard as ballot voting. Namely, the proposed action is authorized if the number of ballots cast during the time polling is open is at least equal to the quorum required to take such action at a meeting of the members and the number of ballots cast in favor of such action is at least equal to the number of votes needed to authorize such action at a meeting at which the number of members present equals the number of votes cast by ballot. MCL 450.2409(3). As with ballot voting, as few as 10% of the members of a corporation may compel that an action be placed to a vote by ballot cast at a polling place if the articles of incorporation or bylaws permit such voting. MCL 450.2409(6).

Member Action by Proxy Voting

The final method available for taking member action without a meeting is proxy voting. MCL 450.2421. Unless prohibited by the articles of incorporation or bylaws, a member of a Michigan nonprofit corporation who is entitled to vote at a meeting, submit a ballot, cast a ballot at a polling place, or consent or dissent without a meeting may authorize another person or persons to act for such member by proxy. MCL 450.2421(1). A member may grant the authority to another person to act by proxy by a variety of methods including, but not limited to, a writing to the authorized person signed by the member or an electronic transmission to the authorized person in which there is sufficient informa-

tion to determine that the transmission was authorized by the member. MCL 450.2421(5).

Typically, a member who authorizes another person to act by proxy may revoke such proxy at any time and a proxy will expire three years from the date executed. MCL 450.2421(2) and (3). However, a proxy may be irrevocable depending on the language of the proxy and the person who is authorized to act. MCL 450.2422 provides that:

A proxy that is entitled 'irrevocable proxy', and that states that it is irrevocable, is irrevocable when it is held by any of the following or a nominee of any of the following:

- (a) In the case of shares or memberships that are transferable, a holder of a pledge or other security interest in the shares or membership.
- (b) In the case of shares or memberships that are transferable, a person that has purchased or agreed to purchase the shares or membership.
- (c) A creditor of the corporation that extends or continues credit to the corporation in consideration of the proxy.
- (d) An individual who has contracted to perform services as a director, officer, or employee of the corporation, if a proxy is required by the contract of employment.
- (e) A person designated by or under an agreement [as to voting rights].
- (f) A holder of any other proxy coupled with an interest.

An irrevocable proxy may become revocable if such proxy no longer satisfies one of the conditions listed above. For example, a proxy that is irrevocable because the membership interest is transferrable and the proxy is held by one who holds a pledge in the membership interest becomes revocable when the pledge is redeemed. Furthermore, unless renewed, proxies that are irrevocable under MCL 450.2422(c) and (d) are revocable three years after the date of the proxy or upon the end of a period specified in the proxy, whichever occurs first. MCL 450.2423.

Director Action Without a Meeting

The Act provides relatively few options for director action outside of a meeting when compared to the options available to members. Unless prohibited by the articles of incorporation or bylaws, the board may take

action without a meeting if, before or after the action, all directors then in office consent to the action in writing or by electronic transmission. MCL 450.2525. The written consents must be filed with the minutes of the proceedings of the board, and have the same effect as a vote of the board for all purposes. *Id.* Unlike with members, there is no option for the board to take action without a meeting by less than unanimous consent.

The 2015 amendments to the Act created a limited power for director action by proxy voting. Directors of corporations organized on a directorship basis have a limited ability to vote by proxy with respect to the election of directors. MCL 450.2421. Unless prohibited by the articles of incorporation or bylaws, such directors may authorize another person or persons to act for the director with respect to the election of directors by proxy, provided that such proxy voting conforms to the proxy requirements applicable to members. *Id.* Directors may not vote by proxy under any other circumstances.

Transmittal of Consents by Electronic Transmission

As discussed above, members and directors may act by written consent. Consents may also be given by electronic transmission. MCL 450.2407 and 450.2525. An "electronic transmission" means any form of communication that (1) does not directly involve the physical transmission of paper; (2) creates a record that may be retained and retrieved by the recipient; and (3) may be directly reproduced in paper form by the recipient through an automated process. MCL 450.2106. Thus, under this statute, an electronic transmission includes an email or facsimile.

The Act is not clear as to how a consent may be transmitted electronically by directors. For example, one could extrapolate that checking a box in an online poll or survey could be an electronic transmission of a consent. Or, if a question is posed to all board members via email, is a "yes" response considered a consent by electronic transmission? It has been suggested by some commentators that, to ensure validity, a written consent should be physically signed by all directors but may be transmitted electronically (for example, in PDF form, by email, or by fax) by a director to the corporation. However, this guidance may be overly conservative as it appears to go beyond what a literal reading of the statute requires.

Section 525 of the Act provides that, unless prohibited by the articles or bylaws, the board may take action "without a meeting if, before or after the action, all directors then in office consent to the action in writing or by electronic transmission." MCL 450.2525. [Emphasis added.] There is no explicit requirement that a director's consent by electronic transmission include a physical signature.

The section on member action without a meeting differentiates between written consents (which must be physically signed and dated by a member) and consents by electronic transmission (which do not require a physical signature). Regarding member consents by electronic transmission, the Act provides:

An electronic transmission that consents to an action that is transmitted by a [member] is written, signed, and dated for the purposes of this section if the electronic transmission is delivered with information from which the corporation can determine that the electronic transmission was transmitted by the [member], and the date on which the electronic transmission was transmitted. The date on which an electronic transmission is transmitted is the date on which the consent was signed for purposes of this section. A consent given by electronic transmission is not delivered until it is reproduced in paper form and the paper form is delivered to the corporation by delivery to its registered office in this state, its principal office in this state, or an officer or agent of the corporation that has custody of the book in which proceedings of meetings of shareholders or members are recorded. Delivery to a corporation's registered office shall be made by hand or by certified or registered mail, return receipt requested. Delivery to a corporation's principal office in this state or to an officer or agent of the corporation that has custody of the book in which proceedings of meetings of shareholders or members are recorded shall be made by hand, by certified or registered mail, return receipt requested, or in any other manner provided in the articles of incorporation or bylaws or by resolution of the board of directors of the corporation. MCL 450.2407.

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Although the provisions on member action without a meeting do not explicitly apply to board action without a meeting, it is likely that the same standards would apply in determining whether a consent from a director is valid. Thus, a consent “in writing” should be physically signed and dated by the director. A consent “by electronic transmission” should be valid without a physical signature if the requirements described above are met.

For example, an email sent by a director from the director’s email address should be considered a valid consent by electronic transmission. Other methods of electronic transmission (such as responses to online polls or surveys) may also be valid so long as the nonprofit corporation can determine that the response was transmitted by the director and the date on which it was transmitted. As to any form of electronic transmission, an individual at the nonprofit corporation must print the consent on paper and then deliver it to the corporation’s Secretary (or other officer that keeps the corporation’s corporate records book).

Participation in Meetings by Remote Communications

Unless otherwise restricted in the articles of incorporation or bylaws, a member or director may participate in a meeting by means of conference telephone or other means of remote communication if all individuals who are participating in the meeting can communicate with the other participants. Participation in a meeting in this manner constitutes attendance in person at the meeting. MCL 450.2405 and 450.2521.

Prior to February 29, 2008, the Act permitted members and directors to participate in a meeting by “a conference telephone or similar communications equipment by which all persons participating in the meeting may hear each other.” MCL 450.2405 and 450.2521. These sections were amended effective February 29, 2008 to permit participation in a meeting by means of “conference telephone or other means of remote communication by which all persons participating in the meeting can communicate with each other.” MCL 450.2521. (The section on member participation left in the reference to “hearing” each other, rather than “communicating with” each other, but this is assumed to be an oversight that was corrected with the 2015

amendments to the Act). A meeting may be held entirely by means of remote communication, meaning that all participants can participate remotely.

Based on conversations with the drafters of the 2008 and 2015 amendments to the Act, it is understood that the changes to sections 405 and 521 of the Act were done in response to requests from the deaf community, who may have been restricted from “hearing” other participants. The changes were not in response to any desire to eliminate the requirement that, when participating in meetings remotely, it is essential that participants have the ability to engage in dialogue with one another.

In addition to a conference call, methods of remote communication may include Skype, Go-To Meeting, FaceTime and other methods of video conferencing so long as all participating board or committee members can communicate with one another. One may even extrapolate that a meeting could be held entirely via group text messages or an email chain, although some attorneys have suggested that these methods may not be valid as they could limit dialogue. As technology continues to evolve, it is likely that new methods of remote communication will arise. Any method of remote communication where all participants can communicate with each other should be permissible under the Act so long as it does not restrict dialogue among participants.

Conclusion

In summary, members may act without a meeting in a number of ways—by written consent (unanimous or, if permitted by the articles, less than unanimous), ballot voting, at a polling place, or by proxy. Directors, on the other hand, may generally only act without a meeting by unanimous written consent. The likely intent behind limiting the ways that directors may act without a meeting is to encourage meetings (with dialogue and debate) among directors. Although member consent is required for major corporate actions (like article amendments and dissolutions), it is generally the directors who are responsible for the overall governance of the nonprofit corporation. Such dialogue and debate is, therefore, likely deemed more vital in director decision-making than in member decision-making.



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