



OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
CHARITIES BUREAU

Issued: April 2020

**Guidance for Conducting Virtual Meetings of Members of
New York Not-for-Profit Corporations**

New York charitable nonprofit organizations are being faced with the unprecedented challenges to and changes in their operations during the COVID-19 pandemic. While adhering to the requirements of social distancing, it has become difficult – if not impossible – to convene meetings of members of nonprofit corporations in a single physical location. Many nonprofit organizations have inquired of the Charities Bureau whether meetings of members may be conducted “virtually,” by, for example, tele- or video-conferences which allow participants to communicate and share information without being together physically.

The Charities Bureau is issuing this guidance to help organizations seeking, during the COVID-19 pandemic, to comply with Article 6 of the Not-for-Profit Corporation Law (N-PCL), particularly § 603(b), which requires an annual membership meeting for the election of directors and other business and § 603(c), which permits special meetings of membership. The Charities Bureau also wants to assure not-for-profit membership corporations that, in exercising its authority pursuant to the N-PCL, the Charities Bureau will recognize the necessity to conduct virtual meetings of members at a time when, as a result of the COVID-19 pandemic, social distancing is required or advisable to promote the health and safety of participating members.

Nothing in this guidance is intended to express an opinion on the permissibility of virtual meetings when the state of emergency has ended.

N-PCL § 708(c) explicitly permits boards of not-for-profit corporations to conduct board meetings virtually, unless such action is prohibited by their certificate of incorporation or by-laws. Boards of such organizations should consult their organizations' certificates of incorporation and by-laws to determine whether they bar virtual meetings. If such a prohibition is contained in the by-laws, it may be amended by the board's unanimous written consent, as permitted under N-PCL §708. However, if the by-law provision is only amendable by the members under N-PCL §602, the proposed amendment must be submitted to the membership for approval before it can take effect. If such a prohibition is contained in the certificate of incorporation, the organization must file an amended certificate with the Department of State, pursuant to N-PCL §803.

The Charities Bureau is aware of the numerous ways in which the nonprofit sector has had to adjust to executive orders changing and limiting the ways in which they may operate. Challenges faced by nonprofits include the impossibility of conducting in-person meetings while sheltering in place and, at the same time, needing to make important decisions during this unprecedented time. For many, conducting virtual meetings is the only way for members of nonprofits to conduct their business and fulfill their responsibilities to their organizations. Organizations have raised concerns that such meetings may be required or advisable until their activities are back to "normal," which may be many months from now.

On April 17, 2020, Executive Order 202.18 was issued to, among other things, modify "Section 603(b) of the Not-for-Profit Corporations Law to the extent necessary to permit annual meetings of members to be held remotely or by electronic means."

The order, by its terms, currently expires on May 16, 2020. Because of the meeting notice requirements of N-PCL §605, or specific by-law (or certificate of incorporation) requirements, strict compliance may be difficult. In addition, the Order does not expressly apply to special or emergency meetings.

The Attorney General's Charities Bureau is issuing this guidance in recognition of the need for further guidance to the nonprofit sector on how to conduct virtual annual and special meetings of their membership. While we recognize the current need for nonprofits to conduct their membership meetings by virtual means (or for certain individuals to participate virtually) as long as social-distancing is required or advisable, virtual meetings must follow proper procedures and provide information as required for in-person meetings.

In any challenge to a virtual meeting or participation by members via virtual means, the Charities Bureau will take the position that meetings conducted in accordance with this guidance should be deemed in substantial compliance with the requirements of the Not-for-Profit Corporation Law, and that the Court in which such a challenge is

brought should exercise its discretion under Section 618 to confirm the meeting and election.

The information below is intended to serve as guidance for nonprofits considering conducting annual or special meetings of their memberships entirely or partially through virtual means. Organizations' certificates of incorporation and by-laws should also be reviewed as they may already include authorization for and additional requirements applicable to conducting virtual meetings.

The following issues and procedures are best practices that should be considered by nonprofits when setting up and conducting virtual meetings of their memberships to ensure that members who attend those meetings will be able to "hear and be heard" and have the ability and information necessary to participate in discussions and to vote during the meetings. The specific procedures that should be followed will depend on multiple factors, such as the number of members entitled to vote, specific notice periods required by an organization's certificate of incorporation or by-laws, whether the meeting is an annual or special meeting, and the issues to be voted on. Not all of these best practices will be appropriate for every organization or meeting.

BEFORE THE MEETING

1. Identify an accessible platform for meeting and provide information about it to all members in advance of the meeting. Note, a video conference may be more conducive to member participation than a conference call. There are many commercial options available, some of which are free.
2. Give members the option to dial-in if they do not have the technology that permits access to a video conference.
3. Confirm the names of members and those entitled to vote. Note, pursuant to N-PCL § 607, members are entitled to receive such a list. See also N-PCL §§ 611, 612 and 616 to determine if any specific qualifications for membership or entitlement to vote apply.
4. Provide information required by the by-laws concerning candidates for director and officer positions.
5. Make sure you have appropriate contact information (e.g., street address, phone numbers, email addresses) for all members.
6. Prepare and disseminate, before the meeting, notice of the date and time of the meeting, the electronic form of the meeting, instructions on how to log on/call-in and, when required, the agenda, including the issues upon which a vote will take place. Organizations should consider providing members with the agenda even if such distribution is not required. Note that N-PCL § 609 permits voting by proxy and § 609(b) expressly allows proxies to be given by electronic mail.
7. Test the system being used for the virtual meeting to make sure it is in working order.

8. Determine the method for taking attendance.
9. Determine the method for counting votes.
10. Arrange to take and maintain minutes of the meeting.
11. Appoint someone to manage the meeting to make sure that the meeting adheres to the agenda and allows an opportunity for attendees to participate – some virtual meeting programs have a feature that allows people to “raise their hands.”
12. Appoint someone to help people who are having trouble joining the meeting. A separate phone number should be disseminated to allow reporting and resolving problems in real-time.
13. A record should be maintained of calls or complaints about logging-in.

DURING THE MEETING

1. Confirm membership and record of attendance.
2. Determine if quorum requirements are met. Note, organizations should review their Certificates of Incorporation, by-laws and N-PCL §§ 608 and 615 to determine the number of members needed to reach a quorum.
3. Ensure that participants can hear (and, if applicable, see) the proceedings and communicate to the full group in real-time, via a text-based “comment” function or otherwise.
4. Set time limits for presentations and discussions
5. Give members the opportunity to communicate, consistent with the organization’s by-laws
6. Give members the opportunity to bring motions or nominations from the floor, consistent with the organization’s by-laws.
7. Consider challenges to nominations, voting eligibility and requirements, consistent with the organization’s by-laws.
8. Count votes.
9. Contemporaneously maintain a record of votes.
10. Contemporaneously record minutes.
11. Where directors take action during the meeting, assure (unless a vote is unanimous) that the minutes reflect the votes of the individual directors.
12. Where directors hold a portion of the meeting in executive session, the record should reflect the basis for the executive session, the start and end times of the executive session, the attendees at the executive session, decisions made during the executive session and a record of the vote.

AFTER THE MEETING

1. Circulate draft minutes.
2. Give member-attendees the opportunity to make suggested corrections or additions to minutes.
3. Circulate final minutes.

4. Obtain member approval of minutes at the next meeting if that is standard practice for the organization.

ADDITIONAL CONSIDERATIONS

Some sections of the N-PCL require the votes of members to approve significant transactions by nonprofits, such as sales of property, mergers, dissolution, and amendments of certificates. Additional protections may be required when conducting such votes, such as distribution of detailed documentation and discussion of issues involved. Additionally, some boards of directors must be elected by the members. Boards of Directors should make sure that members have all the necessary information and an opportunity to ask questions, so they may make informed decisions when voting on such matters.

HOW THE CHARITIES BUREAU CAN HELP

The entire staff of the Charities Bureau is working remotely and will be available to provide assistance to the nonprofit community. Because of the volume of inquiries, and the need to have a central record of inquiries and responses while we are working remotely, we request that you contact us by email until further notice. Questions, including those concerning registration and filing by charities, should be sent to our **Customer Service Unit** by sending an email message to charities.bureau@ag.ny.gov – when necessary messages will be referred to an “Assistant Attorney General of the Day” for response.

If your organization is seeking approval of a transaction, such as the sale of property, a merger, dissolution, or amendment of a certificate of incorporation to change purposes or powers, applications and questions should be sent by email, with any documents attached as PDFs, to charities.transactions@ag.ny.gov.

Please send complaints about charities to charities.complaints@ag.ny.gov

Additional guidance for charities, including “Right from the Start: Responsibilities of Directors of Not-for-Profit Corporations” is posted on our website – www.charitiesnys.com.