

Can Non-Profit Boards Vote by Email?

By Gene Takagi and Emily Nicole Chan



Can nonprofit boards vote by mail and email? As is true of so many matters, there are legal answers and sensible answers to this question, which may not be the same. Attorney Gene Takagi and Emily Nicole Chan discuss both in this helpful article:

One of the many Blue Avocado readers who contributed to this article by sharing their experiences and viewpoints commented, "Over the last year we had new members of our Board who used electronic communication as an extension of the board's actions. It was a disaster." In sharp contrast, another reader was chipper: "We have had great success with making decisions between board meetings."

We'll start by discussing the legalities, then take a look at the advantages and disadvantages, and finally, we'll offer guidelines and a sample policy for using email voting.

First, the legal issues

Can nonprofit boards legally vote by email? The short answer: Yes, in most U.S. states, but typically only if the vote is consistent with the requirements for unanimous written consent -- that is, when the vote is unanimous and in writing. Some states like Texas require only majority written consent.

Most states make provisions for boards to take action without meeting by written consent. Typically, this involves mailing the proposed action to each board member, and having each sign and return the written action to the board secretary. Once all the signed consents are received, the action taken is just as valid as if it had been taken at a meeting.

Many nonprofits use the rules for mail voting to guide their process of email voting. This may involve an email to each director detailing the proposed action, and an email reply from each director with his or her vote. In a "unanimous written consent" state, if all directors vote the same way, the action is taken.

The danger with email voting is that few, if any, states specifically authorize this practice. The problem is whether an email should be treated the same as a signed written consent. With a signed written consent, the signature gives us some assurance that the director actually consented. With an email without a signature, the consent could have been sent by anyone with access to the board member's email account. Should we accept an email that simply states "Yes" in response to a complicated proposal without further verification? If the director later claims not to have sent the email, the action may be nullified and could result in all kinds of problems, including lawsuits against the nonprofit and individual directors. And what if the email says "Yes, as long as we . . ." Is that an effective consent? Probably not.

One way to address the problem of verification is to have each board member sign the written consent and return the signed copy back to the board secretary -- either by postal mail, by returning a scan of the signed consent via email, faxing back a signed copy, or using an

authenticated electronic signature. But lawyers prefer that all of the original signed consents be included in the board minute book as evidence that the action was properly taken. The many variations in how states regulate (or don't even mention) email voting reflect the newness of the technology and this voting practice. Over time we can hope that standards emerge that most states will adopt, but in the meantime the standards differ widely. And unfortunately there is no one place that lists the applicable laws for each state. A further complication is that different states assign these responsibilities to different departments. The [National Association of State Charity Officials \(NASCO\)](#) has a list of links to the appropriate authority in each state;

Email discussions can enhance governance

"We require a 2/3's majority on all items we vote on," comments Marcia Slagle of Oak Ridge, Tennessee. "Two years ago our board adopted new guidelines that allow email voting on matters discussed at board meetings. I think it helps keep those members who are unable to attend a meeting in the loop about what has happened at the meeting, but also gives them a voice."

Craig Pampeyan notes that at the all-volunteer nonprofit with which he is involved, "Votes via email work well, though there have not been any major policy change decisions we've conducted this way. All the board members are well-versed in the mission, activities, and much of the historical perspective of the nonprofit."

In many organizations, board discussions by email enhance participation. This should not be discouraged. But more frequently, email voting is not used to promote thorough discussion and involvement. Most nonprofits are interested in email voting in order to make decisions *without* discussion or involvement -- typically on items that appear not to need either. Between meetings it may be more convenient to take board action by written consent done via email. But email voting can also serve to effectively discourage rigorous discussion.

Risks and problems

Here's an example: The ABC Organization has the opportunity to take on a government-funded program recently dropped by another organization. But the papers must be signed almost immediately. The Executive Director decides that the program would be attractive and makes her case to the Chairperson. The Chairperson emails the board a request for an email vote (to be followed by written consent) to accept the program and the funding. In the absence of discussion about the risks of taking on this work, it seems like a "no brainer" to the board members who then blindly approve the project.

Regardless of the ultimate decision, this too-common process is seriously flawed. The lack of discussion on a major action indicates inadequate oversight and may even be regarded as a breach of the directors' duties of care. If the decision had instead been made at a board meeting, there would have been an opportunity for board members to ask questions, raise serious issues, and consider alternatives.

"I was really bothered when we were asked to vote in a new board member by email," wrote one Blue Avocado reader who asked to be anonymous. "I wasn't really against the nominee because I hardly knew him, but by the time I saw the email other people were sending, all replying with their 'yes' votes, I didn't feel comfortable asking any questions."

Along the same lines, Put Barber of Idealist comments, "The point of meeting and discussing something in a room together is that better ideas emerge in the course of such discussions and

pitfalls are more likely to be identified." He goes on to point out that "a telephone conference meeting, assuming the organization's bylaws and the statutes of its state of incorporation permit that method, is preferable to email voting for many reasons."

We suggest a simple safeguard: the executive committee (or the officers) can be assigned the responsibility of determining whether a particular action should be taken by email/written consent or at a board meeting. If the matter is routine or has already been discussed and widely agreed upon, an action by written consent may be appropriate. And as reader Kellie Dyslin pointed out, it's important to be sure that all such votes are recorded in the minutes of the organization, perhaps at the next meeting (actually, the written actions should be kept with the minutes). On the other hand, if the matter is important or sensitive, and/or may have serious consequences for the organization, holding a meeting may become imperative.

Policy templates

Laurie Prospero provides a good example of a simple but careful way to conduct email voting: "Prior to sending out the email request for a vote, the board secretary confirms the motion along with a mover and seconder. We tried to use the voting buttons in Outlook, but they don't work if you are not on an exchange server. Now we include the voting options in the email. We impose a deadline for the votes to be cast and ask board members to return their vote to the Secretary and Executive Director. The Secretary keeps a log of all the votes and reports on the results. As the ED, I save each individual vote -- and any comments -- as a PDF of the email so that we'll have electronic backup. The motion and the results of the vote are read into the minutes at the next scheduled board meeting." Laurie adds that email voting is only used for items that don't need much additional discussion.

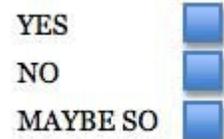
Melissa Kaestner of [Community Radio Fund of Canada](#) shared the highlights of their well-developed "CRFC Guidelines for Conducting Board Business Online" (but note that these procedures would not be legally valid in most U.S. states):

"First, we have a private online website that is just for the board of directors, using Google sites. One page is dedicated solely to current decisions.

"Second, we have outlined a procedure that includes how things are posted and timelines for the entire process. There are two types of work we do online: general discussions of issues and official business motions.

"For official business motions:

- Discussion can precede or follow a motion.
- A director can move a motion, and should include a suggestion for discussion time.
- The Secretary (or relevant board member) will post the motion on the board's online space.
- All discussion must follow the same email thread; other emails should not follow this thread.
- A motion needs to be seconded before discussion or voting.



- Discussion: Minimum 5 days unless all agree in writing to a shorter timeframe. Since we are not all online everyday, we need to allow reasonable time for people to discuss. Discussion time can be extended by simple majority of all board members.
- Chair (or mover) sends a summary of points and reminder that the motion is on the table after 3 days and again after 6 days if the discussion period is longer.
- Amendments: If amendments are deemed friendly by the mover, discussion then moves to the amended motion. If amendments are not friendly, then the proposed amendment will be discussed and voted on.
- Consensus: We should aim for consensus. If we cannot achieve it, then we vote.
- In the case of a vote, the chair or mover circulates email with a new subject with a vote name and number. Directors vote by sending an email with "MOTION on xxxx." YES/NO/ABSTAIN.

The Community Radio Fund of Canada has generously made their complete policy available to readers;

Sample E-Mail Voting Policy

In addition to the above guidelines, readers may find helpful the following Sample E-Mail Voting Policy we've developed for this article:

1. Board actions may be taken by unanimous written consent.
2. If an item for board action is best addressed before a board meeting, the following factors will be considered by the Board President before determining whether to ask for an action by written consent:
 - (a) How soon a decision is required.
 - (b) Whether the decision would be better made after further discussion and/or whether alternatives should be considered.
 - (c) Whether the action is a routine action that the Executive Committee can take in lieu of the board at a Committee meeting.
 - (d) Whether a conference call meeting can be scheduled and held (either just for discussion or if a quorum is obtained, to take a vote).
 - (e) Whether all directors have indicated they are unanimously in favor of the action and will be available to sign and return a written consent.
3. If after considering the above factors, the Board President determines it would be best to take the action by unanimous written consent, the Board President may have the Secretary draft the proposed action and email it as an attachment to all directors at their respective email addresses.
4. The action shall allow a director to check that he or she is in favor of or opposed to the particular action.
5. Each director shall sign and return the written consent to the Secretary by email (scanned copy of the signed consent) or fax within 24 hours unless another deadline is provided in the email. The original signed consents will be sent to the Secretary by mail or delivered in person at the next board meeting.

6. Upon the Secretary's receipt and verification of all written consents approving the action, the action is duly approved. Regardless of whether the action is approved or not, the Secretary will confirm whether the action has passed or failed by email to all directors upon receipt of all the individual written consents.

7. The Secretary will file all individual written consents with the corporation's minute book.

8. The Board will ratify any action taken by unanimous written consent at the next Board meeting. The minutes of this meeting will record the ratification.

Finally . . .

As you can see, conducting legal votes by email is not as simple or as speedy as might be assumed at first glance. To recap our suggestions:

- Check your national and state regulations on what's permissible in your jurisdiction.
- Allow email votes only when they have been authorized by the executive committee or another authorized body or process.
- Have clear, written guidelines about how the votes will be taken.
- Follow up, when appropriate, with documentation of unanimous written consent.
- Be sure that all of the signed written consents are maintained with the board minutes.
- Be hesitant to use email voting: even in a rush, a board meeting via conference call can allow for questions and concerns to be raised about an issue that might not be obvious when first presented. And a conference call of less than a quorum can still serve as important feedback to the ED and the board chair as to whether the issue requires discussion.