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Can a California Nonprofit Board Vote by Email?

The answer to this question would appear to be simple: Your CEO and CFO routinely communicate with your board by email, directors frequently discuss issues in email chains or on an internal forum, and notices of board meetings are always sent by email. So directors should be able to vote by email too...right?

Unfortunately, the answer in California is “No.” Under [Section 5211\(b\)](#) of the Nonprofit Corporation Law, a board can take action outside of a duly held meeting only if all directors consent to the action in writing. This applies to nonprofit public benefit, mutual benefit, and even religious corporations. There’s only one exception to the unanimity requirement for written consent: when a board is approving a transaction involving a conflict of interest or a transaction where it shares one or more directors with the counterparty—for public benefit corporations, [Sections 5233 and 5234](#), respectively—the interested or common directors do not need to be counted, and the consent can be “unanimous” without their input.

Why the cumbersome requirement for unanimity when a simple majority of the directors attending a proper meeting ([Section 5211\(a\)\(8\)](#)) can usually take the same action? The reason goes to principles of corporate democracy and due process. Under California law, some form of prior notice is always required for board meetings, except for regular meetings where the bylaws or the board fixes the time and place of the meetings in advance. Directors can waive the notice requirement either by attending a meeting without protesting the lack of proper notice, signing a waiver of notice or consent to holding the meeting, or approving the meeting minutes in writing. Otherwise, any action taken at a meeting without proper notice is invalid. These procedural requirements protect corporate democracy by, for example, preventing board leaders from holding a secret meeting with a cherry-picked majority and excluding dissenters who might otherwise attend and influence other directors to vote with them. No prior notice is required for a written consent, but the tradeoff under the law is that every director must consent to the action for it to be valid.

The good news: directors don’t necessarily have to manually sign a paper written consent, since under [Section 5079](#) “writing” and “written” include email, provided that the electronic transmission requirements under the Corporations Code ([Sections 20 and 21](#)) are met. To conduct a unanimous written consent by email, certain additional safeguards should be put into place, including the following:

- The cover email to the directors should clearly explain that their formal consent to an action is being solicited, that their replies should state such a consent unambiguously,

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and that the action will not take effect unless all directors approve it.

- › All responses by directors to a written consent conducted by email should be printed out and filed with the board's regular minutes, as would a signed written consent on paper.
- › When all director replies have been submitted, the corporate secretary should send a follow-up email to advise directors on whether the consent has been approved unanimously.

Even with these safeguards, however, a charity may not want to solicit a written consent by email except for routine, noncontroversial issues, since email is not a perfect system. For significant or problematic matters, the additional security of having manually signed paper consents on file may be desirable.

If it looks like not all directors will consent or will respond in time, another option would be to hold a telephone meeting after proper notice is sent to all directors. If a board is so large that even this option is unwieldy, consider vesting more authority in small board committees, which under [Section 5212](#) can be given the power to act with the authority of the full board on all but certain matters.

(A note for corporations formed elsewhere: A few other states, such as [Nevada](#), allow nonprofit corporation boards to act by written consent without unanimity. For corporations formed in these states, board leaders could circulate a written consent by email that approximated the effect of a board vote by email. Still, care needs to be taken. For example, Nevada requires a higher threshold—a "majority of the board of directors"—for written consents than for actions at a live meeting.)