



TAKING THE HARD ROAD, STOPPING DIRECTOR PROXY VOTING

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Recently, I was reviewing the Bylaws of a Delaware association, when I saw a sentence that stated: "Directors may vote by proxy." This association had a large Board of Directors, which was comprised mostly of officers of member corporations. These directors held important, stressful jobs, which made it difficult for them to personally attend board meetings. Therefore, instead of attending some meetings, they either asked other directors to vote for them at these meetings, or sent a designee to attend in their stead. When I spoke to the Executive Director of this association, he seemed surprised to learn that in the state of Delaware, directors do not have the authority to vote by proxy. He is not alone. Many people assume that since members are permitted to vote by proxy, directors must have this authority as well.

In most states, directors are prohibited from voting by proxy. (Louisiana and Arizona are two of the few exceptions to this rule. Proxy voting is permitted in these states if a corporation's articles of incorporation specifically allow for it.) There are several reasons for this rule. First, a director's personal judgment is necessary for proper decision making. Members of a nonstock corporation specifically elect board members for their personal experience and knowledge. Such experience and knowledge cannot be accessed by a person voting by proxy for that director. Second, members of an organization choose each director for specific reasons, such choice is

not the grant of a transferable privilege. Third, all directors are entitled to hear the opinions and judgments of every duly elected director, not his designee. A director has no authority to assign his power, or delegate his duties. To do so is a breach of his fiduciary duty.

So what do you do if your association Board has been improperly using proxy voting? First, stop all proxy voting at Board meetings immediately. Second, the Board should ratify all actions previous voted on by proxy at the next properly held and attended Board meeting. This should help mitigate against any claims of improper voting. Third, amend your association's bylaws to delete any reference of proxy voting at Board meetings. Finally, find alternate ways to have directors present at meetings. The Delaware General Corporation Act, like most states, does allow the use of conference telephone or use of other equipment by means of which all persons participating can be heard as a substitute for a face-to-face meeting. Such participation is considered to be the same as presence at the board meeting.

What if some directors are still not able to regularly attend meetings? To put it simply, they should not be a director of your association. Directors have a fiduciary duty to regularly attend board meetings. If they are unable to make the time for such meetings, they are breaching their duty of care to the association. In this day and age,

directors can no longer be just figureheads of an association. They have to play an active and informed role.

During the last few years, with the Enron and WorldCom scandals, courts have required increased accountability by boards of directors. Boards of directors have

become a target of efforts to enhance accountability. Therefore, all corporations, including nonprofit corporations, must ensure that all matters that come before their boards of directors are properly voted upon. While this might make it more difficult to obtain proper attendance at board meetings, it will protect your Board and its decisions.