



ALAN WILSON
ATTORNEY GENERAL

September 3, 2020

The Honorable Stephen Goldfinch, Member
South Carolina Senate
P.O. Box 823
Murrells Inlet, South Carolina 29576

Dear Senator Goldfinch:

We received your letter requesting an opinion regarding the ability of a nonprofit corporation to hold its annual meeting via Zoom or electronic means due to exigent circumstances.

Law/Analysis

Section 33-31-701 of the South Carolina Code (2006) requires nonprofit corporations registered in the state of South Carolina to hold an annual meeting and provides as follows:

- (a) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.
- (b) A corporation with members may hold regular membership meetings at the times stated in or fixed in accordance with the bylaws.
- (c) Annual and regular membership meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual and regular meetings must be held at the corporation's principal office.
- (d) At the annual meeting:
 - (1) The president and chief financial officer shall report on the activities and financial condition of the corporation; and
 - (2) Unless this chapter or the articles of incorporation or bylaws require otherwise, notice of an annual meeting need not include a description of the purpose for which the meeting is called.

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(e) At regular meetings, the members shall consider and act upon matters as raised consistent with provisions of the articles of incorporation or bylaws and, in addition, with the notice requirements of this chapter.

(f) The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of a corporate action.

According to this provision, where an annual meeting is held is predominately determined by the nonprofit corporation's bylaws. While section 33-31-701 does not address use of electronic means to conduct annual meetings, it also does not prohibit the use of electronic means. We understand some nonprofit corporations' bylaws specifically allow for the use of electronic means to conduct their meetings. Therefore, if use of electronic means is allowed under the bylaws, we believe use of such means to conduct a meeting would meet the requirements under section 33-31-701.

However, we understand your concern arises when either the bylaws do not specifically allow for the use of electronic means to conduct annual meeting or the bylaws are silent as to where or how the annual meeting shall be held. In regard to the former scenario, without a copy of the bylaws, it is difficult to interpret what they allow. As to the later scenario, section 33-31-701 states if the bylaws do not provide for a place, the annual meeting "must be held at the corporation's principal office." This language suggests the meeting must take place at a physical location.

Given the recent impact of the Covid-19 pandemic, many nonprofits are concerned about conducting an annual meeting in a physical location as they involve large gatherings and require some members to travel to attend the meeting. Because of the current situation, a court may find holding a meeting via electronic or virtual means substantially complies with the purposes of section 33-31-701. See Op. Att'y Gen., 2020 WL 4730384 (S.C.A.G. Aug. 3, 2020)(stating a court could find that holding a tax sale within a county but using an online platform substantially complies with section 12-51-50 of the South Carolina Code). "American jurisprudence generally holds substantial compliance is met if the purpose of the statute is achieved." "Substantial compliance has been defined as 'compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.'" Brown v. Baby Girl Harper, 410 S.C. 446, 453, 766 S.E.2d 375, 379 (2014) (quoting Orr v. Heiman, 270 Kan. 109, 12 P.3d 387, 389 (2000)). Annual meetings are generally held for the purpose of electing directors and transacting other business of the nonprofit. We believe these same purposes could be accomplished in a virtual or electronic meeting as an in person meeting. Therefore, while not free from doubt, a court may find holding a virtual or electronic meeting substantially complies with the purposes of section 33-31-701.

Other states are grappling with the same issue in regard to both for profit and nonprofit corporation's annual meetings. Georgia, whose Nonprofit Corporation Code is very similar to

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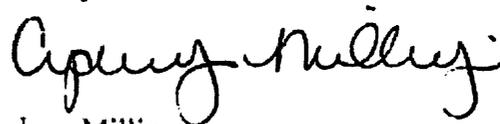
South Carolina's Nonprofit Corporation Act, also requires annual meetings be held at "the place stated in or fixed in accordance with the bylaws." However, Georgia's Secretary of State, Brad Raffensperger, released a memo interpreting the annual meeting requirements under Georgia law as not prohibiting virtual or telephone attendance of annual meetings. Memorandum from Brad Raffensperger, Georgia Secretary of State to Georgia Corporations (Mar. 20, 2020), available at <https://sos.ga.gov>.

The South Carolina Secretary of State, as of the date of this opinion, has not issued similar guidance. However, given the need for social distancing during the Covid-19 pandemic, we believe our Secretary of State or a court could come to the same conclusion as Georgia's Secretary of State and also find that because the South Carolina Code does not prohibit virtual or telephone attendance at annual meetings, use of such means to conduct an annual meeting is not prohibited. Nonetheless, we must advise that nonprofit corporations seeking to have virtual or telephone meetings should provide notice to its members as required by section 33-31-705 of the South Carolina Code (2006).

Conclusion

Section 33-31-701 of the South Carolina Code calls for annual meetings to be held "at the place stated in or fixed in accordance with the bylaws." This statute does not speak to the use of virtual or electronic meetings, but such are not specifically prohibited under the Nonprofit Corporation Act. Accordingly, we believe if the bylaws allow for these methods to conduct annual meetings, then such meetings do not run afoul of this provision. In situations in which the bylaws do not speak to use of electronic or virtual meetings, the ability to conduct annual meetings in this manner is less clear, but a court could find holding a meeting virtually or electronically substantially complies with section 33-31-701. Other jurisdictions including Georgia, take the position that because the conduct of meetings through electronic or virtual means is not prohibited, it is allowed under Georgia law. While not free from doubt, a court or the South Carolina Secretary of State could, in light of the Covid-19 pandemic, could take a similar position.

Sincerely,



Cydney Milling
Assistant Attorney General

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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "R.D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General