

ISSUE BRIEF:

Auxiliary Board Emergency Powers, Meetings and Actions

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I. Background

Strong transparency laws apply when auxiliary organization governing boards and committees meet, deliberate and act.

For student body organizations and the statewide student organization, detailed meeting requirements and exceptions are found in the Gloria Romero Open Meetings Act of 2000.¹ All other auxiliary organizations are subject to a more general statutory open meetings framework in the “Seymour Act.”² Common to these laws (although treated very differently in scope and detail) are:

- Meeting call-notice requirements to board members;
- Meeting public notice and posting requirements;
- Clear statements of public policy requiring meeting to be open and public and accessible to the public;
- Regular and special meeting requirements; and
- Restrictions on closed sessions.³

The Romero Act includes provisions on meeting-by-teleconference⁴ and conducting emergency meetings.⁵ The Seymour Act is silent on both.

All CSU auxiliary organizations in good standing are nonprofit public benefit corporations chartered under the California Nonprofit Public Benefit Corporation Law⁶ (NPBCL). The NPBCL includes

¹Education Code §§ 89305-89307.4.

² *Id.* at §§ 89920-27. Use of the title “Seymour Act” is an informal reference to Senator John F. Seymour Jr., author of SB 2286(*Stats.1984, c.1158*).

³ For a detailed analysis on dealing with open meetings and closed sessions, see AOA 2019 *Issue Brief: Managing Board Closed Sessions*, posted on the AOA website.

⁴ Education Code §§ 89305.1(b) ((2) and (c-d).

⁵ *Id.* at § 89306.5(c-e).

⁶ Corporations Code § 5110 *et seq.*

important default provisions on board teleconferencing, emergency meetings, and action without a meeting.

This *Issue Brief* summarizes key aspects of the Seymour Act and corporate emergency powers; explores if and how auxiliary organizations under the Seymour Act might conduct board and subboard⁷ meetings under emergency conditions; and what emergency actions may come into play. For organizations subject to the Romero Act, the path of emergency meeting conduct is statutorily explicit and beyond the scope of this paper.

II. The Seymour Act Meeting Requirements Revisited

Let's briefly review key aspects of the Seymour Act. Education Code §§ 89920-89928 require auxiliary organizations to follow an open meeting regimen for the conduct of its business in board or subboard public meetings at which all persons shall be permitted to attend.⁸ An annual schedule (date, time and location) of *regular* meetings must be set by the governing board and subboard.⁹

Any action to be taken on any issue by the governing board or subboard shall have been publicly posted for at least one week.¹⁰ As a statutory, but undefined term, "publicly posted" should be viewed and practiced consistently in the interest of corporate transparency and common sense. A written posting procedure should be in place. Single-point posting is rarely adequate. The typical combination is website, campus newspaper/newsletter, and prominent bulletin board postings.

Special meetings¹¹ may be called at any time by the board or a subboard presiding officer, or by a majority of board or subboard members. Special meeting calls/notices must be delivered personally or in writing by mail: (1) to each board or subboard member and to any medium or other party to be directly affected by a meeting; or (2) to any person having requested meeting written notice. Special meeting notice (including time, place and business to be transacted) shall be delivered at least 24 hours before the meeting. Only the business stated in the notice may be conducted at the special meeting. A waiver-of-notice provision is included in Section 89922.

Note carefully that there are two distinct meeting notice requirements: the § 89922 24-hour *special meeting call/notice* requirement (for notice to board/subboard members); and the § 89924 one-

⁷ The term "subboard" is an unfortunate and undefined term used through the Seymour Act. A reasonable interpretation: any committee established by the governing board charged with acting on behalf of the board, or overseeing specified organization affairs (with or without delegated decision-making authority).

⁸ Ed Code § 89920.

⁹ *Id.* at § 89921 allows such regular meeting schedules to be established by resolution, bylaws or conduct-of-meeting rule.

¹⁰ *Id.* at § 89924. This *public posting* requirement applies to both regular and special meetings when *action* on any item is to be considered by the board or a subboard. The term "one week" is not defined. Meeting conduct rules or procedures should include a consistent definition of this term.

¹¹ *Id.* at § 89922.

week *publicly-posted* notice rule (notice to the public) for any meeting where action is to be taken. Do not confound, confuse or misapply the 24-hour notice requirement to meetings requiring the one-week notice rule.¹²

III. Meeting by Teleconference

Meetings by teleconference for auxiliary governing boards and subboards under the Seymour Act must take a statutory crosswalk to the NPBCL in the California Corporations Code. The use of conference telephone, electronic video screen communication, or electronic communications constitutes participant presence under specified conditions.

Meeting notice requirements (see Section II above) under the Seymour Act remain the same, except that if all board or subboard members will be teleconferencing for the meeting without a physical meeting location, then special arrangements must be made for the *call-notice* recipients and the public to have access to the teleconference line or electronic communication mode. An accessible physical location for the public to tie into the meeting may be an option. All meeting-by-teleconference notices should detail necessary information to access the meeting.

Advance planning for teleconferencing should include the meeting site reservations and public access, equipment testing, control connections and settings, access codes, and lines/circuits to be utilized.

Corporations Code § 5211(a)(6) sets out the parameters for valid participation in a meeting-by-teleconference. This is an NPBCL default provision, meaning unless the organization's Articles of Incorporation or Bylaws specifically opts out, it applies to such a meeting method.¹³

Valid Participation by Conference Telephone or Electronic Video Screen Communication: All participating board or subboard members are able to hear one another.

Valid Participation through use of Electronic Transmission by and to the Organization (other than the above): both the following apply:

- Each member-participant by this method can communicate with all of the other member-participants; and
- Each such member-participant has been provided the means to engage in all matters before the board or subboard, including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the organization.

¹² Unlike the Romero Act (at § 89306.5(c)), the *Seymour Act* has no emergency meeting notice exception to the one-week posting requirement.

¹³ It is now common for auxiliary organization Bylaws to include by citation, summary or restatement the provisions of § 5211(a)(6).

The meeting's presiding official should, when convening the meeting: advise all member-participants of the applicable valid participant requirements; ascertain by roll-call or other means that each member-participant can fully engage in meeting matters; and monitor participation to confirm participation validity.

Minutes of a meeting-by-teleconference should include a brief description of the communication means used by each teleconferencing member-participant, the notice given by the presiding official concerning the participant means being utilized, and a statement confirming whether or not all teleconferencing member-participants were valid over the course of the meeting.

IV. NPBL Corporate Emergency Powers

Again, in the absence of Seymour Act coverage (silence) on the subject of emergency meetings and decision-making, auxiliary governing boards and subboards may take a statutory cross-walk over to the NPBL.

Corporations Code Section 5140(n) is, like the teleconferencing authority, a default feature of the law that the Articles or Bylaws may include, opt out of, or limit. A common feature of auxiliary organization Bylaws is the authority of this provision stated by citation, summary or as a restatement.¹⁴

The Section 5140(n) emergency powers framework defines "emergency" in narrow event or circumstance terms that, as a result of and during which, the corporation's board cannot be readily convened for action:¹⁵

- A natural catastrophe, including, but not limited to, a hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought, or regardless of cause, any fire, flood, or explosion;
- An attack on the state or nation by an enemy of the United State of America, or upon receipt by the State of California of a warning from the federal government indicating that an enemy attack is probable or imminent;
- An act of terrorism or other manmade disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the infrastructure, environment, economy, government functions, or population, including, but not limited to, mass evacuations; or
- A state of emergency proclaimed by a governor or by the President.

The organization's powers and limitations as a corporate entity are expressed in Section 5140. Except for any limitations that may be set out in the Articles of Incorporation or Bylaws, the

¹⁴ The statutory default provisions should be included in or altered through the Bylaws. See Corporations Code § 5151(g).

¹⁵ Corporations Code § 5140(n)(5)(A-D).

Nonprofit Corporation Law, or any other applicable laws,¹⁶ the organization has all of the powers of a natural person, including, without limitation, enumerated in Section 5140(a) through (n).

Section 5140(n)(1)(A-B) provides, in summary, that an organization can take either or both of the following actions necessary to conduct ordinary business operations and affairs in *anticipation of or during an emergency*:

- Modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent resulting from the emergency.
- Relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

In *anticipation of or during an emergency*, the organization's governing body may not take any action that is not in the course of ordinary business, unless the board (and university, presumably) approval was obtained prior to the emergency. See Section 5140(n)(3).

Section 5140(n)(2) authorizes the organization to take either or both of the following actions *during an emergency* as necessary to conduct ordinary business operations and affairs:¹⁷

- Give notice to a board director or directors in any practical manner under the circumstances, including, but not limited to, by publication and radio, when a board meeting notice cannot be given in the manner prescribed in the Bylaws (restating the Seymour Act requirements).
- Deem that one or more corporate officers present at an emergency meeting is a board director, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum for that meeting.

Section 5140(n)(4) provides that any actions taken in good faith *in anticipation of or during an emergency* under the 5140(n) framework bind the organization and may not be used to impose liability on a corporate director, officer, employee, or agent.

An auxiliary organization response *in anticipation of or during an emergency* will necessitate governing board involvement. A board takes action as a deliberative body, and even in an emergency situation, how and what the board decides should follow a common pattern: set an agenda and meeting day, time and place; send the meeting call-notice; notify the public; convene and hold the meeting; take any action; document meeting results; oversee action taken.

¹⁶ Whether any Seymour Act requirements should be viewed as limitations on the application of § 5140(n) for emergency meetings is a matter best taken up with legal counsel in relation to the restriction obviated.

¹⁷ Corporations Code § 5140(n)(2)(A-B). Organization Bylaws may provide for emergency meeting notice procedures, quorum requirements, and designation of additional or substitute directors (§ 5151(g)).

V. Board Emergency Meetings and Actions

Setting the Agenda and Meeting Parameters. A simple (and abbreviated) agenda-setting process should either be in place or established between key staff and the board chair. A fast-moving emergency may require that agenda items be expressed in more general terms than usual, and foreclose comprehensive documentation when the agenda is sent with the meeting call-notice.

If appropriate delegated authority is in place and the board is not being asked to take any immediate formal actions, consider one or more written progress reports distributed to board members by the most expeditious means, and/or simply contacting board members individually with the information. Staff should document how such reports were given to the board, and take management actions to notify, as appropriate, organization employees, customers, clients, etc.

Board action may be required to reset officer and committee duties or lines of authority. For example, an Executive Committee's delegated authority during the emergency may need to be expanded (consider such action as a Bylaws provision well before an emergency). Other committee responsibilities may need to be suspended and reorganized under the board or management.

Meeting Call-Notice Arrangements. Normal meeting call-notices to board members and others may not be practical or permitted in an emergency. Alternative communication methods should be devised, tested if feasible, and used until regular means are available. Call-notices should ask for confirmations (of receipt and attendance). At some reasonable point, document the method(s) used and why they were used. [A pre-planned approach would be Bylaws provisions extending the terms "written" and "in writing to electronic transmission, and allowing for noticing thereby.]"¹⁸

The meeting venue and time details may need to be stated in alternative terms if emergency conditions are apt to change rapidly.

Public Notice Arrangements. The physical public posting of an emergency meeting may not be practical or permitted. Physical postings should include a statement describing where meeting information can be obtained if physical posting locations are closed. For example, the organization may set up a special page on the website where all essential information, including meetings, during the emergency is posted.

Meeting Venue. A meeting location can be disrupted by fast-paced emergency conditions. Be prepared to quickly reconvene to a pre-arranged alternative site; or to adjourn to a teleconference or other electronic-platform mode at a determined time, day, and access means. Confirm that a quorum would remain at the alternate schedule. Recording and teleconferencing equipment should be tested beforehand. Each member or other key meeting participant should plan ahead for an alternative participation method.

¹⁸ *Id.* at § 20 and § 5211(a)(2).

Convening Emergency Meetings. The meeting's presiding officer should open the meeting on time; verify that recording equipment is on and adjusted; make appropriate convening remarks about the nature of the emergency; have a roll-call taken (and confirm valid participation by any teleconferencing members or others) and state for the minutes that a quorum is present; address any agenda changes; and, confirm that all members have in hand the distributed agenda material.

Board Emergency Actions. Do not use corporate actions during an emergency to circumvent the law, regulations, or duties/obligations unrelated to the emergency, or to go beyond the business requirements of the organization because of the circumstances.

Actions taken should be well conceived, clearly and concisely stated, and conditioned upon the situation known at the time. Appropriate delegations of authority may be necessary to allow for evolving conditions bearing upon the reasons for the action. Include appropriate follow-up reporting requirements.

In protracted emergency, the Board may consider the delegation of a range-of-authority to a specified committee and/or CEO, with clear parameters, and a reporting and feedback/challenge process.

Documenting & Announcing Actions. Emergencies take a toll on paperwork. Yet, after-emergency debriefings often rely on contemporary records to aid recollections. If actions will impact employees, customers, clients or the public, have a plan for and carry out prompt announcements of actions taken and why.

Post-Meeting Oversight. The board should be specific about who has supervision (and any delegated authority) over emergency actions decided by the board. Oversight may be retained by the board, delegated to an officer, or assigned to a subboard.

VI. Board Action Without a Meeting?

What if a grave emergency situation comes to this: It is impossible or prohibited for the Board of Directors to convene the members as a body – even by teleconference -- to take crucial action(s) in direct response to the situation?

Again, the Seymour Act does not address board or subboard action without a meeting in an emergency. What is explicit are the provisions requiring:

- The conduct of business in public meetings (with exceptions relating to closed sessions);¹⁹
- Action on any issue be publicly posted for at least one week;²⁰ with
- Proper meeting call-notices.²¹

¹⁹ Education Code §§ 89920 and 89923.

²⁰ *Id.* at § 89924.

²¹ *Id.* at §§ 89921-22.

There is a statutory cross-walk on this issue to the NPBCL, but it should be approached with caution and in consultation with legal counsel. Corporations Code Section 5211(b) provides that an action required or permitted to be taken by the board (and subboards)²² may be taken without a meeting by *written consent* under specific limitations and strict procedures:

- Requires the approval of all board members;
- The consenting board members must constitute a quorum;²³
- Consent must be in writing signed by each director;²⁴ and
- Consent forms must be filed with the minutes of the proceedings.²⁵

A consent means a director is voting to approve the proposed action(s) specified in the consent, and to do so without a meeting.

Action without a meeting is not a substitute for a regular or special meeting. Don't abuse this emergency recourse.

The board may consider a post-emergency special meeting to revisit the *written consent* action, and to confirm those steps by a formal vote.

VII. Conclusions

Use of corporate emergency powers to call an urgent board meeting or to act without a meeting requires close scrutiny of the statutory limitations, together with a high degree of prudent judgment and consultation. Hopefully, much of that can occur before, or at least in anticipation of an emergency, not during an emergency. A comprehensive Bylaws review would be an excellent step to be ready.

Yet, many quick-acting decisions may be required. The corporate interest in transparency and accountability should remain the prominent principals. The organization should take care to give reasonable public notice and provide ways for the board to meet under public scrutiny.

This *Issue Brief* is provided to AOA member-organizations in support of authorized functions as auxiliary organizations in good standing, and is not intended to address the specific circumstances of any particular entity, transaction, relationship, individual, or circumstance. It should not be relied upon as legal advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required. 4/4/2020

²² Corporations Code § 5211(d).

²³ This requirement does not apply if the consent is for the purpose of filling a board vacancy.

²⁴ The consent may be in the form of one or more written documents, including in facsimile, telegraphic or electronic form. See Corporations Code § 5079.

²⁵ A required consent-to-act is effective on the date the last signed form is obtained; but effective action date can be a different, even earlier date.