

KEY MASSACHUSETTS LEGISLATION AND ADMINISTRATIVE GUIDANCE TO HELP MASSACHUSETTS NONPROFITS NAVIGATE THE PANDEMIC

Massachusetts nonprofit organizations should take note of three actions taken by Massachusetts governmental bodies in April 2020 to assist them in operating during the current COVID-19 pandemic and beyond. These actions are:

- **Legislation signed by Governor Baker** [see Section 16 of the legislation] on April 3, 2020 that temporarily provides relief to members and directors of Massachusetts nonprofit corporations who need to meet remotely and, sometimes, urgently
- Compliance relief provided by the Massachusetts Attorney General's office on April 22, 2020 in the form of extended deadlines and electronic submissions
- **Guidance issued by the Attorney General's office** issued on April 28, 2020 to aid charitable organizations considering the appropriate use of endowment funds at this time

FACILITATION OF REMOTE AND TIMELY MEETINGS

Prior to this legislation, unlike meetings of nonprofit boards of directors, meetings of members of nonprofit corporations organized under Chapter 180 of the Massachusetts General Laws were permitted to be held only in person.¹ Members could vote by proxy, but not if proxy voting was prohibited by a nonprofit corporation's governing documents. For a temporary period, a Massachusetts nonprofit corporation may now conduct meetings of its members remotely and members may vote by proxy regardless of what is stated in their bylaws, as long as the organization's articles of organization (sometimes referred to as a charter) do not prohibit such actions. In implementing these measures, a corporation must take reasonable measures to (a) verify that each person present is, in fact, a member and (b) allow for concurrent participation during the meeting. And, in determining whether a quorum is present, members voting by proxy count toward achieving a quorum.

This legislation also provides relief for boards of directors of nonprofit organizations. For the temporary period specified in the legislation,

1. A Massachusetts nonprofit corporation may be formed with or without members. A review of an organization's articles of organization and bylaws will allow a Massachusetts nonprofit organization to determine whether it has members or not. If a nonprofit organization has members, typically the members are responsible for electing board members, approving fundamental transactions, and sometimes, approving an organization's budget, often at an annual meeting.



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regardless of what is contained in an organization's bylaws, directors have the authority to:

- Provide notice of a board meeting only to those directors it is practicable to reach in any practicable manner
- Cancel a member meeting by using any practicable manner to give notice of such cancellation
- Allow director and officer terms to continue beyond their normal period of expiration until a successor is elected, appointed, or designated
- Appoint a successor to any officer or director position
- Allow directors to participate in remote meetings as long as directors may communicate simultaneously (many nonprofit organization's bylaws already permit remote meetings)
- Relocate the corporation's principal office
- Deem that directors present at any meeting that takes advantages of the relaxed provisions in this legislation constitutes a quorum for a meeting, provided that the organization's members (if the organization has members) must be informed of the action taken at the meeting

This relief is in effect for the duration of the state of emergency declared by Governor Baker on March 10, 2020, plus an additional 60 days. For example, if the state of emergency declaration is lifted on August 31, 2020, this law remains in effect until October 30, 2020. This temporary law acknowledges that certain procedural requirements may be impracticable and impede a nonprofit organization's ability to function effectively during the disruption and dislocation of the COVID-19 pandemic, but the legislature was not prepared to make these changes permanent at this time.

MODIFICATION OF COMPLIANCE REQUIREMENTS FOR ATTORNEY GENERAL FILINGS

Most charitable organization formed in Massachusetts or operating in Massachusetts must file Form PC annually with the Non-Profit Organizations/Public Charities Division of the Attorney General's office (the "Division"). This filing is due four and a half months after the close of the charitable organization's fiscal year. Citing the widespread disruptions due to the COVID-19 pandemic, the Division announced that it is extending by six months the filing deadlines for all required filings for fiscal year 2019². As long as the charitable organization is registered and in compliance with its reporting requirements with the Division, the extension is automatically granted, with no written request required. By way of example, the Division explained:

*A public charity with a fiscal year end date of June 30, 2019 would normally file its annual charities filings on November 15, 2019. If it had obtained a six-month extension, its filing would be due May 15, 2020. With this **COVID-19-related announcement**, that public charity's annual filing will now be due on November 15, 2020.*

Required payments owed with these filings also are extended, but must be made electronically during this time [here](#). Checks will not be accepted.

Also aimed at assisting the sector in operating remotely, the Division announced that it has relaxed any original signature requirement for its filings, except for signatures required on Forms 11A and 11B (Professional Fundraiser filings), and Form 9 (Surety Bond). Where a signature is required, the Division at this time will accept original signatures, photocopies of signatures, and e-signatures, including signatures via DocuSign.

2. See our advisory, [Updated: Deferring Tax Filings and Payments Amid COVID-19 Emergency](#), for a summary of the extensions granted by the federal government.

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The following filings are being processed via email only at the following addresses:

- Initial charities registrations must be submitted to CharitiesFilings@mass.gov
- Courtesy copies of dissolution petitions must be submitted to charities@mass.gov
- Required notices of proposed transfers of charitable assets must be submitted to charities@mass.gov
- Probate notices and related materials must be submitted to CharitiesProbate@mass.gov

ENDOWMENT GUIDANCE

The Non-Profit Organizations/Public Charities Division of the Attorney General's office oversees the administration of endowment funds and other charitable assets held throughout the Commonwealth. In its recently published guidance, the Division recognizes that this crisis has deeply affected the charitable institutions across many nonprofit sectors. Acknowledging that many charities may need to consider extraordinary measures in order to survive and continue to serve their charitable missions, the Division has provided guidelines to public charities examining their endowments as a potential option for addressing financial challenges. By design, endowment funds are not readily available for discretionary spending and charities need to be mindful of the restrictions in place with respect to the use of endowment funds.

What Are Endowment Funds?

Generally speaking, endowment funds are donor-restricted funds that are intended to be invested and maintained over time to sustain charities and allow them to carry out their missions perpetually. Most charities in Massachusetts that hold funds with donor-imposed restrictions are subject to the Uniform Prudent Management of Institutional Funds Act (UPMIFA).³ Under UPMIFA, endowment funds have three characteristics:

1. They are held exclusively for charitable purposes;
2. They cannot be spent by the charity all at once; and
3. The restrictions on the funds are imposed by donors either through a gift agreement or impliedly through a response to fundraising solicitations.

HOW CAN DONOR RESTRICTIONS ON ENDOWMENT FUNDS BE MODIFIED?

Only the original donor or a court has the power to modify a donor's restriction placed on charitable funds, other than for certain small endowments described below. In the case of a court action, the Attorney General must be named as a defendant in order to represent the intended charitable interests. If a charity reaches the point where it determines it must seek a court order to modify restrictions on funds or to borrow against endowment funds, the charity should obtain legal counsel and approach the Division to discuss the circumstances warranting the court petition, prior to making such a filing. The Division will review the circumstances surrounding the intended court action prior to deciding whether or not to assent to the charity's petition. As a necessary party to any petition, the Attorney General's assent (or lack thereof) is a material consideration for the court.

Donor-restricted funds are distinguished from board-restricted funds. If charitable funds are subject to use restrictions that are imposed by the organization's governing body, a court order is not needed to lift these restrictions. They can be modified or removed by a vote of the governing body pursuant to the organization's internal procedures.

Are There Options to Consider Other Than Going to Court?

Yes. There are several options a charity should pursue before seeking to access donor-restricted funds. In general, charities should first explore other potential sources of funding; approach donors (if still living or, if

3. M.G.L. c. 180A, §§ 1-9

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a foundation or other entity, if still in existence) to request a modification or release of the restriction; or consider an increase to the organization's endowment spending rate in accordance with UPMIFA. The Division's guidance lists as common alternative or additional funding sources:

- Additional fundraising for unrestricted funds
- Federal or state funding, such as aid provided in various forms through the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Small Business Recovery Loan Fund, or Economic Injury Disaster Loan Program
- Grant funding through COVID-19 relief funds or foundations
- Financing or refinancing through commercial banks

If an endowment fund is less than \$75,000 and has been in existence for 20 years or more, the Attorney General has the authority to release these restrictions without court involvement. Previously published guidance by the Division on this process can be found [here](#).

Accessing donor-restricted endowment funds in a crisis raises many potential legal issues. Charities should make sure to assess all other options before heading down this path.

THIS ADVISORY WAS PREPARED BY JULIA SATTI COSENTINO AND MELISSA SAMPSON MCMORROW IN NUTTER'S NONPROFIT AND SOCIAL IMPACT PRACTICE GROUP. IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT JULIA, MELISSA, OR YOUR NUTTER ATTORNEY AT 617.439.2000.

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