

# CONSENT IN LIEU IN THE ELECTRONIC AGE: A TENNESSEE PRACTITIONER'S GUIDE TO ACTION WITHOUT MEETING VIA ELECTRONIC TRANSMISSION

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## I. INTRODUCTION AND BACKGROUND

This article seeks to serve Tennessee practitioners with a best practices guide on the topic of corporate action taken without a board of directors meeting for business and nonprofit corporations via electronic transmission.<sup>2</sup> The first section provides an explanation of the statutory provisions that govern this type of action. The next section discusses various electronic mediums for conducting action without a meeting, including emails, online forums, and unanimous written consent with E-Sign as governed by the Tennessee Uniform Electronic Transactions Act. This article also discusses record keeping as required by Tennessee law. As with any action taken online, some risk of fraud or mistake is unavoidable. This article discusses some suggestions to minimize risk for both the small startup nonprofit to a larger for-profit business corporation. This article concludes with sample documentation of electronic or digital consent in lieu of a meeting procedure.

The annual meeting of shareholders or members helps to serve the important function of managing a corporation.<sup>3</sup> As such meetings

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<sup>2</sup> This article covers law applicable to Tennessee corporations that are not publicly held. Any additional record keeping or regulatory requirements for publicly held corporations are beyond its scope.

<sup>3</sup> *Hoschett v. TSI Int'l Software*, 683 A.2d 43, 45 (Del. Ch. 1996). In having an annual meeting, shareholders are able to bring important matters before the governing body of a corporation that apply to both the management of the corporation as well as issues of "corporate democracy." *Id.* at 45-46. Though this case was decided in Delaware, and as such is not controlling law in Tennessee, a challenge to the validity of mandatory annual meetings has yet to be brought before a Tennessee Court.

are required by law,<sup>4</sup> “something said [at such meetings] may matter.”<sup>5</sup> Under Tennessee law, the chair shall preside over the annual meeting and establish rules for the meeting, unless the bylaws provide otherwise, in which case the board performs those duties.<sup>6</sup> Shareholder voting during a meeting takes place during and ends when the meeting is concluded.<sup>7</sup> No shareholder vote can be accepted after the meeting ends.<sup>8</sup>

A quorum, a majority of voting shareholders, is required for a vote to be effective on matters that do not concern the election of directors.<sup>9</sup> The election of directors only requires “a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present” unless the charter is amended otherwise.<sup>10</sup> But even if there is a quorum of shareholders, the directors of a corporation manage the business and affairs<sup>11</sup> so shareholders vote on only a few matters comparatively.<sup>12</sup>

Even if a corporation is incorporated in Tennessee, state law does not require that all shareholders reside within the state.<sup>13</sup> By

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<sup>4</sup> TENN. CODE ANN. §§ 48-17-101(a) (2013), -57-101(a) (2015).

<sup>5</sup> *Hoschett*, 683 A.2d at 46.

<sup>6</sup> TENN. CODE ANN. § 48-17-110 (2013).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> § 48-17-206(a), (e).

<sup>10</sup> § 48-17-209. Members voting for directors of a nonprofit corporation only requires a plurality as well. § 48-57-206.

<sup>11</sup> §§ 48-18-101, 48-58-101.

<sup>12</sup> Shareholders can vote on the election of directors and approval of charter or bylaw amendments, mergers, sales of substantially all of the corporation's assets, and voluntary dissolution. *See* §§ TENN. CODE ANN. § 48-13-102, -18-104, -22-102, -24-102. A corporation can amend its charter or bylaws to include more actions that require a shareholder vote where permitted by statute. § 48-11-202(j). The members of a nonprofit have comparable matters to vote on as provided under: §§ 48-51-202, -53-102, -58-104, -62-102, -64-102.

allowing for action to take place electronically, a shareholder can vote anywhere with Internet access. This removes the need for a shareholder or a member to be anchored to a physical mailing address or have an operable fax line. Both can be costly and inefficient options for a shareholder or member with other obligations. Email by far is the most convenient and efficient option for taking shareholder action without meeting.<sup>14</sup> Because email is readily accessible to most business people, there is a possibility that shareholder or members have already been taking corporate action through electronic transmissions without any regard to statutory requirements or the potential for later litigation challenging the action taken.<sup>15</sup> Email is easy to use and much quicker than postal mail,<sup>16</sup> and while a physical fax machine may be quicker than postal mail, fax use has declined significantly in recent years.<sup>17</sup>

One method for making annual shareholder or member meetings more efficient would be to cease mandating annual meetings.<sup>18</sup>

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<sup>13</sup> § 48-11-201(41). A shareholder is simply someone “in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.” *Id.* For purposes of a nonprofit organization, members are not required to be residents of the state of incorporation of the nonprofit corporation. Under Tennessee Law, a member is “any person who on more than one occasion, pursuant to a provision of a corporation's charter or bylaws, has the right to vote for the election or appointment of a director or directors.” § 48-51-201(29)(A).

<sup>14</sup> Jason Spainhour, *Effective E-mail Communication in the Workplace*, Corporate Strategies by Skillpath, Feb. 15, 2012, <https://www.skillpath.com/on-site-blog/post.cfm/effective-email-communication-in-the-workplace>.

<sup>15</sup> See generally Leah Cohen Chatinover, *Email Voting: A Practical Approach to a Difficult Trap*, BUSINESS LAW TODAY, Jun. 2014. Chatinover's article does not speak to the issues of shareholder email voting, but focuses on the problems that director email voting can cause.

<sup>16</sup> Spainhour, *supra* note 14.

<sup>17</sup> Robert C. Thurston, *The Total Solo: By Tossing Out Time Wasters in Your Day You'll Assure a Smooth Running Practice*, THE PHILADELPHIA LAWYER, 12, 12 (Fall 2010). Physical fax machines are outdated. Now a lawyer or a corporation can use a service like eFax which sends faxes directly to from an email system. This only furthers the argument that email is the most efficient means for conducting business. *Id.*

<sup>18</sup> See generally William K. Sjostrom, *The Case Against Mandatory Annual Director Elections and Shareholder's Meetings*, 74 TENN. L. REV 199 (2007). In fact, Minnesota and North

However, this approach has not been adopted in Tennessee law for either business or nonprofit corporations.<sup>19</sup> As such, an efficient way to conduct business would be to take action without meeting via consent by electronic transmission.

## II. STATUTORY PROVISIONS

In 2013, the Tennessee legislature amended multiple provisions of the Tennessee Business Corporations Act (“TBCA”),<sup>20</sup> allowing shareholders to conduct action without meeting via electronic transmission.<sup>21</sup> Shortly thereafter, in 2015, the legislature amended multiple provisions of the Tennessee Nonprofit Corporations Act (“TNCA”),<sup>22</sup> granting members the ability to conduct action without meeting via electronic transmission.<sup>23</sup>

### A. *Electronic Transmissions*

What is an “electronic transmission”? Both the TBCA and the TNCA definition state that any form of communication that does not involve a physical medium qualifies as an “electronic transmission.”<sup>24</sup> However, that electronic transmission must be “suitable” for its purpose

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Dakota have made shareholder meetings optional for non exchange-listed corporations. MINN. STAT. ANN. § 302A.431 (2008); N.D. CENT. CODE § 10-19.1-17 (2009).

<sup>19</sup> TENN. CODE ANN. §§ 48-17-101(a) (2013), § 48-57-101(a) (2015). However, the TBCA does allow for a “virtual” annual meeting that can happen via “...any means of communication by which all shareholders participating may simultaneously hear each other during the meeting. A shareholder who participates in a meeting by this means is deemed to be present in person at the meeting. § 48-17-109. This is only available to for-profit corporations, as there is no provision in the TNCA that allows this kind of meeting.

<sup>20</sup> The Tennessee Business Corporations Act is codified from sections 48-11-101 to 48-27-103 of the Tennessee Code Annotated.

<sup>21</sup> 2012 Tenn. Pub. Acts 1051, § 24(h). See Trevor McElhaney, *2013 Revisions to the Tennessee Business Corporations Act*, 14 TRANSACTIONS 39 (2012).

<sup>22</sup> The Tennessee Nonprofit Corporations Act is codified from sections 48-51-101 to 48-69-123 of the Tennessee Code Annotated.

<sup>23</sup> 2014 Tenn. Pub. Acts 899, § 22(h).

<sup>24</sup> TENN. CODE ANN. §§ 48-11-201(14) (2013), -51-201(18) (2015).

and intended recipient<sup>25</sup> and capable of being retrieved in paper form through a “conventional commercial practice.”<sup>26</sup> To further illustrate the definition of electronic transmissions, a practitioner should look to the Tennessee Uniform Electronic Transactions Act (“TUETA”).<sup>27</sup> TUETA’s definition section helps to complete the explanation of what is required to be an electronic transmission.<sup>28</sup> The TUETA is particularly illuminative because it concerns all transmissions that are electronic, which includes electrical, digital, and wireless transmissions.<sup>29</sup>

For a nonprofit corporation incorporated in Tennessee, there is an additional format that a member can use to take action without meeting: action by written ballot.<sup>30</sup> Instead of using the phrase “electronic transmission,” the statute uses the term “electronic record.”<sup>31</sup> The TNCA defines an electronic record somewhat differently from an “electronic transmission,” but it does not include the language requiring that the communication is “suitable” for its purpose and intended recipient.<sup>32</sup> A nonprofit corporation under TNCA’s action by written

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<sup>25</sup> *Id.*

<sup>26</sup> §§ 48-11-201(14)(B), -51-201(18)(B).

<sup>27</sup> The Tennessee version of the Uniform Electronic Transactions Act is codified from sections 47-10-101 to 47-10-123 of the Tennessee Code Annotated.

<sup>28</sup> § 47-10-102.

<sup>29</sup> § 47-10-102(5) defines “electronic” as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.”

<sup>30</sup> TENN. CODE ANN. § 48-57-108 (2015). There is no action by written ballot provision in the TBCA. This kind of member action is only available to nonprofit corporations in Tennessee.

<sup>31</sup> *Id.*

<sup>32</sup> § 48-51-201(17). Under TNCA, an “electronic record” is “information that is stored in an electronic or other medium and is retrievable in paper form through an automated process used in conventional commercial practice.” *Id.* TUETA defines “electronic record” somewhat differently. Its broader definition includes “a record created, generated, sent, communicated, received, or stored by electronic means.” § 47-10-102(7). An email is created, communicated, and stored by electronic means and would qualify under the TNCA’s narrower definition. *Internet Message Format*, (OCT. 2008), <https://tools.ietf.org/html/rfc5322#section-3.6> § 3.6.1.

ballot provision does not have to require that the electronic record is electronic in all aspects.<sup>33</sup> Additionally, under TUETA, the bylaws or corporate charter can require that the record be stored in the physical corporate records, for example, if that better serves the corporation.<sup>34</sup>

The shareholders<sup>35</sup> of a business corporation must consent to use electronic transmissions as a method of conducting formal action before implementing this procedure.<sup>36</sup> Similarly, in a nonprofit corporation, the members<sup>37</sup> must consent to the use of electronic transmission.<sup>38</sup> To do so, both types of corporations must amend their corporate charters or bylaws to allow for this kind of action.<sup>39</sup> The method that the corporation chooses to use is not limited to certain forms of electronic transmission; instead, any transmission can qualify as long as it is suitable for its purpose and recipient.<sup>40</sup>

Although the definition of “electronic transmission” includes the requirement of being capable of being retrieved in a physical form, there is an exception to this definition if both the sender and receiver have consented in writing to allow for use of a form that exists solely in

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<sup>33</sup> § 48-51-201(17).

<sup>34</sup> § 47-10-105.

<sup>35</sup> § 48-11-201(41). A “shareholder” is “the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.”

<sup>36</sup> TENN. CODE ANN. § 48-11-202(d) (2013). Section VII of this article provides sample bylaw language that corporations can use to allow for this type of action.

<sup>37</sup> § 48-51-201(29)(A). A “member” is “without regard to what a person is called in the charter or bylaws, any person who on more than one occasion, pursuant to a provision of a corporation’s charter or bylaws, has the right to vote for the election or appointment of a director or director.” *Id.*

<sup>38</sup> § 48-51-202(f).

<sup>39</sup> §§ 48-17-104(b), -57-104(b). By amending the corporate charter to allow for action via electronic transmission, it is possible to “conduct [the corporation’s] annual election of directors through shareholder consent process,” therefore “the requirement to conduct an annual...meeting is eliminated entirely.” McElhaney, *supra* note 21, at 44.

<sup>40</sup> §§ 48-11-201(14), -51-201(18). Different methods are discussed later in this article in Section III.

electronic form.<sup>41</sup> It is, therefore, prudent that language in the corporate charter, bylaws, or any amendments to either document designate the method of transmission and whether the requirement of a retrievable physical form has been waived.

Absent an agreement between the sender and recipient stating otherwise, an electronic transmission is deemed “received” when it enters the recipient’s designated “information processing system” and is in a “form capable of being processed by that system.”<sup>42</sup> “Information processing system” is not a defined term within the TBCA or the TNCA, but the TUETA does define the term broadly to include any system used for “creating, generating, sending, receiving, storing, displaying, or processing information.”<sup>43</sup> A shareholder or member, the sender, could use an email server or online forum as an information processing system to send a vote to the designated corporate officer, the recipient.<sup>44</sup>

Sometimes there is an issue of a “lost” shareholder<sup>45</sup> when an electronic transmission is used to send out requests for a vote, which leads to less than unanimous consent to the proposed action. The TBCA sets out a procedure for this situation.<sup>46</sup> If an action passes with less than unanimous consent, the corporation must give non-consenting

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<sup>41</sup> §§ 48-11-202(j), -51-202(f). Like with most other provisions, shareholders in a business corporation or members in a nonprofit corporation can amend the corporate bylaws where permitted by statute.

<sup>42</sup> TENN. CODE ANN. §§ 48-11-202(f) (2013), -51-202(h) (2015). In other words, the “mailbox rule” of traditional contract law does not apply to consent in lieu actions.

<sup>43</sup> § 47-10-102(11).

<sup>44</sup> Even if a shareholder or member follows the appropriate procedure to take action via electronic transmission, it is important to note that this “does not establish that the content sent corresponds to the content received.” §§ 48-11-202(g), -51-202(i). Further discussion on cybersecurity is in Section V of this article.

<sup>45</sup> After two consecutive attempts to give notice about the annual meeting to the shareholder at a registered address with no response, the shareholder waives notice of later actions of the corporation. § 48-26-106. Similarly, after two consecutive attempts to give notice of annual meetings a member return undelivered, the member has waived notice. § 48-66-106.

<sup>46</sup> § 48-17-104(f). The TNCA also establishes a procedure for this situation under section 48-57-104(f).

voting shareholders notice of the action to be taken no later than ten days after the corporation receives a sufficient number of consenting votes to the action.<sup>47</sup> This notice should also include an adequate description of the action to be taken by the corporation.<sup>48</sup> Similarly, the TNCA also provides that if the consenting votes to an action are less than unanimous, the corporation must provide non-consenting members with notice of the action, including an adequate description of the action, no later than ten days after the corporation has received sufficient consents to the action.<sup>49</sup>

Once the shareholder or member has voted on the action, the electronic transmission should be sent to the designated officer.<sup>50</sup> If the bylaws or charter does not state otherwise, the designated officer is the corporation's agent or the corporation's secretary.<sup>51</sup> The registered agent receives the vote at the registered office—i.e., the secretary at the corporation's principal office.<sup>52</sup> The designated officer is deemed to have received the vote when it enters the officer's email inbox.<sup>53</sup>

#### B. *The Action Without Meeting via Electronic Transmission Provision*

Though the statutory language concerning this action is similar when comparing the action without meeting provisions in the Tennessee

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<sup>47</sup> § 48-17-104(f)(1)(A). Subsection (B) also allows for a business corporation to provide notice as set out in its charter or bylaws. *Id.* at 104(f)(1)(B). An electronic transmission is deemed received even if no one “is aware of its receipt” under TENN. CODE ANN. §§ 48-11-202(h), -51-202(j) (2015). Sufficient notice of action consented to by a less than unanimous vote could be sent to the registered email address of a shareholder or member even if they did not vote on the matter or even received the ballot.

<sup>48</sup> §§ 48-17-104(f)(2), -57-104(f).

<sup>49</sup> TENN. CODE ANN. § 48-17-104(f) (2015). If the TNCA or the nonprofit corporation's bylaws require additional notice to non-consenting members, that notice must be sent at least ten days before the corporation takes the action. § 48-57-104(e).

<sup>50</sup> §§ 48-17-104(i), -57-104(i).

<sup>51</sup> §§ 48-17-104(i), -57-104(i).

<sup>52</sup> §§ 48-17-104(i), -57-104(i).

<sup>53</sup> § 47-10-115.

Business Corporations Act and the Tennessee Nonprofit Corporations Act, there are some important differences.<sup>54</sup>

The TBCA's provision allowing action without meeting via electronic transmission is codified at section 48-17-104 and states that:

An electronic transmission may be used to consent to an action, if the electronic transmission contains or is accompanied by information from which the corporation can determine the date on which the electronic transmission was signed and that the electronic transmission was authorized by the shareholder, the shareholder's agent, or the shareholder's attorney-in-fact.<sup>55</sup>

Similar to the language the TBCA's "Action without Meeting" provision, the TNCA's "Action by Written Consent" provision, currently codified at section 48-57-104, requires a timestamp and verification.<sup>56</sup> The only language that is different from this specific TBCA provision is the TNCA provision requiring the authorization of a member instead of a shareholder.<sup>57</sup> Otherwise, the language is verbatim.<sup>58</sup>

To more easily illustrate the similarities and differences, the chart below compares the statutory requirements for a business and a nonprofit corporation's action via electronic transmission to be valid under Tennessee law.

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<sup>54</sup> TENN. CODE ANN. §§ 48-17-104(h) (2013), -57-104(h) (2015).

<sup>55</sup> § 48-17-104(h).

<sup>56</sup> § 48-57-104(h).

<sup>57</sup> §§ 48-17-104(h), -57-104(h).

<sup>58</sup> "An electronic transmission may be used to consent to an action, if the electronic transmission contains or is accompanied by information from which the corporation can determine the date on which the electronic transmission was signed and that the electronic transmission was authorized by the *member*, the *member's* agent, or the *member's* attorney-in-fact." § 48-57-104(h). (emphasis added).

<b>Statute</b>	<b>Tenn. Code Ann. § 48-17-104(h)</b>	<b>Tenn. Code Ann. § 48-57-104(h)</b>
<b>Title of Statute</b>	“Action Without Meeting”	“Action By Written Consent”
<b>Authorized by...</b>	Shareholder, Shareholder’s Agent, or Shareholder’s attorney-in-fact <sup>58</sup>	Member, Member’s Agent, Member’s attorney-in-fact <sup>59</sup>
<b>Date Required</b>	Yes <sup>60</sup>	Yes <sup>61</sup>
<b>Number of Votes Required for Action to Be Taken</b>	Dependent upon the action to be taken; some actions require only a majority of shareholders entitled to vote on the action <sup>62</sup>	Dependent upon the action to be taken; some actions require only a majority of members entitled to vote on the action <sup>63</sup>
<b>Notice to Non-Voters</b>	Necessary if required by other provisions of the TBCA <sup>64</sup>	Necessary if required by other provisions of TNCA <sup>65</sup>
<b>Documents Need for Record Keeping</b>	- Written consent describing the action to be taken signed by each shareholder entitled to vote on the action - One (or more) additional documents that indicates each share holders vote or abstention <sup>66</sup>	- Written consent describing the action to be taken signed by each member entitled to vote on the action - One (or more) additional documents that indicates each share holders vote or abstention <sup>67</sup>
<b>Record Keeping</b>	Votes reflecting the action to be taken must be included in the minutes of the next meeting of the corporation or filed with corporate records <sup>68</sup>	Votes reflecting the action to be taken must be included in the minutes of the next meeting of the corporation or filed with corporate records <sup>69</sup>
<b>Notice to Non-Consenting Shareholders or Members</b>	Must be sent at least ten days before the corporation takes the action <sup>70</sup>	Must be sent at least ten days before the corporation takes the action <sup>71</sup>
<b>Effect of Vote</b>	The effect of a meeting	The effect of a meeting

	vote <sup>72</sup>	vote <sup>73</sup>
<b>Date of Effect of Action</b>	When sufficient consenting vote are delivered to corporation <sup>74</sup>	When sufficient consenting votes are delivered to corporation <sup>75</sup>
<b>Valid Delivery</b>	- registered agent at registered office or designated mailing address - secretary of corporation at principal office or designated mailing address <sup>76</sup>	- registered agent at registered office - secretary of corporation at principal office or designated mailing address <sup>77</sup>

<sup>58</sup> § 48-17-104(h). An electronic signature qualifies as information that verifies the shareholders vote as TUETA defines an electronic signature as an electronic “sound, symbol or process...executed or adopted by a person with the intent to sign the record.” Use of an electronic signature, as defined by TUETA in section 47-10-102(4), would qualify as information that the shareholder authorized the transmission. Examples of what electronic signatures and processes to use will be discussed later in this article in Section III.

<sup>59</sup> TENN. CODE ANN. § 48-57-104(h) (2015). Similar to the TBCA, as explained *supra* n. 58, an electronic signature, as defined in section 47-10-102(4), would qualify as information that the member authorized the transmission to comply with the TNCA’s requirements.

<sup>60</sup> § 48-17-104(h). Under TUETA, absent any agreement between the sender and receiver, an email is “sent” when it “enters an information processing system outside the control of the sender...or enters a region of information processing system...which is under the control of the recipient.” § 47-10-115(a)(3). In other words, an email is sent when “a user pushes the ‘send’ or ‘submit’ button in an application program,” such as Outlook or Gmail. Additionally, the corporation can fix the date that it wishes to record the votes, as set out in section 48-17-107.

<sup>61</sup> § 48-57-104(h). *See supra* note 60.

<sup>62</sup> § 48-17-104(a) uses the language “necessary to authorize such action” as “permitted by chapters 11-27” of the TBCA. Corporations can require more than the Act deems necessary by amending the bylaws or articles of incorporation, but a corporation may not amend the bylaws to only require less than is necessary under the TBCA.

<sup>63</sup> § 48-57-104(b) uses the same “necessary to authorize such action” language that the TBCA does; however, this statute refers to actions “permitted by chapters 51-68” of the TNCA. Similarly, nonprofit corporations can require more than the Act deems necessary by amending the bylaws or articles of incorporation of the Corporation, but may not amend the bylaws to require less.

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<sup>64</sup> § 48-17-104(e).

<sup>65</sup> TENN. CODE ANN. § 48-57-104(e) (2015).

<sup>66</sup> § 48-17-104(b).

<sup>67</sup> § 48-57-104(b).

<sup>68</sup> § 48-17-104(b). However, the corporation should designate method of record keeping that will be used in the bylaws for clarity.

<sup>69</sup> § 48-57-104(b). Though the TNCA provides two different methods of recording the votes, a nonprofit corporation may also have to satisfy requirements of other law when performing record keeping functions that are not covered by this Act alone.

<sup>70</sup> § 48-17-104(d), (f). If the corporation desires to require additional notice, the statute can be augmented with language in the corporation's bylaws. § 48-17-104(b).

<sup>71</sup> TENN. CODE ANN. § 48-57-104(f) (2015). *See supra* notes 44-49.

<sup>72</sup> § 48-17-104(d). Not only does it have the effect of a meeting vote, but also it can be referred to as such in any subsequent documents. *Id.*

<sup>73</sup> § 48-57-104(d). Similarly to the TBCA, the vote via electronic transmission can also be referred to as a meeting vote in any subsequent document. *Id.*

<sup>74</sup> § 48-17-104(d).

<sup>75</sup> § 48-57-104(d).

<sup>76</sup> § 48-17-104(i) allows for either the registered agent or the corporate secretary to set a designated mailing address for delivery if the United States postal service cannot deliver to either. However, this is not an issue when conducting action via electronic transmission, as the postal service does not deliver emails. Instead, the delivery should be sent to the registered agent or the corporate secretary, whichever is designated in the bylaws to be the registered email address.

<sup>77</sup> Section 48-57-104(i) allows for only the corporate secretary to set a designated mailing address for delivery if the United States postal service cannot deliver to either. This is more restrictive than the TBCA's delivery provision. However, this is still not an issue when conducting action via electronic transmission, as the postal service does not deliver emails. Instead, the delivery should be sent to the registered agent or the corporate secretary, whichever is designated in the bylaws to be the registered email address.

Similar to action by written consent, in the case of non-profit corporations, the TNCA also allows for an action by written ballot.<sup>79</sup> However, a corporation may choose to prohibit this kind of action by declaring so in the bylaws or charter of the corporation.<sup>80</sup> A ballot, concerning director elections, must be a document,<sup>81</sup> describe the action to be taken, provide the option to vote for a director,<sup>82</sup> and the ability to vote for, against, or abstain from a proposed action on the ballot.<sup>83</sup>

When asking members to vote upon an action by written ballot, the solicitation of the vote must indicate not only the deadline for returning the ballot, but also the number of responses needed to meet quorum.<sup>84</sup> This percentage of approval votes must also be stated in the solicitation for the vote when it is sent to members.<sup>85</sup> A ballot may not be revoked once it is delivered to the designated corporate official, unless there is a revocation procedure outlined in the bylaws.<sup>86</sup>

It is important to note that an action without a meeting via electronic transmission does not affect a shareholder's or a member's substantive voting rights. These provisions from the 2013 amendments to the TBCA and the 2015 amendments to the TNCA concern a new

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<sup>79</sup> TENN. CODE ANN. § 48-57-108 (2015). This can be used specifically for the purpose of election of directors. It is important to note that the TBCA does not contain any similar provision. *Id.*

<sup>80</sup> § 48-57-108(a).

<sup>81</sup> The definition of document in the TNCA permits the use of an "electronic record." § 48-51-201(14)(B).

<sup>82</sup> The proper options include "an opportunity to vote, or for withhold a vote for each candidate for election as a director." § 48-57-108(b)(3).

<sup>83</sup> § 48-57-108(b). If it is an action other than the election of directors, the ballot must describe the action to be voted on. *Id.*

<sup>84</sup> § 48-57-108(c), (d)(1), (d)(3).

<sup>85</sup> TENN. CODE ANN. § 48-57-108(d)(2) (2015). This only applies to votes on actions other than the election of directors. The bylaws of a corporation should state what percentages for each kind of action taken are needed. Like with other actions without meeting, these requirements can be made stricter by the language a corporation uses in its bylaws. *Id.*

<sup>86</sup> § 48-57-108(e).

procedure for shareholder voting and member voting respectively. When a corporation amends its charter to allow for action via electronic transmission it should provide “more flexibility by affording them the ability to forego the traditional requirement of a shareholders’ [or members’] meeting and having the capacity to streamline the process.”<sup>87</sup> These are procedural steps and do not affect the shareholders’ or members’ substantive rights.

### C. *Parallels to LLCs*

In 2005, the Tennessee General Assembly passed the Tennessee Revised Limited Liability Company Act (“TRLLCA”).<sup>88</sup> Applicable to LLCs formed after January 1, 2006, TRLLCA includes a provision allowing for members, managers, or directors of a limited liability company (“LLC”) to take action by written consent via electronic transmission.<sup>89</sup> TRLLCA deems consents via electronic transmission as “written and signed” by the member or manager.<sup>90</sup> Unlike the TBCA and the TNCA, there is no timestamp or verification requirement in the provision.<sup>91</sup> Instead, the members, managers, or directors may designate the appropriate procedure in the LLC’s operating agreement.<sup>92</sup>

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<sup>87</sup> McElhaney, *supra* note 21, at 45.

<sup>88</sup> 2005 Tenn. Pub. Acts 286. TRLLCA is codified from section 48-249-101 to section 48-249-1103 in the Tennessee Code Annotated. TRLLCA replaced the prior act, the 1994 Tennessee Limited Liability Act, which originally “endorsed the formation of LLCs” in Tennessee. See Erin Reagan, *Tennessee’s New Limited Liability Company Act: New Ways of Doing Business*, 73 TENN. L. REV. 267, 269 (2006).

<sup>89</sup> § 48-249-405(c)(2). Depending on the date of formation, LLCs in Tennessee are governed by either the 1994 LLC Act or TRLLCA. There is not a provision in TRLLCA that grandfathers in LLCs formed prior to January 1, 2006. However, the members of an LLC formed prior to 2006 can amend the operating agreement if they desire to be governed by TRLLCA. Reagan, *supra* note 88, at 273.

<sup>90</sup> § 48-249-405(c)(2).

<sup>91</sup> *Id.*

<sup>92</sup> § 48-249-405(b). “The LLC documents may set forth provisions relating to... any other matter with respect to the exercise of any such right to vote.” *Id.*

The provision allowing this type of action also includes definition of an “electronic transmission.”<sup>93</sup> However, the definition applies only to this provision of TRLLCA.<sup>94</sup> TRLLCA defines the term similarly to the TBCA and the TNCA, but does not include an ability to waive the requirement of reproduction in paper form.<sup>95</sup> The notice requirement for a less-than-unanimous vote also tracks the language of the TBCA and TNCA, as non-consenting members should be provided “prompt notice.”<sup>96</sup>

TRLLCA allows for a more “streamlined structure” of LLCs overall, especially with a provision allowing for this kind of action by written consent via electronic transmission.<sup>97</sup> TRLLCA included a provision allowing action by written consent via electronic transmission eight years prior to the TBCA amendments and ten years prior to the TNCA amendments, possibly because LLCs can accommodate both simpler establishments and more complex companies.<sup>98</sup>

### III. MODES OF VOTING

#### A. *Emails*

Business email can be an informal mode of communicating with someone.<sup>99</sup> However, because email’s efficiency and ubiquity, many

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<sup>93</sup> TENN. CODE ANN. § 48-249-405(c)(2) (2012).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* Under TRLLCA, an “electronic transmission” means “as “any form of communication not directly involving the physical transmission of paper that creates a record that may be retained, retrieved and reviewed by a recipient of the communication, and that may be directly reproduced in paper form by such a recipient through an automated process.” *Id.*

<sup>96</sup> § 48-249-405(c)(2). “[H]owever, . . . failure to give such notice shall not affect the validity of the action taken.” *Id.*

<sup>97</sup> Reagan, *supra* note 88, at 280.

<sup>98</sup> *Id.*

<sup>99</sup> Sue Shellenbarger, *This Embarrasses You and I\**, WALL STREET JOURNAL (Jun. 19, 2012),

areas of business use email as a means of conducting formal business.<sup>100</sup> Corporations in Tennessee, under the appropriate provisions of the TBCA or the TNCA, can do so as well.<sup>101</sup> While Tennessee law does allow for this kind of action without a meeting, mistakes associated with drafting and email in general can still be pitfalls for an attorney seeking to help Tennessee clients.<sup>102</sup>

Most importantly, the email should be noticeably formal to the recipient shareholder or member. Using language that does not explicitly state the intention of the writer can lead to ambiguity when sending emails.<sup>103</sup> The ambiguity obscures not only the topic of the email, but the desired action from the recipient of the email.<sup>104</sup> When attempting to conduct action without meeting, formality is not only important, but formal action is the only kind covered by the statute.<sup>105</sup> Therefore, the sender of the email requesting a vote should include explicit language that notifies the shareholder or member voting that this email is a formal

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<http://www.wsj.com/articles/SB10001424052702303410404577466662919275448>.

Shellenbarger blames this informality in workplace emails on the increased use of slang in texting and tweeting. “Such looseness with language can create bad impressions with clients, ruin marketing materials and cause communications errors.” *Id.*; see George W. Kuney, *Legal Forms, Style, and Etiquette for Email*, 15 TRANSACTIONS 59 (2013). Proofreading is of utmost importance in any correspondence, but the informality of email can lend itself to ambiguous phrasing and simple errors. *Id.* at 65.

<sup>100</sup> Spainhour, *supra* note 14, at 1.

<sup>101</sup> §§ 48-17-104(h), -57-104(h). Both provisions use the phrase “electronic transmission”. As discussed *supra*, an email is a form of electronic transmission. The email, if drafted and verified properly, has the effect of a meeting vote. The action by written ballot provision of the TNCA uses the term “document.” § 48-57-108. As discussed *supra*, the TNCA includes an “electronic record” in its definition of “document.” § 48-51-201(14)(B). An email is a form of an electronic record, as explained *supra*.

<sup>102</sup> With increased use of the Internet, words are continuing to change meaning. “English has always been an inherently subjective, very complicated beast.” PHIL SIMON, MESSAGE NOT RECEIVED: WHY BUSINESS COMMUNICATION IS BROKEN AND HOW TO FIX IT 74 (2015). See generally Kuney, *supra* note 99.

<sup>103</sup> Chatinover, *supra* note 15, at 2.

<sup>104</sup> *Id.*

<sup>105</sup> §§ 48-17-104(h), -57-104(h).

action of the corporation.<sup>106</sup> Not only is the language signifying the formal action important, the language of the voting options should be explicit as well.<sup>107</sup>

Once the language has been carefully selected, should the email vote be placed in the body of the email or within an attachment? As with any other action on the Internet, both give rise to security concerns. Some suggest using an attachment to the email message.<sup>108</sup> One way to do this would be to attach a fillable Adobe PDF.<sup>109</sup> In doing so, the drafter of the vote could control both the language signifying formal action and the language of the voting options. This option can be afforded by both small nonprofits and larger business corporations because it only requires that one person purchase the current version of Adobe Acrobat Pro to create the files.<sup>110</sup> Additionally, Adobe now has the capability to require a password login to view or edit a PDF file.<sup>111</sup>

In using the fillable, password-protected PDF, shareholders or members would be able to satisfy both prongs of the action without meeting via electronic transmission statutes: timestamp and verification.<sup>112</sup> The timestamp is included with every email sent.<sup>113</sup> This

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<sup>106</sup> For a sample document, see Section VII of this article.

<sup>107</sup> Chatinover, *supra* note 15, at 3. If “yes” or “no” options are not clearly stated, then chasing down consenting votes becomes a hassle for the person requesting the votes and if not correctly stated could be seen as abstaining from the vote. *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Converting Existing Forms To Fillable PDF's*, ADOBE ACROBAT DC, <https://acrobat.adobe.com/us/en/how-to/create-fillable-pdf-forms-creator.html>.

<sup>110</sup> At this time, the current edition of Adobe Acrobat with this function is Adobe Acrobat Pro DC. However, to create the fillable form, one would need to purchase the Pro version, as the free one does not offer the user the ability to create these fillable PDFs at this time. *Converting Existing Forms To Fillable PDF's*, ADOBE ACROBAT DC, <https://acrobat.adobe.com/us/en/how-to/create-fillable-pdf-forms-creator.html>.

<sup>111</sup> *Apply PDF Passwords and File Permissions*, ADOBE ACROBAT DC, <https://acrobat.adobe.com/us/en/how-to/pdf-file-password-permissions.html>.

However, like with the fillable form capability, creation of password protected PDFs is only possible when using Adobe Acrobat Pro. Once the file has been created, the free version allows access to viewing and editing a password-protected PDF.

<sup>112</sup> §§ 48-17-104(h), -57-104(h).

timestamp notes the time that the sender submitted the email which if printed could be saved in the corporation's paper records or could be stored electronically with the date included with the vote.<sup>114</sup>

The statute's verification component requires that there must be some information accompanying the transmission that proves the shareholder or member authorized such a transmission.<sup>115</sup> While logging into a particular email address is its own authorization of that email, this is not sufficiently secure.<sup>116</sup> With the increased reliance on technology, there are more risks inherent in the Internet's convenience. In 2013, the Economist reported that "[o]ver a third of known data breaches are at businesses."<sup>117</sup>

The password-protected PDF requires a second login in addition to the login to the email client to access the vote. By requiring a secondary login, the vote would have increased security and a clear authorization by the shareholder or member that the vote was their intentional vote.

If a corporation does not want to use attachments as the preferred method of email voting, it can instead use the body of the email itself to write out the vote and collect authorizations. As with the timestamp with the PDF attachment, an email will provide a timestamp for the corporation's records.<sup>118</sup> Similarly, the designated record keeper

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<sup>113</sup> *Internet Message Format*, (OCT. 2008), <https://tools.ietf.org/html/rfc5322#section-3.6> §3.6.1.

<sup>114</sup> *Id.*

<sup>115</sup> TENN. CODE ANN. §§ 48-17-104(h) (2013), -57-104(h) (2015).

<sup>116</sup> Simply searching Google with the phrase "how to hack email" shows how easy it can be to hack into someone's email address. Kim Komando, *5 Ways Hackers Attack You (And How To Counter Them)*, (JULY 19, 2013, 8:07 A.M.), <http://www.usatoday.com/story/tech/columnist/komando/2013/07/19/hacker-attack-trojan-horse-drive-by-downloads-passwords/2518053/>.

<sup>117</sup> *The Rise of the Hacker*, THE ECONOMIST, NOV. 7, 2015, <http://www.economist.com/news/business/21677638-rise-hacker>.

<sup>118</sup> *Internet Message Format*, (OCT. 2008), <https://tools.ietf.org/html/rfc5322#section-3.6> §3.6.1 (last visited August 1, 2016).

could collect paper records of the emails by printing them out or storing them electronically with the date included in the vote.<sup>119</sup>

Leaving the text of the vote in the body of the email also opens it up to decreased security when compared to a password-protected PDF. However, technology companies have responded to this decreased security by creating systems of verification that can be added to an email.<sup>120</sup> Comodo Group, Inc. (“Comodo”) provides one example of an email verification program.<sup>121</sup> Cyber security can be expensive; however, Comodo offers full versions of its security software for free to some buyers.<sup>122</sup>

Comodo’s Personal Authentication Certificate (“PAC”) provides a secure authorization that the person whose email address is at the top of the email is the correct sender.<sup>123</sup> The PAC can “encrypt and digitally sign email communications” and requires a “two-factor authentication of users and employees.”<sup>124</sup> The digital signature with added encryption is

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<sup>119</sup> *Id.*

<sup>120</sup> *The Mission of Comodo*, <https://www.comodo.com/about/comodo-company-profile.php?key5sk1=3f3aa098fa5393f29af141964d37b4a86320f210>.

<sup>121</sup> *Id.* Comodo’s services include: authenticating individuals, business websites and content; securing information; securing websites and e-commerce; and securing and maintaining personal computers. It is important to note that this article only selected Comodo as an example and does not endorse the program nor believe it to be the only option. Attorneys advising Tennessee corporations and companies should seek to find the best fitting program for clients. *Id.*

<sup>122</sup> *Id.* Comodo believes that the more computers that are protected the better for everyone who uses the Internet. “Comodo provides full versions of ours for free, resulting in fewer unprotected computers that can be turned against us. More security software means fewer infected PCs to distribute scam e-mails, and malware or be part of a botnet executing a denial-of-service attack.” It is important to note that this article only selected Comodo as an example and does not endorse the program nor believe it to be the only option. Attorneys advising Tennessee corporations and companies should seek to find the best fitting program for clients. *Id.*

<sup>123</sup> *Personal Authentication Certificates*, <https://ssl.comodo.com/personal-authentication.php?key5sk1=cf7922b6e27774cadadd3fd19237cd4b43709910>.

<sup>124</sup> *Id.*

an easy way to meet the verification requirement of both the TBCA and the TNCA statute.<sup>125</sup>

### B. *Online Forums*

With increased business use of the Internet, many corporations have a designated website.<sup>126</sup> If shareholders or members do not want to use email to take action via electronic transmission, a corporation can allocate a portion of its website to host a forum for shareholder or member votes.

This section of the website would need at least one additional level of security so as to verify that the shareholder or member authorized the vote taken online.<sup>127</sup> As with email, the online forum would also require a mechanism to show the date and time when the shareholder or member voted. Using an online forum could ease the process for the designated recipient of the electronic votes, as the recipient would be able to view and record the votes from viewing a single forum website.<sup>128</sup> This involves less time than culling emails from numerous shareholders and then recording the votes as document on the email itself.

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<sup>125</sup> TENN. CODE ANN. §§ 48-17-104(h) (2013), -57-104(h) (2015).

<sup>126</sup> For corporations that do not have a company website with this kind of capability, there are other online options to create polls with the correct language. They are not as secure as a website hosted by the corporation itself, but could possibly meet the statutory guidelines of action by electronic transmission if there is a verification process and the vote is time stamped. *Team Up To Conquer Decision Making*, [https://www.surveymonkey.com/mp/enterprise/?ut\\_source=ent&ut\\_source2=web\\_tour](https://www.surveymonkey.com/mp/enterprise/?ut_source=ent&ut_source2=web_tour). This article only selected SurveyMonkey as an example and does not endorse the program or believe it to be the only option. Attorneys advising Tennessee corporations and companies should seek to find the best fitting program for clients.

<sup>127</sup> If the shareholder did not authorize it personally, the additional verification login would show the shareholder's agent or attorney-in-fact authorized the vote. § 48-17-104(h). Similarly, if the member did not personally authorize it, the additional verification login would show the member's agent or attorney-in-fact authorized the vote. § 48-57-104(h).

<sup>128</sup> *Team Up To Conquer Decision Making*, [https://www.surveymonkey.com/mp/enterprise/?ut\\_source=ent&ut\\_source2=web\\_tour](https://www.surveymonkey.com/mp/enterprise/?ut_source=ent&ut_source2=web_tour). SurveyMonkey allows for a one portal login that can be synced to the network of the corporation. *Id.*

*C. Unanimous Written Consent with E-Sign*

For actions that are unanimously agreed to by all of the shareholders or members, a corporation may proceed by using a written consent. This kind of action does not require a vote as all the eligible participants agree upon taking the action without a formal meeting.<sup>129</sup> TUETA governs the electronic aspects of this kind of action.<sup>130</sup>

Some even argue that the formality required by action by electronic transmission is not as necessary when taking action by unanimous written consent.<sup>131</sup> However, to avoid negative or undesired consequences, practitioners should advise clients to avoid informality.<sup>132</sup> Similar to taking action via electronic transmission using an email, a corporation should use a password-protected, fillable PDF attached to an email to collect the shareholders' or member's e-signatures.<sup>133</sup> An e-signature has the effect of a written signature.<sup>134</sup>

After all the signatures of the shareholders or members entitled to vote on the action have signed electronic document, the action has the effect of action taken at a meeting.<sup>135</sup> The designated officer should then

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<sup>129</sup> "If all shareholders entitled to vote on the action consent in writing to taking such action without a meeting, the affirmative vote of the number of votes that would be necessary to authorize or take such action at a meeting shall be the act of the members." § 48-17-104(a). The language is the same in the TNCA; however, the word "member" is used in place of "shareholder." § 48-57-104(a).

<sup>130</sup> § 47-10-122. Because Tennessee has adopted the Uniform Electronic Transactions Act, the state law supersedes, with some exceptions, the Electronic Signatures in Global and National Commerce Act. 15 U.S.C. § 7002(a) (2000).

<sup>131</sup> Chatnover, *supra* note 15, at 3. "There is also a growing consensus among practitioners that a proposal or resolution circulated by e-mail that is unanimously approved, constitutes a valid unanimous written consent, even if it lacks the formality of a written consent attached to an e-mail." *Id.*

<sup>132</sup> For a sample written consent, *see infra* Section VII.

<sup>133</sup> *See supra* Section III (a) for Email Voting.

<sup>134</sup> TENN. CODE ANN. § 47-10-107(d) (2001). Where a writing is required by law, an electronic record, such as an email, satisfies the law as well. *Id.* at 107(c).

<sup>135</sup> §§ 48-17-104(a), -57-104(a).

file the consent and the action should be read into the minutes of the next meeting of the shareholders or members.<sup>136</sup>

#### IV. RECORD KEEPING

As explained in Section II, the TBCA and the TNCA require that record of the action taken and the votes concerning it must either be read into the minutes of the next meeting or filed with the corporation's records.<sup>137</sup> Either is acceptable,<sup>138</sup> but the corporation should designate the method and explain the desired procedure in its bylaws. However, there are some instances in which a corporation has more than one regulatory body that it must respond to.<sup>139</sup>

It is important to note that for nonprofits seeking 501(c) status,<sup>140</sup> more thorough record keeping is needed to retain tax-exempt status.<sup>141</sup> The Internal Revenue Service does not require a specific type of record keeping system; instead, a nonprofit should choose the record keeping system that is best fitting for the corporation's structure.<sup>142</sup> For

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<sup>136</sup> *Id.*

<sup>137</sup> §§ 48-17-104(b), -57-104(b). *See supra* Section II for discussion on the statutory requirements concerning dating and verifying an electronic transmission under Tennessee law.

<sup>138</sup> *Id.*

<sup>139</sup> A corporation should seek to have organized and accurate record keeping and record retention systems for all aspects of its business. However, the scope of this article focuses on how a corporation should record documents when action is taken via electronic transmission, not the requirements to maintain tax-exempt status. *Id.*

<sup>140</sup> I.R.C. § 501(c) lays out the different kinds of corporations that can apply for tax-exempt status.

<sup>141</sup> "If an organization does not keep required records, it may not be able to show that it qualifies for tax-exempt status or should be classified as a public charity. Thus, the organization may lose its tax-exempt status or be classified as a private foundation rather than a public charity." Marc Hoffman, *IRS Release Compliance Guide For 501(c)(3) Charities*, (OCT. 29, 2009), <https://www.irs.gov/pub/irs-pdf/p4221pc.pdf> at p. 16.

<sup>142</sup> *Id.* at 17. "The types of activities a public charity conducts determines the type of records that should be kept for federal tax purposes. A public charity should set up a recordkeeping system using an accounting method that is appropriate for proper monitoring and reporting of its financial activities for the tax year." *Id.*

purposes of recording an action taken via electronic transmission, the corporation would need to include the record in its supporting documents to verify actions taken involving monetary transactions.<sup>143</sup> For retention purposes, the record should be kept as long is necessary under applicable law.<sup>144</sup>

## V. CYBERSECURITY

With use of the Internet for business purposes, there is always a chance for an outsider to hack into an electronic transmission for nefarious purposes.<sup>145</sup> However, Tennessee does have some law guiding voters on what to do to prevent such an issue and what the effect of an error, hacked or otherwise, has on a shareholder's or a member's vote.

A corporation should establish a "security protocol,"<sup>146</sup> because under TUETA, if there is an "error," or possibly a hack, without the protocol the erroneous vote has the effect of an actual vote.<sup>147</sup> Once a corporation has adopted and implemented a security procedure, shareholders or members must seek to conform to the procedure whenever they vote. If an error occurs in the sending and receiving of an electronic transmission, a conforming party to the transmission may void the effect of the error if the nonconforming party did not follow

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<sup>143</sup> *Id.* at 20.

<sup>144</sup> *Id.* at 21. Further guidance on maintaining tax-exempt status should be sought from a licensed tax attorney.

<sup>145</sup> *See* The Economist *supra* note 117.

<sup>146</sup> TENN. CODE ANN. § 47-10-102(14) defines a security procedure as "a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record." As discussed earlier, while a standard email login is sufficient for verification purposes under the action without meeting provision, it would most likely not be enough to qualify as a security procedure under TUETA. Using a password-protected PDF or other additional verification program in addition to the shareholder or member's email login would not only help guard against errors and hacking, but also meet the requirements of a "security procedure."

<sup>147</sup> Section 47-10-110(3) states that if a corporation does not have a procedure in place, then the error has "the effect provided by other law, including the law of mistake." To guard against having to deal with the aftermath of a hack or error, a corporation would do best to adopt and implement a security procedure that satisfies TUETA.

the procedure and would have detected the error had they used the correct security procedure.<sup>148</sup>

Even if a corporation establishes a security protocol to attempt to ensure the privacy and accuracy of its electronic transmissions, there is still a possibility for an outsider to hack into the corporation's business for nefarious purposes.<sup>149</sup> There are no statutory guidelines, unlike in the event of human or computer error, to help practitioners to advise clients in the event of a hack. A client would most likely need some proof of outside tampering in order to void a hacked vote. However, this still may not be enough to protect clients from possible litigation or other negative consequences for the corporation.

## VI. CONCLUSION

Sending an email can be quick, easy, and cheap, but shareholders or members of Tennessee corporations should be wary of the statutory requirements to take formal corporation action. A shareholder's, or a member's, authorization and timing of that authorization should be readily discernable. Without meeting those two requirements, the action may be deemed invalid or unenforceable if challenged.

In adopting these electronic transmission provisions, the Tennessee legislature has taken a proactive step allow corporations to operate more efficiently and conveniently in Tennessee. However, the next step would be to adopt amended language to the TBCA and the TNCA to make the action without meeting statutory requirements more uniform. In doing so, corporations would be able to decrease the chance of errors and increase compliance. As technology continues to develop, a more uniform set of statutory requirements for corporate consents in lieu would increase the clarity and efficiencies of their usage.

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<sup>148</sup> TENN. CODE ANN. § 47-10-110(1) (2013). However, a corporation may amend this to hold both parties accountable if there are two parties to the electronic transmission. If an individual is sending a transmission to an automated electronic agent, the procedure for errors may not be altered via agreement. *Id.* at 110(4).

<sup>149</sup> See THE ECONOMIST, *supra* note 117.

**VII. SAMPLES****Action via Electronic Transmission: Body of Email Text Sample**

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To: Shareholder <sup>150</sup> 's Designated Email Address  
[\_\_\_\_@\_\_\_\_.\_\_\_\_]  
From: Designated Corporate Officer [\_\_\_\_@\_\_\_\_.\_\_\_\_]  
Subject: Written Consent to Action Without Meeting

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The undersigned, being a shareholder of \_\_\_\_\_, Inc., a Tennessee corporation, pursuant to the bylaws of the corporation, hereby consents to the following action, without a meeting by replying to this electronic transmission that is accompanied by a verified e-signature as required by the bylaws of the company.

RESOLVED,

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The undersigned, being a shareholder of \_\_\_\_\_, Inc., waive notice of meeting and consent to all actions taken in this consent. Execution of this resolution shall be passed in accordance with the Corporation's bylaws.

/s/ Shareholder

[Here the email would additionally contain some verification symbol/badge such as the Comodo e-signature verification]

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<sup>150</sup> If a for-profit corporation uses this sample, the word "shareholder" is used. If a nonprofit organization uses this sample, the word "member" should replace the word "shareholder" throughout the sample.

**Action via Electronic Transmission: Fillable PDF Form Sample**

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WRITTEN CONSENT TO ACTION WITHOUT MEETING  
OF ALL THE SHAREHOLDERS OF  
\_\_\_\_\_, INC.  
A TENNESSEE CORPORATION

The undersigned, being a shareholder<sup>151</sup> of \_\_\_\_\_, Inc., a Tennessee corporation, pursuant to the bylaws of the corporation, hereby consents to the following action, without a meeting by replying to this electronic transmission that is accompanied by a verified e-signature as required by the bylaws of the company.

RESOLVED,

\_\_\_\_\_  
\_\_\_\_\_

The undersigned, being a shareholder of \_\_\_\_\_, Inc., waive notice of meeting and consent to all actions taken in this consent. Execution of this resolution shall be passed in accordance with the Corporation’s bylaws.

/s/ Shareholder

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<sup>151</sup> If a for-profit corporation uses this sample, the word “shareholder” is used. If a nonprofit organization uses this sample, the word “member” should replace the word “shareholder” throughout the sample.

**Action Without Meeting Via Electronic Transmission Bylaws**<sup>152</sup>

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Action without Meeting Via Electronic Transmission<sup>153</sup>

- (a) Any action which may be taken at any meeting of the shareholders<sup>154</sup> may be taken without meeting, without prior notice, and without a vote, if consent by electronic transmission setting forth the action so taken, shall be consented to by a majority of shareholders.
  
- (b) Every electronic transmission shall contain information from which the corporation shall be able to determine the date of the electronic transmission and the signature of the shareholder, or the shareholder's agent or the shareholder's attorney-in-fact. An electronic transmission signed and dated under this section shall have the effect of a meeting vote.
  
- (c) The electronic transmission shall be received by the corporation upon entry into the appropriate corporate officer's information processing system.
  
- (d) When the designated corporate officer has received the minimum number of consenting votes for the action to be taken, the officer shall record the votes in the manner designated by the Corporation to reflect the action to be taken.<sup>155</sup>

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<sup>152</sup> This language may also be placed in the corporate charter.

<sup>153</sup> If placed in the bylaws, this language can either be set as a new section in the corporate bylaws under meetings or added to a corporation's Action Without Meeting section as a new subsection. Either would be appropriate when drafting this language into the corporation's bylaws.

<sup>154</sup> This sample language is for a business corporation. The word "member" should be substituted anytime "shareholder" is used if creating or amending bylaws for a nonprofit corporation.

<sup>155</sup> The officer can record the votes by either printing the votes on paper and placing them with the corporation's physical records or record them electronically on the corporation's server. Either is appropriate, but the corporation should have some record keeping procedure, especially if other law requires it.

- (e) Prompt written notice of the taking of corporate action without an unanimous vote shall be given to those non-consenting shareholders, who, had the action been taken during a meeting, would have been entitled to such notice. Such notice shall be given to non-consenting shareholders at least ten days before the action is to be taken by the Corporation.<sup>156</sup>

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<sup>156</sup> This is true of both business corporations and nonprofit corporations under Tennessee law. TENN. CODE ANN. §§ 48-17-104(e) (2013), -57-104(e) (2015).

**Action by Unanimous Consent with E-Sign Bylaw Language<sup>157</sup>**

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Any action required or permitted to be taken at a meeting of the shareholders<sup>158</sup> may be taken without a meeting. Consents by electronic mail, setting forth the action so taken, are submitted by all the shareholders, received by the Corporation and filed by the Secretary with the minutes of the meetings of the shareholders. The consents may be executed in any number of counterparts, all of which when taken together shall constitute a single original consent.

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<sup>157</sup> This language may also be placed in the corporate charter.

<sup>158</sup> If the bylaws are to be used by a business corporation, use the word "shareholder." If drafting for a nonprofit corporation, replace the word shareholder with the word "member" through the provision.

**Action Without Meeting By Written Ballot Sample<sup>159</sup>**

ACTION WITHOUT MEETING BY WRITTEN BALLOT  
OF THE MEMBERS OF  
\_\_\_\_\_, INC.  
A TENNESSEE NONPROFIT CORPORATION<sup>160</sup>

The undersigned, being a member of \_\_\_\_\_, Inc., a Tennessee Nonprofit corporation, pursuant to the bylaws of the corporation, hereby votes on the following action, without a meeting by replying to this electronic transmission that is accompanied by a verified e-signature as required by the bylaws of the company.

CONCERNING,  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

APPROVES \_\_\_\_\_

DISAPPROVES \_\_\_\_\_

ABSTAINS \_\_\_\_\_

This ballot must be received by \_\_\_\_\_, \_\_\_\_\_, in order to be counted.<sup>161</sup>

<sup>159</sup> Similar to the Action Via Electronic Transmission samples, *supra*, this language may be placed in a fillable PDF that is attached to an email to the members or it can be placed in the body of an email with a form of additional verification.

<sup>160</sup> This type of action is only available to nonprofit corporations in Tennessee. The TBCA does not allow for business corporations to take comparable action.

<sup>161</sup> The statute does not allow for votes to be revoked after they are received. However, a corporation may modify that in its bylaws or charter. It can even be modified on a ballot-by-ballot basis. TENN. CODE ANN. § 48-57-108 (2015).

\_\_\_\_\_ <sup>162</sup> responses must be received to meet the quorum requirement of the corporation. The percentage of approvals necessary to pass said action is \_\_\_\_\_ <sup>163</sup>.

Date: \_\_\_\_\_

/s/ Member

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<sup>162</sup> § 48-57-108(d)(1) requires this to be the number that meet's the corporation's quorum requirements.

<sup>163</sup> § 48-57-108(d)(2) requires this to be the percentage necessary to approve any matter other than the election of the corporation's directors.

## Nonprofit Action by Written Ballot Bylaw Language<sup>164</sup>

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### Action without Meeting Via Written Ballot<sup>165</sup>

- (a) A “written ballot” is a ballot mailed or electronically distributed to each member<sup>166</sup> entitled to vote on the matter. This definition does not include a ballot distributed to members for purposes of conducting a vote of the members at such meeting.
  
- (b) Any written ballot concerning issues other than the election of directors shall set forth the proposed activity and provide members with the ability to vote for, against, or abstain from the vote. The ballot shall also include the number of members necessary to meet quorum on the action as well as the percentage of votes in favor to pass the action. The ballot also shall state the date when the ballot must be sent to the corporation in order to be counted.
  - (i) Written ballots concerning the election of directors shall list all candidates for election to the Board and an option for the member to vote for, against a director, as well as the number of members necessary to meet quorum on the action as well as the percentage of votes in favor to pass the action. The ballot also shall state the date when the ballot must be sent to the corporation in order to be counted.

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<sup>164</sup> This language can also be placed in the corporate charter.

<sup>165</sup> If placed in the bylaws, this language can either be set as a new section in the corporate bylaws under meetings or added to a corporation’s Action Without Meeting section as a new subsection. Either would be appropriate when drafting this language into the corporation’s bylaws.

<sup>166</sup> This bylaw language is only for use by nonprofit organizations. The TBCA does not have a corresponding provision to allow for-profit corporations to take action by written ballot.

- (c) The member shall provide an electronic signature to verify that the member authorized the vote and shall return the ballot to the designated corporate officer.
- (d) The written ballot shall be received by the corporation upon entry into the appropriate corporate officer's information processing system.
- (e) Once received, the written ballot may not be revoked.<sup>167</sup>

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<sup>167</sup> Alternatively, a nonprofit corporation may create a revocation procedure if they so choose or allow revocation on a ballot-by-ballot basis. Whichever option the corporation chooses should be explained in this bylaw section.