

**APPENDIX D****Electronic Participation Policy Requirement**

The 2014 Session of the General Assembly enacted two identical bills, House Bill 193 (Minchew) and Senate Bill 161 (Favola), which require public bodies to adopt a policy regarding individual participation by electronic means before members are allowed to use the provisions described in Appendices A (electronic participation due to disability, medical condition, or personal matter) and C (electronic participation due to distance in the case of regional public bodies). With the 2019 amendments, this requirement does not apply to meetings held to address a state of emergency declared by the Governor, as described in Appendix B. The requirement specifies that the policy must include "an approval process for such participation, subject to the express limitations imposed by this section. Once adopted, the policy shall be applied strictly and uniformly, without exception, to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting." Note that these provisions and this policy requirement apply to all public bodies subject to FOIA and that, until such a policy is adopted, members cannot use the provisions to participate from remote locations. In other words, members cannot call in under the circumstances described in Appendices A and C until the public body adopts a policy on such participation.

**Sample Policy Language**

In order to facilitate compliance with this requirement, the FOIA Council has prepared sample language that public bodies may use in crafting their own policies. This sample language is based on the language of the statute itself and includes both the basic policy statement and the limitations set forth in the law, as follows:

It is the policy of [the public body] that individual [public body] members may participate in meetings of [the public body] by electronic means as permitted by § 2.2-3708.2 of the Code of Virginia. This policy shall apply to the entire membership and without regard to the identity of the member requesting remote participation or the matters that will be considered or voted on at the meeting.

Whenever an individual member wishes to participate from a remote location, the law requires a quorum of [the public body] to be physically assembled at the primary or central meeting location, and there must be arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.

When such individual participation is due to an emergency or personal matter, such participation is limited by law to two meetings of the public body per member each calendar year, whichever is fewer.

**An Approval Process Must Be Chosen**

As part of the policy requirement, each public body must adopt an approval process. There are several possible mechanisms a public body might use; so long as the process adopted does not violate the express provisions of § 2.2-3708.2, each public body may choose whichever approval process it prefers. As an example, the FOIA Council has adopted a policy of automatic approval unless a member's participation would violate FOIA, and, if such participation is challenged, then the matter would be put to a vote. Sample language follows:

#### Automatic Approval With Vote If Challenged

Individual participation from a remote location shall be approved unless such participation would violate this policy or the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) of the Code of Virginia. If a member's participation from a remote location is challenged, then [the public body] shall vote whether to allow such participation. If [the public body] votes to disapprove of the member's participation because such participation would violate this policy, such disapproval shall be recorded in the minutes with specificity.

#### **Additional Limitations and Other Provisions Are Optional**

Additional policy provisions may be included as each public body sees fit, so long as they do not violate the express provisions of § 2.2-3708.2. It is up to each public body to decide for itself whether to adopt any such additional policy provisions. For example, when the FOIA Council adopted its policy on electronic participation, it chose to explicitly state that the policy also applied to the Council's committees and subcommittees.



## MEMO REGARDING PROXY VOTING BY COMMISSIONERS

To: Virginia Redistricting Commission  
From: DLS Staff  
Subject: Proxy voting by commissioners

In recent weeks, the question has been raised about the use of proxy voting to allow for participation by commissioners who are not present at a meeting.

Under the provisions of the Freedom of Information Act, proxy voting is not permitted by public bodies unless there is language in the enabling legislation that explicitly authorizes it or there is authority for it elsewhere. For example, the Senate of Virginia permits the use of proxy voting and is authorized to do so pursuant to its constitutional authority to "settle its own rules of procedure."

In this instance, there is no language in Chapter 62 of Title 30 of the Code of Virginia (§ 30-391 et seq.) that permits the use of proxy voting by any commissioner on the Commission or allows a commissioner to designate someone to vote on his behalf, nor is there such language in Article II, Sections 6 or 6-A of the Constitution of Virginia.

A possible solution is available. During the 2021 Special Session II, legislation could be introduced and enacted to permit the Commission to use proxy voting. Using Rule 20 (e) of the Rules of the Senate of Virginia as a model, the language could read:

*Any commissioner attending and recorded as present at a Commission meeting who must depart prior to the adjournment of the meeting, may designate, in writing on a form for such purpose, one member of the Commission to vote his proxy for the duration of his absence, but for no longer than the meeting at which the proxy is given. Proxies are not transferable. The Co-Chairs shall be informed in open session of the proxy authority prior to the departure of the commissioner so leaving.*

Please note that this language would not permit proxy voting by a commissioner who is not, at any point, in attendance at the meeting.

Thank you for your time and attention to this matter. As always, please let us know if you have any questions.

## MEMO REGARDING ELECTRONIC PARTICIPATION IN IN-PERSON MEETINGS

To: Virginia Redistricting Commission  
From: DLS Staff  
Subject: Electronic participation in in-person meetings

With the lifting of the Governor's order of a state of emergency, the Commission will no longer be able to meet virtually under the provision put in place last year to permit virtual meetings during the state of emergency. However, there are several provisions in law that will permit a commissioner to participate remotely in an in-person meeting through electronic means.

Section 2.2-3708.2 of the Code of Virginia sets out the rules for certain public bodies to hold meetings through electronic communication means. Relevant to this Commission are subsection A, which covers all public bodies, and subsection D, which covers state public bodies.

### Subsection A: all public bodies

Subsection A provides a narrow authority for allowing electronic meetings. Subdivision A 1 states that, subject to certain requirements, a public body may conduct any meeting through electronic communication means if, on or before the day of a meeting, a member of the public body notifies the chair that he is unable to attend the meeting due to:

- (1) A temporary or permanent disability, or other medical condition or a family member's medical condition, which prevents his physical attendance at the meeting, or
- (2) A personal matter.

There are restrictions on the number of times a member may participate electronically under this subdivision due to a personal matter but there is no numerical limitation on participation due to medical condition or disability.

Subsection C provides the conditions that must be met in order for participation through electronic communication means pursuant to subdivision A 1:

- The public body has adopted a written policy allowing for and governing participation of its members by electronic communication means,
- A quorum of the public body is physically assembled at one primary or central meeting location, and
- The public body makes arrangements for the voice of the remote participant to be heard by all persons at the primary or central meeting location.

This means that if a commissioner will be on vacation and unable to attend the meeting, he is able to notify the co-chair ahead of the meeting that he will be unable to attend the meeting due to being on vacation and to then participate in the meeting by electronic means, *assuming the Commission has adopted such a policy*. Similarly, if a commissioner wakes up the morning of a meeting to a sick child, subdivision A 1 means the commissioner is able to notify the co-chair ahead of the start of the meeting that he will be unable to attend the meeting due to the care of the sick child and to then participate in the meeting by electronic means, *assuming the Commission has adopted such a policy*. Without such policy, in both examples, the commissioner would be unable to participate.

### Subsection D: state public bodies

Subsection D is a broader authority for allowing electronic meetings. Subsection D permits a state public body to conduct its meetings through electronic communication means, provided that:

- A quorum of the public body is physically assembled at one primary or central meeting location,
- Notice of the meeting has been given in accordance to law, and
- Members of the public are provided a substantially equivalent electronic communication means through which to witness the meeting, with "witness" defined as observe or listen.

At such a meeting, all votes taken during the meeting must be done by roll-call and included in the meeting's minutes. Additionally, there are several other procedural requirements but these are handled by staff.

This means that so long as there is a quorum<sup>1</sup> of commissioners in physical attendance at a meeting location, a commissioner who is unable to attend for any reason may participate in the meeting electronically. Participation includes voting.

Thank you for your time and attention to this matter. As always, please let us know if you have any questions.

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<sup>1</sup> Subsection E of § 30-392 defines the Commission's quorum as a majority of the commissioners appointed, including a majority of the legislative commissioners and a majority of the citizen commissioners, or 5 legislative commissioners and 5 citizen commissioners.