

DRAFT
FOR APPROVAL

Model Public Meetings During Emergencies Act

Uniform Law Commission

MEETING IN ITS ONE-HUNDRED-AND-THIRTY-FIRST YEAR
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Model Public Meetings During Emergencies Act

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Model Public Meetings During Emergencies Act

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Model Public Meetings During Emergencies Act

Section 1. Title

This [act] may be cited as the Model Public Meetings During Emergencies Act.

Section 2. Definitions

In this [act]:

(1) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) “Emergency declaration” means a declaration of emergency issued under other law of this state, law of a political subdivision of the state, or federal law.

(3) “Meeting” has the meaning of [meeting] in the open meetings law governing a public body.

(4) “Observe” means listen to or watch, whether or not permitted to participate.

(5) “Open meetings law” means a law of this state or a political subdivision of the state that governs when and how a meeting of a public body must be open to the public.

(6) “Participate” means speak or submit a comment.

(7) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency or instrumentality, or other legal entity.

(8) “Political subdivision of the state” includes a city, [county], district, and any other local or regional governmental authority.

(9) “Public body” means an entity subject to an open meetings law. [The term does not include the [Legislature and agencies of the Legislature] or a state [or local] court.]

(10) “Record” means information:

1 (A) inscribed on a tangible medium; or

2 (B) stored in an electronic or other medium and retrievable in perceivable

3 form.

4 (11) “Virtual meeting” means a meeting of a public body, during at least part of

5 which one or more members of the public body attend by electronic means.

6 **Legislative Note:** *If a state or political subdivision uses a term other than “meeting” in its open*
7 *meetings law, insert that term in the brackets in paragraph (4).*

8
9 *In paragraph (10), a state that includes the state legislature and its agencies and its state and*
10 *local courts in the state’s open meetings law and does not choose to extend the scope of the act*
11 *to those branches of government should include the bracketed sentence. If the bracketed*
12 *sentence is included, the state should insert the language used in the state to describe its state*
13 *legislature and legislative agencies. In a state that does not have local courts, the bracketed text*
14 *“or local” should be omitted.*

15 16 **Comment**

17
18 The Public Meetings During Emergencies Act builds on and fits into existing state laws
19 authorizing the declaration of emergencies and subjecting public meetings to various procedural
20 and public access requirements, particularly open meetings laws and laws providing for public
21 comment on and participation in the deliberations of public bodies. During the COVID-19
22 pandemic, most governors included within their declarations of emergency provisions
23 suspending many state laws concerning the meetings of public bodies, such as those governing
24 the location of meetings and public access and participation, and authorized virtual meetings.
25 Some of the executive orders included provisions intended to create public access and
26 participation rights in virtual meetings comparable to those applicable to traditional in-person
27 meetings. Since the onset of the pandemic a number of states have adopted laws – some
28 temporary, intended to expire after the pandemic, and others permanent – authorizing public
29 bodies to hold virtual meetings during emergencies, subject to various requirements for the
30 conduct of those meetings, including public access. States that adopted such laws or amended
31 pre-existing laws that provided some authorization for remote or virtual meetings in 2020-2022
32 include Arkansas, California (teleconference meetings for local agencies; emergency provisions
33 expire December 31, 2023, other provisions take effect January 1, 2024); Connecticut (expires
34 April 30, 2022; as of this writing a bill is pending before the state senate to extend authorization
35 through December 31, 2022), Delaware, Hawaii, Maine, Massachusetts (expires July 15, 2022),
36 Minnesota, Nevada, New York (expires, unless renewed, upon the expiration of Governor
37 Hochul’s executive order #11; that executive order was most recently extended on March 16,
38 2022 for thirty days), North Carolina, Oklahoma (expires February 15, 2022, or thirty days after
39 the expiration of the COVID state of emergency; as of this writing, the Oklahoma legislature is
40 considering a bill to permit remote meetings by “a public body in any county in which the
41 Governor has declared a state of emergency until the emergency declaration expires or is

terminated”), Vermont (expires January 15, 2023), and Virginia. This Act would provide a statutory basis for the authorization of virtual meetings during an emergency conditioned on compliance with requirements intended to assure comparable public access and participation.

The Act uses a state’s open meetings law to provide definitions of “public body” and “meeting.” Different states use different terms – including but not limited to “open meetings,” “sunshine” or “government in the sunshine,” “open doors,” “freedom of information” – for the law that sets the requirements for public observation of meetings of public bodies. The Act’s use of the term “open meetings law” is intended to reach all such laws regardless of how they are referred to in a specific state. The Act uses the open meetings law to define “public body” and “meeting” for several reasons. Most of the executive orders or laws addressing virtual meetings during emergencies have, to date, been operated as exceptions to or amendments of an open meetings law as that is necessary to allow a public body to meet in a physical location that is not publicly accessible. So, too, an important purpose of these orders or laws has been to provide alternative means of public access via electronic technology comparable to the access required by open meetings laws. Moreover, a state’s open meetings law typically includes a comprehensive definition of what the state considers to be its public bodies. Rather than provide a new definition of “public body” consisting of a lengthy list of agencies, authorities, boards, bureaus, commissions, committees, councils, etc. that would surely vary from state to state, the Act incorporates by reference the state’s open meetings law definition.

The Act also assumes the broad definition of “meeting” – a convening or gathering of a public body to discuss or transact the public’s business – typically found in state open meetings laws.

The Act uses the term “virtual” to refer to a meeting of a public body conducted by electronic means. The executive orders and state laws that have authorized such meetings more commonly use the term “remote.” However, “remote” may imply that there is an in-person meeting of the public body with only some members participating remotely by electronic means. Indeed, a number of states before the pandemic had adopted laws permitting some members of public bodies to participate remotely in a public meeting that occurred at the public body’s usual physical location. “Virtual” makes it clearer that this Act applies to meetings where there need not be a central gathering. The “one or more” phrase permits the Act to apply in hybrid settings in which some members of the body are at a central location but the meeting involves the use of electronic means to connect them to other members of the body who are participating virtually.

Section 3. Scope

(a) This [act] applies to the conduct of a virtual meeting only while an emergency declaration is in effect.

(b) This [act] does not limit or supersede other law authorizing a public body to permit a member of the public body to participate, or a member of the public to observe or participate, by

1 electronic means, in a meeting of the public body, whether or not an emergency declaration is in
2 effect.

3 **Comment**

4
5 A number of states have laws authorizing remote participation in public meetings by
6 individual members of a public body and some forms of remote observation or participation by
7 members of the public. These laws assume that the meeting of the public body will be in a
8 physical location, and may specify that members of the public body also be at a publicly
9 accessible physical location, such as at a state office building. The Act does not supersede those
10 laws but supplements them with an authorization for an entirely or primarily virtual meeting
11 during an emergency.
12

13 **Section 4. Authorization for Virtual Meeting**

14 (a) A public body may conduct a virtual meeting while an emergency declaration is in
15 effect that applies to all or part of the jurisdiction of the public body if:

16 (1) the emergency declaration prohibits, limits, or has the effect of prohibiting or
17 limiting an in-person meeting of the public body; or

18 (2) the presiding officer of the public body or other individual authorized to act
19 for the public body determines it is not practical or prudent for the public body to conduct an in-
20 person meeting because of the emergency; and

21 (A) communicates to the members of the public body that the meeting will
22 be held virtually; and

23 (B) takes reasonable steps to inform members of the public that the
24 meeting will be held virtually.

25 (b) An action taken at a virtual meeting that complies with this [act] has the same effect
26 as an action taken at an in-person meeting of the public body.

27 (c) Other law that applies to an in-person meeting of a public body applies, to the extent
28 practicable, to a virtual meeting.

Comment

Subsection (a) creates a two-part test for authorizing public bodies to meet virtually. First, the individual authorized by state law to declare an emergency has done so with respect to a geographic area that is part of the public body's jurisdiction. That individual is likely to be the governor, but for local emergencies it could be a county executive, mayor or other local official. Minnesota's law, for example, requires that "the presiding officer, chief legal counsel, or chief administrative officer for the affected governing body" make the determination that an in-person meeting is "not practical or prudent." Minn. Stat. Ann. § 13D.021.1 (1). Second, either the emergency declaration itself must have the effect of preventing an in-person meeting – such as by a direct prohibition, a stay-at-home order, or an order limiting the number of people at a gathering – or the presiding officer of the public body or another individual authorized to act for the public body determines that due to the emergency it would be impractical or imprudent for the body to meet.

The reason for the second requirement is that sometimes emergency declarations remain in effect long past the most acute phase of an emergency. This may be necessary for the area to continue to receive special emergency assistance or because some emergency measures may still be needed. However, it might be possible for the public body to meet in-person. The second requirement addresses that concern. If the emergency declaration in effect continues to have the effect of prohibiting an in-person meeting, the public body may continue to meet virtually. Alternatively, if the emergency declaration by its terms does not have the effect of prohibiting an in-person meeting, a virtual meeting will be authorized only if the public body's presiding officer or someone else – such as its executive director – determines that it would be impractical or imprudent due to the emergency for the public body to meet and advises the members of the public body and the public of that determination prior to the meeting.

With the authorization for a virtual meeting triggered by an emergency declaration, the exigent circumstances of the emergency may interfere with the ability of the presiding officer of the public body or other authorized individual to provide the other members of the public body and members of the public with notification of the change to a virtual format in the manner ordinarily required for notices of meetings of public bodies. This is most likely to occur with respect to meetings scheduled prior to the issuance of the emergency declaration. This section requires that at a minimum the presiding officer or other authorized individual shall communicate to the other members of the public body that a meeting will be held virtually and shall make a reasonable effort so to inform the public. If, however, emergency conditions do not interfere with the ability of a public body to comply with notice requirements, it must comply with the notice provisions of Section 8 in addition to any other applicable notice requirements.

Subsection (b) creates a safe harbor for actions taken at a virtual meeting conducted in accordance with the requirements of the act. The converse will also be true. That is, if the meeting is not conducted in accordance with the requirements of the act, the action taken may not be valid if, under the open meetings law, it would not be valid if taken at an in-person meeting that is not conducted in accordance with the rules for the meeting required by the law.

Section 5. Conduct of Virtual Meeting

1 (a) A public body shall to the extent practicable select technology to conduct a virtual
2 meeting that is compatible with assistive technology commonly used by people with disabilities
3 and that facilitates the accommodation needs of people with disabilities to access the meeting.

4 (b) Except as provided in subsections (c) and (d), technology used to conduct a virtual
5 meeting must permit each member of the public body who attends the meeting
6 contemporaneously and throughout the meeting to see and hear, and to be seen and heard by, the
7 other members of the public body who attend the meeting.

8 (c) If a member of a public body is unable to obtain visual access to the virtual meeting
9 but is able to obtain audio access that permits the member contemporaneously and throughout
10 the meeting to hear and be heard by the other members of the public body who attend the
11 meeting, the member may attend by audio access.

12 (d) If a public body lacks the capacity to provide contemporaneous visual access to a
13 virtual meeting for members of the public body, the public body may conduct the meeting by
14 audio-only access that permits each member of the public body who attends the meeting
15 contemporaneously and throughout the meeting to hear and be heard by the other members of the
16 public body who attend the meeting.

17 (e) A member of a public body who attends a virtual meeting is considered present for all
18 purposes, including for determination of a quorum and voting, if contemporaneously and
19 throughout the meeting the member can:

20 (1) for a meeting conducted in compliance with subsection (b), see and hear and
21 be seen and heard by the other members of the public body who attend; or

22 (2) for a meeting conducted in compliance with subsection (c) or (d), can hear and
23 be heard by the other members of the public body who attend.

1 (f) A member of a public body who attends a virtual meeting through electronic means
2 that provide audio-only access to the meeting shall state the member's name each time the
3 member speaks or votes.

4 (g) The minutes of a virtual meeting must include any vote taken, that the meeting was
5 conducted by electronic means, the technology used, and which members of the public body
6 attended by electronic means.

7 **Comment**

8 The provisions of this Section derive from some of the gubernatorial executive orders or
9 state laws authorizing remote public meetings, adopted between 2020 and 2022. These include:
10 Cal Gov't Code § 54953; 5 Ill. C.S. 120/7(e), Ind. Code 5-14-1.5-3.7, Ky SB 150, ch. 73, Ls of
11 2020; Me. Rev. Stat. tit. 1, § 403-A; Michigan Gov. E.O. 2020-154 (July 17, 2020); Mich.
12 Comp. L. Ann. § 15.263a; N.J.S.A. § 52:27D-18.11; N.C. Gen. Stat. § 166A-19.24; 25 Okla Stat.
13 § 307.1; Va Code Ann. § 2.2-3708.2; Vt. Laws 2022, No. 78.

14
15 Consistent with Title II of the Americans with Disabilities Act of 1990, the Rehabilitation
16 Act of 1973, and other applicable law, subsection (a) directs the public body conducting a virtual
17 meeting to select, to the extent practicable, technology that reasonably accommodates the needs
18 of individuals with a disability in accessing the meeting. This applies to access by both members
19 of the public body and members of the public when authorized to observe the meeting under
20 section 6 or to participate under sections 7 or 8. The public body shall furnish appropriate
21 auxiliary aids and services, as defined in 28 C.F.R. § 35.104, to enable individuals with
22 disabilities to effectively participate in or observe a virtual meeting of the public body.

23
24 As subsection (b) indicates, the intent of this section is to require technology that permits
25 the members of the public body attending the meeting to see and hear each other throughout the
26 meeting. However, this may not always be possible. Subsection (c) addresses the situation of a
27 meeting conducted by technology that provides both visual and audio access but where a
28 particular member may not be able to obtain video access. Subsection (d) addresses the situation
29 where the public body as a whole lacks the technical capacity to provide video access. That
30 could be due, for example, to Internet bandwidth limitations in the public body's area. In that
31 case, the virtual meeting may still be conducted using technology that provides only audio
32 access. In any of those events, the member will still be treated as attending for purposes of a
33 quorum and voting. Subsection (g) provides that the type of technology used, e.g., audio-visual
34 or just audio, shall be reflected in the minutes of the virtual meeting.

35 36 **Section 6. Public Observation**

37 (a) If the open meetings law requires that the public be able to contemporaneously

1 observe all or part of a meeting of a public body:

2 (1) the public body shall permit the public to contemporaneously observe a virtual
3 meeting or the part of the virtual meeting that would be required to be open to the public if it
4 were part of an in-person meeting; and

5 (2) the public body shall provide the technological means to allow the members of
6 the public who observe the virtual meeting to see and hear or, if the public body conducts the
7 meeting by audio-only access under Section 5(d), to hear any members of the public authorized
8 by the public body to speak in the meeting.

9 (b) A document, exhibit, or other record presented to a public body at a virtual meeting
10 that, under the open meetings law, would have been available to the public at an in-person
11 meeting, including members of the public observing or participating in a virtual meeting under
12 Section 7, must be made available to the public contemporaneously with the virtual meeting to
13 the extent practicable.

14 **Comment**

15 This Section confirms that the state's open meetings law applies to a virtual meeting to
16 the same extent as it would to a comparable in-person meeting. If a meeting, or a portion of
17 meeting, such as a closed session, would not be open to the public under the state's open
18 meetings law, that meeting or portion would not be open when conducted virtually. The form of
19 public observation will inevitably be affected by the nature of the technology used. For a meeting
20 conducted by audio-only technology because, under section 5, the public body lacks the capacity
21 for an audio-visual meeting, public observation may be limited to listening to the meeting. Public
22 observation of the meeting requires that the members of the public body, depending on the
23 technology used, be visible and audible, or audible, to the members of the public observing the
24 meeting. As noted in the comment to section 5, appropriate auxiliary aids and services shall be
25 made available to afford individuals with disabilities an equal opportunity to observe the virtual
26 meeting. Paragraph (a)(2) is intended to confirm that members of the public who have a right to
27 observe the virtual meeting also have a right to observe members of the public – such as
28 government officials, staff of the public body, experts, witnesses, or parties to a proceeding
29 before the public body – that the public body has invited or authorized to address the public
30 body. Any documents or exhibits considered by members of the public body may be provided by
31 making those documents or exhibits available for inspection separately from the meeting, such as
32 by posting them to the public body's website. Any such document shall be provided in a format

1 accessible to individuals with disabilities.

2 3 **Section 7. Public Participation**

4 (a) If a law of this state or a political subdivision of the state or a rule, practice, or
5 procedure adopted by the public body requires that members of the public be permitted to
6 participate in a meeting of the public body, the public body to the extent practicable shall permit
7 members of the public to participate in a virtual meeting, subject to the conditions that apply at
8 an in-person meeting of the public body.

9 (b) If members of the public are permitted to speak at a virtual meeting, the technology
10 used to conduct the meeting must permit the members of the public body and members of the
11 public attending the meeting to hear the members of the public who speak at the meeting.

12 (c) If a public body considers at a virtual meeting a matter affecting the right or interest
13 of a person entitled by other law of the state or a political subdivision of this state or by rule of
14 the public body to participate, present evidence, or examine or cross-examine witnesses at an in-
15 person meeting, the public body shall permit the person to use the same technology that the
16 public body uses to conduct the virtual meeting, or provide equivalent access, to attend the
17 meeting and present evidence, or examine or cross-examine witnesses in the meeting.

18 (d) If a person to which subsection (c) applies objects that a virtual meeting will deny the
19 person due process of law, the public body may proceed with the matter in the virtual meeting
20 only if the public body considers the objection and determines that the virtual meeting provides
21 the person due process. The determination and the reason for the determination must be stated in
22 a record.

23 **Comment**

24 Subsections (a) and (b) address the situation in which members of the public have a right
25 to provide comments at the meeting of a public body, either orally or in writing. This right to

1 participate may derive not from an open meetings law but from some other law, such as an
2 administrative procedure act, another law dealing with the operations of state and local public
3 bodies, or the organic law governing the specific public body. Compliance with public comment
4 requirements may require flexible arrangements. For example, the public body could provide for
5 the submission of written comments by e-mail or text message in advance of, or within a limited
6 time after, the virtual meeting. As noted in the comment to section 5, appropriate auxiliary aids
7 and services shall be made available to afford individuals with disabilities an equal opportunity
8 to observe the virtual meeting.
9

10 Subsections (c) and (d) address the situation in which the action of the public body will
11 so affect the rights or interests of a specific member of the public that they have a due process
12 right to be heard at the meeting. These are commonly referred to as quasi-adjudicative
13 proceedings, and typically involve land use matters such as variances, special use permits, and
14 site-specific rezonings, but may also include the grant (or revocation) of licenses, franchises,
15 permits, or benefits. Georgia and North Carolina would bar quasi-adjudicative action at a virtual
16 proceeding unless all persons whose interests are affected agree. The North Carolina law also
17 requires that the right to a hearing occur during the emergency. This Act follows the approach of
18 New Jersey's virtual meeting law, which does not require the consent of the parties or that a
19 decision must be made during the emergency. The Act anticipates, however, that the public body
20 will undertake a "totality of the circumstances" examination to determine whether a virtual
21 meeting could provide due process as required by an administrative rule adopted by New
22 Jersey's Division of Local Government concerning whether a land use board can conduct a
23 public hearing on a development application virtually: "Before holding a public hearing on an
24 application for development during a remote public meeting, a land use board shall determine
25 whether electronic communication technology can sufficiently facilitate due process of the
26 applicant and any interested party, including the ability to examine exhibits, transcribe testimony
27 and cross-examine witnesses, as well as the ability of the public to comment upon the
28 application. Factors in making this determination shall include, at minimum, the scale of the
29 project, the number of approvals requested, the degree of public interest, and the number of
30 potential objectors." N.J.A.C. 5:39-1.7(a). The public body should also consider the
31 consequences of delay until an in-person meeting can be held. Consistent with the comment to
32 section 5, appropriate auxiliary aids and services shall be made available to afford individuals
33 with disabilities entitled to present evidence and examine or cross-examine witnesses during the
34 meeting an equal opportunity to do so.
35

36 The requirements of this section apply not only when the member of the public affected
37 by the public body is participating virtually but also when the member of the public and some
38 members of the public body are present at an in-person meeting of the public body but one or
39 more members of the public body are participating virtually under this act.
40

41 **Section 8. Notice**

42 (a) In addition to any other requirement concerning notice a public body must give for a
43 meeting of the public body, notice of a virtual meeting must specify that the meeting will be a

1 virtual meeting and the technology that will be used for the virtual meeting.

2 (b) Notice of a virtual meeting must specify how

3 (1) members of the public permitted to observe the meeting contemporaneously
4 pursuant to Section 6 may do so;

5 (2) members of the public permitted to participate, present evidence, or examine
6 or cross-examine witnesses at the meeting pursuant to Section 7 may do so;

7 (3) a member of the public may alert the public body of a technical problem that
8 prevents the member from accessing the meeting; and

9 (4) a member of the public with a disability may request the auxiliary equipment
10 or services necessary to permit the member to access the meeting.

11 **Comment**

12 As noted in the comment to Section 4, the exigent circumstances underlying the
13 declaration of emergency that triggers the authorization for a virtual meeting may interfere with
14 the ability of a public body to comply with statutory requirements governing how notice is to be
15 given, particularly for meetings scheduled prior to the issuance of the emergency declaration or
16 at or shortly after the onset of the emergency. The public body should use the best means
17 available in light of the circumstances to give the notice required by this section.

18 **Section 9. Rulemaking Authority**

19
20 A public body may adopt rules for conducting a virtual meeting comparable to rules for
21 conducting an in-person meeting of the public body. The rules may include:

22 (1) the means by which the public body will inform members of the public that a
23 meeting will be held virtually;

24 (2) the effect of a technical problem that interferes with meeting or access to a
25 meeting by a member of the public body or the public;

26 (3) the means by which a record considered at a meeting is made available to the
27 public body and, if required by other law, the public;

1 (4) the means for access to a meeting by an individual with a disability; and

2 (5) the process by which a person may object under Section 7 to the conduct of a
3 meeting on the ground that the procedure denies the person due process of law.

4 **Section 10. Relation to Electronic Signatures in Global and National Commerce Act**

5 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National
6 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or
7 supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
8 described in 15 U.S.C. Section 7003(b).

9 **Legislative Note:** *It is the intent of this act to incorporate future amendments to the cited federal*
10 *law. A state in which the constitution or other law does not permit incorporation of future*
11 *amendments when a federal statute is incorporated into state law should omit the phrase “, as*
12 *amended”. A state in which, in the absence of a legislative declaration, future amendments are*
13 *incorporated into state law also should omit the phrase.*

14
15 **Comment**

16
17 The federal Electronic Signatures in Global and National Commerce Act, popularly
18 known as “E-Sign”, was adopted in 2000 to facilitate the use of electronic records and signatures
19 in commercial transactions. Subject to exceptions not relevant here, E-Sign mandates the
20 acceptance of electronic contracts and electronic signatures in interstate or foreign commerce. It
21 largely tracks the Uniform Electronic Transactions Act, adopted by the ULC in 1999, but
22 includes consumer consent provisions and prohibits state law from giving greater legal effect to
23 any specific technology or technical specification. Under Section 102 of E-Sign, state legislation
24 attempting to regulate electronic records and signatures can opt out of federal preemption,
25 allowing some modification to the federal law, so long as the State treats the records or
26 signatures consistent with E-Sign. In order to take advantage of the exception to preemption, the
27 state law must make specific reference to E-Sign as provided in this Section. See 15 U.S.C.
28 Section 7002(a)(2)(B).

29
30 **[Section 11. Severability]**

31 If a provision of this [act] or its application to a person or circumstance is held invalid,
32 the invalidity does not affect another provision or application that can be given effect without the
33 invalid provision.]

34 **Legislative Note:** *Include this section only if the state lacks a general severability statute or a*

1 *decision by the highest court of the state stating a general rule of severability.*

2
3 **[Section 12. Repeals; Conforming Amendments]**

4 (a) . . .

5 (b) . . .]

6 ***Legislative Note:*** *The state should examine its statutes to determine whether conforming*
7 *revisions are required by provisions of this act relating to meetings of a public body and open*
8 *meetings requirements.*

9
10 **Section 13. Effective Date**

11 This [act] takes effect . . .