

February 1967

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### Repository Citation

Courts Oulahan, *Some Practical Problems Involved in Proxy Solicitation and Counting Under Virginia Law*, 8 Wm. & Mary L. Rev. 185 (1967), <https://scholarship.law.wm.edu/wmlr/vol8/iss2/3>

# SOME PRACTICAL PROBLEMS INVOLVED IN PROXY SOLICITATION AND COUNTING UNDER VIRGINIA LAW

by COURTS OULAHAN, ESQ.\*

No challenge to the ingenuity and patience of the corporate lawyer is more clearly presented than that of a proxy fight for control of a corporation. The fight usually is fought under two sets of rules. Both must be mastered by the counsel who advise management. This article is largely limited to the problems of a proxy fight as seen from the viewpoint of counsel for the management or majority of Board of Directors.

Proxy fights ordinarily should not be rough-and-ready donnybrooks where the Marquis of Queensberry rules are inapplicable. The lawyer who so regards—and conducts—a proxy fight hurts himself and his client. If the other side is intelligent and conscientious enough, the use of plants, diversion of mailing matter, and the supplying of rumors to the press can be detected. Should these tactics warrant action, judicial intervention can be sought, and the Securities and Exchange Commission (SEC) requested to require the wrongdoer to make a full disclosure of the tactics and of the facts in the latter's next mailing to the stockholders.

As in any election, there is no substitute for victory in a proxy fight. Like the normal voter, stockholders should not be underestimated as to their ability to understand issues. If stockholders think that one side in the proxy fight is taking advantage of the other, some percentage of votes—perhaps even the controlling amount—are going to be changed. Stockholder backlash is a consideration which dictates that each side fight hard—but fairly.

## I. SEC PROXY RULES<sup>1</sup>

Before dealing with the practical application of Virginia law to proxy fights, reference to SEC proxy rules is in order.<sup>2</sup> It is assumed

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1. The bible for any lawyer who may be engaged in a proxy fight is ARANOW AND EINHORN, *Proxy Contents for Corporate Control* (1963). (For any ideas expressed in this article which have been nurtured by that volume, the author expresses his grateful appreciation to the writers of that volume.)

2. 14 CFR § 1 et seq. (1964), hereafter Regulations 14A and 14B. Securities Exchange Act, 48 Stat. 881 (1934). The SEC has just published notice of proposed changes to these Rules, Sec. Exch. Act Rel. No. 8000 (Dec. 5, 1966).

that the most proxy fights in which counsel become involved are held under these rules. They have a broad application not only to corporations, the stock of which is traded on an exchange, but also, since the 1964 Amendment to the Securities Exchange Act of 1934, to certain corporations with stock traded over the counter.<sup>3</sup>

Next to cumulative voting, the SEC proxy rules are perhaps the most important assurance of corporate democracy. In Virginia, of course, cumulative voting is not a stockholder right unless expressly provided for in the articles of incorporation.<sup>4</sup> If a corporation comes under the SEC rules, however, the proxy rules apply regardless of corporate wishes.

Under the SEC rules, proxy solicitation is broadly construed. In practical effect, it covers any communication, oral or written, to stockholders "under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy" (Reg. 14a-1). For the management, this coverage means that, in order to avoid any questions, any letters or reports to stockholders during the period of several months before the meeting—other than the annual report—should be carefully phrased to avoid any possibility of challenge. The safest course is to limit pre-stockholder meeting reports to the annual one. For the opposition, the rule means that overt or covert attempts to obtain votes—or to raise opposition to management—must be limited to no more than ten persons (Reg. 14a-2(a)).

The proxy rules apply even where no election contest is involved. Where such is the case, the annual report, together with the proxy card notice of meeting and skeletal proxy statement, should be sufficient to assure compliance on the part of management (Regs. 14a-3,4,5). Preliminary copies of any proxy statement and form of proxy must be filed at least ten days prior to intended use or "such shorter period prior to that date as the commission may authorize upon a showing of good cause therefor." (Reg. 14a-6(a)).

The term "Commission" is used euphemistically because it is the Staff of the Division of Corporation Finance which reviews compliance of submitted proxy material with applicable regulations. The Staff member usually will be the Branch Chief of the Division who ordinarily handles other filings by the corporation. After the Staff has had an adequate time to review the material, a telephone call or personal visit to the Staff member will be helpful in clarifying any problems the

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3. 15 U.S.C. § 780-3 (1964).

4. Va. Code § 13.1-32 (1950).

Staff may have. Such a call or visit may even avoid the necessity for a "comment letter" by the Staff, which is usually and literally swamped with proxy materials during the stockholder meeting season in the spring and early summer. It should be noted that the Staff does not "pass" or "approve" proxy material. It merely informs the side involved that the Staff finds no reason to comment adversely upon the material submitted. For any side to claim that its proxy material has been "approved" during a proxy contest is to brook trouble.

If there is going to be an election contest, the opposition often will wait until the management has sent out its annual report and proxy statement. Therefore, management intelligence must pretty well alert it to what opposition can be expected, and the annual report and proxy statement accordingly drafted.

If management's intelligence is alert enough, it should detect "publicized activity which, if successful, could reasonably have the effect of defeating the action proposed to be taken at the meeting" (Reg. 14a-12(a)(1)). In such event, preliminary solicitation by management is permitted without all of the information required in a written proxy statement, provided such fuller information "is sent or given to security holders at the earliest practicable date" (Reg. 14a-12(a)(4)). Five days clearance with the SEC staff is required (Reg. 14a-12(b)). Such material often consists merely of a press release stating management's view as to certain claims made by the opposition and promising a full counter-statement in the near future. If the opposition claims are such as to possibly damage the business reputation of the corporation and, thus, to adversely affect its stock on an exchange, the Staff of the SEC may permit release of the press statement immediately upon submission and review on the same day.

The first real information management has as to an opposition usually comes with the filing of Schedule 14B forms by participants in the proxy solicitation by the opposition. These must be filed at least five business days before the opposition solicitation can begin (Reg. 14a-11(c)(1)). In this particular, the SEC rules give management an advantage since the latter, in the event of an election contest, need only file the 14B reports within five days after a solicitation has begun (Reg. 14a-11(c)(2)).

Prudent management always will prepare Schedule 14B reports as part of its annual meeting procedure, in order to assure prompt filing should a contest develop. Such forms are required of a "participant" in a

solicitation (Reg. 14a-11(b)). The definition of a participant under these rules is broad and, in addition to the nominee directors, includes anyone who substantially contributes his time, effort, or money to soliciting proxies. Employees in the field who follow up on proxy solicitation should be considered participants. Ordinarily, counsel, both house or outside, should scrupulously avoid any acts which might make them a participant. Thus, private counsel or a house counsel-secretary can answer stockholder letters which merely involve the sending of a requested new proxy card or the request for a power of attorney. If the lawyer-secretary adds to his letter some comment such as "We are counting on your vote for management", he probably would be considered a participant.

The problems of compliance with Regulation 14B can be substantially avoided by using the services of a professional proxy soliciting organization. Such organizations are particularly useful in the solicitation of proxies from brokerage houses. Prudent management will put such an organization on retainer from year to year, if only to assure a large stockholder vote even in the absence of a contest. Such a vote may well furnish an indicia of the support which management has among stockholders and help to deter possible opposition at the next year's annual meeting.

Assuming a contest, each mailing by one side usually evokes a counter-mailing by the other side. Clearance of such "additional soliciting material" with the SEC Staff is still required under a two-day rule (Reg. 14a-6(b)). Once the exchange starts, the danger of diatribes and personal attacks upon the personalities involved seems naturally to develop. In this situation the cardinal rule of proxy material drafting is fair comment. Each statement of fact must be based on actual fact. If the SEC Staff has any question about factual accuracy, it will require the submitting party to set forth the basis for the statements by separate letter. Counsel would do well to anticipate such requests and to submit supplementary information to the Staff along with the proposed proxy material.

The SEC regulations are quite clear as to what allegations may not be included in proxy material. These are (Reg. 14a-9, Note):

"(a) Predictions as to specific future market values, earnings, or dividends.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges

concerning improper, illegal or immoral conduct or associations, without factual foundation.

(c) Failure to so identify a proxy statement, form of proxy and other soliciting material as to clearly distinguish it from the soliciting material of any person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation."

Should one side depart from these rules and publish proxy material which has not been cleared by the Staff, that side may be required by the Staff to publish, in effect, a retraction in a special proxy mailing. The damage of such a retraction can be incalculable to the group required to so act.

Two cardinal rules should be followed in proxy solicitation. First, the letter of the regulations should be observed. Second, and more important, no form of written solicitation should be used until assurance has been received from the SEC Staff that there will be no comment. Such a procedure should be followed even if the time period for comment has expired. SEC Staff members are not as overworked as counsel during a proxy solicitation season. The deadlines for comment often cannot be met, despite the Staff's best efforts. The relationship of professional trust between counsel for a proxy solicitation group and the Staff can best be assured by the Staff's knowledge that all fair comment by them will result in modification of the proxy material submitted and that counsel will not take advantage of any understandable failure on the part of the Staff to meet a deadline.

## II. PREPARING FOR THE MEETING

Good faith conformity to the SEC proxy rules requires conscientious and well informed advice by counsel to the party involved. Counsel which the SEC Staff learns to trust may well turn out to be the advocate in the heaven of Federal securities regulation. At the same time, however, counsel must be practical and develop with his clients the kind of mutual respect which results in molding the facts of corporate life to the regulatory framework of the SEC.

A key element of this mutual respect is teamwork. A successful proxy solicitation, in compliance with the letter and the spirit of the SEC proxy rules, will be characterized usually by the efforts of a group in which the talents necessary for victory have been harnessed.

This harnessing should start immediately after the annual stockholders' meeting. An analysis of the immediately preceding stockholders' vote should be compiled. Lists of large stockholders who did not vote for management or who favored management should be compiled. The holding of broker-dealers and nominees should be listed, together with statistics showing how many shares were voted and for whom. Even where there is no election contest, failure of management to get out the vote of shares held in street name is an indication of lack of interest and even hostility to management, and thus a potential source of votes for an opposition next year.

The compilation just described should be brought up to date on a regular basis. The transfer agent should not be permitted to let his records of transfer fall too far behind. The informed accountant or stock specialist in management can detect danger signals for management from the changes in stock holdings. Thus, the shift of a large number of small blocs of stock from individual shareholders to large blocs held in street name may well indicate that one or more stockholders are accumulating shares with a view to their use at the next annual meeting. If management doesn't know the extent or reasons for the shift, then it ought to find out.

### III. COUNTING OF PROXIES

As previously noted, a professional proxy soliciting organization should be retained and used where a large number of stockholders must be solicited. In addition, professional organizations are available to receive, tabulate, and collect proxies for management while solicitation is progressing. Such organizations welcome the assistance of counsel, who should regularly review the proxies compiled to insure that they are valid. Where there is any serious question as to validity, prompt action must be taken to secure a new proxy or to obtain documentation—such as a power of attorney—to validate the proxy. Such a review should be made daily during the week preceding the meeting itself.

With the proxies in the hands of an independent professional organization, no charge can be made by an opposition group that management has destroyed or altered proxies. At the commencement of the annual meeting, at least three of the representatives of the organization should be sworn in as inspectors of election. These inspectors

supervise the collection—usually by corporate employees—of proxies and ballots at the meeting.<sup>5</sup>

Even without an election contest, it is well to provide for a three-step procedure in counting proxies and casting ballots. In the first step, the inspectors of election report the number of shares represented in person or by proxy at the meeting. This establishes a quorum. In the second step, the inspectors report the number of shares voting for nominees for election as director and voting for and against any proposals being considered by the stockholders. The third and final step is for the casting of ballots by the proxy holders, to include all of the proxies, after which the inspectors certify the official results of the election.

Where there is no election contest, the inspectors of election apply the rules affecting the validity of proxies during the period when they are being collected and, to a lesser extent, during the tabulation while the stockholders' meeting is in progress. Rules with respect to the validity of proxies have developed over the years from corporate practice and statutory law and, to a lesser extent, from judicial decisions. The scarcity of firm judicial precedent is unfortunate. On the other hand, this lack of precedent shows the extent to which practical considerations have governed the procedures for corporate democracy.

The rules have a much more important role to play where there is an election contest. In such a situation, experience indicates that the following procedure be followed:

1. Try to work out with counsel on the other side an agreed-upon set of rules which will govern the counting of proxies.

2. If this can be done, incorporate these rules in a stipulation executed by the opposing groups or their counsel, preferably both. Enthusiastic members of a slate may forget the rules prevailing at the election during the heat of the stockholders' meeting unless they have personally executed the stipulation.

3. The stipulation also should contain provisions establishing the procedure for collecting proxies and ballots at the meeting and for casting final ballots after all of the proxies have been counted and their validity, if challenged, determined.

4. The stipulation also should prohibit any further electioneering after the meeting has been convened. Ordinarily, this provision is de-

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5. A more detailed discussion of the duties and role of inspectors of elections is provided in Appendix B.



signed to protect an opposition from being taken advantage of by management, which effectively controls the meeting. Indeed, the chief executive officer's annual message to the stockholders might be postponed until after the election of directors, in order to avoid a charge that his speech unfairly presented the accomplishments of management. The stipulation also should serve to restrain the opposition, particularly where one of its members, as an existing director, may be on the platform with management directors and, after a planted question, use the rostrum to make a last electioneering speech.

5. Ordinarily, mere inspectors of election should be sufficient to review the proxies and ballots for validity and to certify the vote. However, where the contest is particularly heated, one side may require a so-called "judge of elections" to pass upon the validity of proxies which are challenged while the proxies are being counted by the inspectors of election.

6. Such counting, where there is a contest, takes place in the presence of counsel for each opposing side. As each name of a shareholder is read by one of the inspectors, a second inspector reads out the date and vote on any proxy or ballot received by management from that stockholder, and a third inspector gives the same information with respect to any proxy or ballot held by the opposition. Ordinarily, a ballot will cancel out a proxy, and a later proxy an earlier proxy. One of the proxies, however, may be challenged on the grounds of lack of authority, illegible signature, lack of date, or some alleged failure to comply with the rules. The challenged proxies are then matched, and reserved for decision before the "judge of elections".

7. Even if an active or retired member of the judiciary is chosen as "judge of elections", the title is a misnomer. His duties are ministerial, not judicial. He applies the rules to the challenged proxies in order to assure the vote of the shareholder to the maximum extent possible. He uses a practical approach to the manner in which the shareholder, no matter how inexpertly, expressed his intention. A challenge to proxies on the grounds of alleged improper solicitation under the SEC proxy rules should not be recognized. This is a matter solely for the courts. A transcript of the proceedings should be kept by a recognized court reporter.

8. The general experience is that, although many proxies may be challenged, very few are invalidated where the date is later than that of the opposition and the signature is reasonably legible or, where the name of the stockholder is typewritten on the card, the name is

only partly legible. The tendency of counsel in a disputed election is to challenge, usually for bargaining purposes. In one disputed election in which the author participated, out of hundreds of thousands of votes challenged, challenges involving only several hundred votes were held valid by the judge of elections.

#### IV. RULES AFFECTING VALIDITY OF PROXIES

Appendix A sets forth certain general rules which are believed to reflect applicable Virginia statute (§ 13.1-32) and generally applicable principles developed by court decisions.

These rules originally were developed under applicable Ohio law, which is far more specific than that of Virginia and which has been construed to some extent by the Ohio courts. Because of the lack of Virginia authority, it is believed that the references to Ohio authority will be helpful to the counsel who must seriously prepare for a proxy contest in Virginia (Appendix B).

## APPENDIX A

## SUGGESTED RULES AND PRESUMPTIONS

## FOR

DETERMINING VALIDITY OF PROXIES UNDER VIRGINIA LAW  
WITH APPLICABLE VIRGINIA AND OHIO PROVISIONSI. *Introduction*

1. The following rules of law and presumptions should be applied in determining the validity of proxies under Virginia law.

For a discussion of rules of law and presumptions for determining the validity of proxies under Ohio law, see Dampeer, *Proxy and Ballot Questions Submitted to Inspectors of Election in Shareholders' Contests*, 24 Ohio Bar 564 (1951). For a discussion concerning such rules and presumptions generally, see 5 Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 2053-2058 at 214-229 (1952 rev.); 1 Prentice-Hall, *Corporation Guide* para. 2020; Axe, *Corporate Proxies*, 41 Mich. L. Rev. 38, 225 (1942) (the most comprehensive, early article on the subject); 18 C.J.S., *Corporations* § 550 at 1248-1255 (1939). The presumptions and rules of law under the 1955 Montgomery Ward & Co. proxy contest appear in 11 Business Lawyer 127 (Nov. 1955) (hereinafter called Ward Proxy Rules). See 13 Business Lawyer 706, 712, *Virginia's Experience With The Model Business Corporation Act*. See also Ohio Revised Code, Section 1701.01 (F) ("shareholder" defined), Section 1701.45 (record date), and Section 1701.48 (A) (voting of shares by proxy).

2. When used in the following rules of law and presumptions, a "stockholder" means a stockholder of record on the particular date fixed by the Board of Directors as the record date as of which stockholders are entitled to receive notice of, and to vote at, a stockholders' meeting, and references therein to the shares held by a stockholder mean the shares of record in the particular stockholder's name on such record date. No applicable Virginia provision.

II. *General*

3. In general, a proxy should be accepted unless it appears on its face that it has not been executed by the person entitled to vote the shares, or otherwise in the manner required by law. If, however, there is presented reliable evidence that the proxy was not executed by the person

entitled to vote the shares, or otherwise in the manner required by law, such evidence may be recognized, or further written clarification from the person executing the proxy obtained. See Va. Code § 13.1-29.

Ohio Revised Code, Section 1701.48 (A), requires that a proxy must be "a writing signed by" a shareholder or other person entitled to vote shares (*i.e.*, fiduciary). See *Klein v. United Theatres Co.*, 80 O.A. 173, 176-177 (Hamilton Co. 1947), *affirmed* 148 O.S. 306, 319, 323-324 (1947); *Axe, supra* note 1, at 58. "\*\*\*\* Inspectors of election are . . . entitled to presume the validity [of the signature on a proxy] in the absence of proof to the contrary", *Dampeier, supra* note 1, at 567; see *Investment Associates, Inc. v. Standard Power & Light Corp.*, 48 A. 2d 501 (Del. Ch. 1946), *affirmed* 51 A. 2d 572, 580 (Del. Sup. Ct. 1947); *Atterbury v. Consolidated Coppermines Corp.*, 20 A. 2d 743, 747 (Del. Ch. 1941); *Axe, supra* note 1, at 60-63; *Molloy v. Bemis Bro. Bag Co.*, 174 F. Supp. 785 (D. N.H. 1959). On the other hand, the Delaware Corporation Law contains no such requirement of the shareholder's own signature, but merely refers to a "proxy" (Section 212); see 5 *Fletcher, supra* note 1, § 2056 at 222; *Investment Associates, Inc. v. Standard Power & Light Corp.* 48 A. 2d 501, 512 (Del. Ch. 1946), *affirmed* 51 A. 2d 572, 580 (Del. Sup. Ct. 1947) ("We know of no [Delaware] statute or rule of law that militates against a shareholder's authorizing a third party to sign his [shareholder's] name to a proxy. The mere fact that the signature on a proxy is not in the handwriting of the shareholder does not invalidate the proxy. \*\*\*\*"); *Stephens Fuel Co., Inc. v. Bay Parkway National Bank*, 109 F. 2d 186, 189 (2d Cir. 1940) (proxies to national banking association signed by persons other than shareholders in such shareholders' names "not . . . invalid since there was no proof that they were not authorized"). Illustrations of the above rule are as follows:

- (a) Where a shareholder was unable to sign her name on a proxy because of illness, and on instructions from the corporation, she affixed an "X" and thereafter her brother wrote "Jane Jones, her mark, by John Jones", the proxy was accepted.
- (b) Where a proxy for shares registered in the name of "Mr. John Jones" was signed "Mrs. John Jones", the proxy was rejected in the absence of proof of authority of the wife to sign as her husband's agent or fiduciary.
- (c) Where a proxy for shares registered in the name of "Mrs. John

Jones" was signed "Mr. John Jones", the proxy was accepted upon receipt of a letter from Mr. Jones stating that the shares were incorrectly registered in the name of Mrs. Jones.

- (d) Where a proxy for shares registered in the name of "Mary Jones, c/o Mrs. Florence Jones" was signed in the same handwriting "Mary Jones, Mrs. Florence Jones", the proxy was accepted on the presumption that, in the absence of proof to the contrary, Mary Jones signed both names because she believed that this was required by the registered name.
- (e) Where a proxy for shares registered in the name of "Mary Jones" was signed "Mary Jones, by John Jones, Agent" or "Mary Jones, by John Jones, Attorney", the proxy was rejected in the absence of a certified or photostatic copy of John Jones' authority to sign such proxy.
- (f) Where a proxy for shares registered in the name of "John Jones" was signed "John Jones (minor) per Mary Jones (mother)", the proxy was rejected.

4. In case of any ambiguity with respect to a proxy, consideration should be given to the probable intention of the stockholder, and such intention should be liberally inferred to the end that the proxy will confer the power manifestly sought to be given. No applicable Virginia provision.

See 5 Fletcher, *supra* note 1, § 2056 at 220-221, 224; Dampeer, *supra* note 1, at 567:

"The general rule that inspectors [of election] are entitled to treat whatever reasonably purports to be a proxy as entitled to prima facie evidence of validity is supported by the factual situation that what is desired is a determination of whether or not a proxy sufficiently evidences the intention of a shareholder to constitute the designated person his agent in voting his shares. It seems only reasonable that the document intended as a proxy should be liberally construed so that it will confer the power manifestly intended".

5. A proxy must be in writing, and may be in the form of a telegram or cablegram appearing to have been transmitted by a stockholder or of a photographic, photostatic, or equivalent reproduction of such a writing. See Va. Code § 13-32.

See Ohio Revised Code, Section 1701.48(B); Axe, *supra* note 1, at 52-53. Illustrations of this rule are as follows:

- (a) Where a shareholder gave a telegraphic proxy in the form of the printed proxy, the proxy was accepted.
- (b) Where a shareholder who previously had been requested to execute a printed proxy sent a telegram to a corporation official authorizing him to vote her shares as he saw fit, the proxy was accepted as one which could be voted by such official.

6. A proxy executed by a stockholder and otherwise appearing to be valid should be rejected if (a) the execution of such proxy is contrary to the order of a court in a proceeding to which the corporation is a party; or (b) such execution is contrary to, or the right to execute such proxy has been transferred to or vested in another by, a judgment, order, or decree of a court in a proceeding to which the corporation is not a party, upon receipt by the corporation of a certified copy of such judgment, decree, or order. No applicable Virginia provision.

See Ohio Revised Code, Section 1701.46(G).

7. A proxy executed by a stockholder and otherwise appearing to be valid should not be rejected because the persons appointed in such proxy are not stockholders of the corporation. *Syphers v. McCune*, 143 W. Va. 315, 101 S.E. 2d 834 (1958) (Stockholder may freely select his proxy even though the proxy may not be a stockholder). But note *Callister v. Paige*, 146 F. Supp. 399 (D. Del. 1956); also *Petition of Melloh*, 187 N.Y.S. 2d 203 (1959).

See *Axe*, *supra* note 1, at 50-51; 5 Fletcher, *supra* note 1, § 2055 at 218-219.

8. Unless a proxy otherwise provides, each person appointed by such proxy may select in writing a substitute to act for him, and, when three or more persons are so appointed by a proxy, a majority of them or of their individual substitutes may appoint one or more substitutes to act for all. No applicable Virginia provision.

See Ohio Revised Code, Section 1701.48(F)(1).

9. Where a proxy appoints more than one person, a majority of such persons as attend the meeting, or if only one such person attends then that one may vote all of the shares represented by such proxy. If a majority of the persons so appointed by a proxy and attending the meeting do not agree on any particular issue (*i.e.*, a slate of nominees for election as directors), each such person is entitled to vote an equal number of shares, the sum of which does not exceed the aggregate number of shares entitled to be voted by such proxy. No applicable Virginia provision.

See Ohio Revised Code, Section 1701.48(F) (2).

10. A proxy is not revoked by the presence, at the meeting where it is to be voted, of the stockholder signing the proxy. Without affecting any vote previously taken, a stockholder signing a proxy can revoke it by giving notice thereof to the corporation either in writing (*i.e.*, a subsequent proxy or ballot explicitly or implicitly revoking an earlier proxy or merely a written statement revoking the proxy) or orally at the meeting at which the proxy is to be voted. No applicable Virginia provision.

See Ohio Revised Code, Section 1701.48(D).

### III. *Signatures—Individual*

11. A proxy may be signed in either crayon, lead pencil, or ink. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 568; Ward Proxy Rule A-3, *supra* note 1.

12. A proxy bearing a plainly illegible or undecipherable signature should be rejected in the absence of reliable evidence that the signature is that of a stockholder or other person entitled to vote the shares. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 568. Reliable evidence of the identity of an otherwise illegible or undecipherable signature could consist of a letter on the letterhead of the shareholder signed in the same manner as the proxy, or the addition of a rubber stamp or legible facsimile signature on the proxy.

13. A proxy bearing a rubber stamp or facsimile signature of an individual stockholder should be rejected in the absence of reliable evidence that the stamp or signature was affixed upon the authority of such stockholder. The existence of two proxies, one signed by the stockholder and the other bearing his stamp or facsimile signature, would be an indication that such stamp or facsimile was not affixed by the stockholder or upon his authority, and the proxy bearing such stamp or facsimile signature should be rejected, and the other proxy accepted. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 568-569; Ward Proxy Rule A-2, *supra* note 1. The rule stated herein is based on the presumption that the use of rubber stamp or facsimile signatures by individuals is not so widespread, as in the case of their use by partnerships, including nominees and brokers (notes 27, 48 and 49 below), as to warrant their acceptance by inspectors of election.

However, inspectors at one election under Ohio law in 1956 adopted a contrary rule, as follows:

"A proxy bearing a rubber stamp or facsimile signature should be accepted in the absence of some indication, either by evidence submitted or by the circumstances, that the same was affixed by someone other than the shareholder."

The above quoted rule is based in part on Sections 1-201(46) of the Uniform Commercial Code, Ohio Revised Code, Sections 1301.01(TT) and 1301.23, which have been interpreted as permitting a rubber stamp or facsimile signature on a negotiable instrument. A share certificate is a negotiable instrument within the meaning of the U.C.C., *ibid.* at Article 8 is fully negotiable under the Uniform Stock Transfer Act, pursuant to which such a certificate is held to be endorsed for transfer when an assignment thereof is "signed" by the transferor or "when the signature of such person is written" on the back thereof, Ohio Revised Code, Section 1301.01(N), 1308.19. See 2 Davies, *supra* note 1, § 8673-1 at 1275 *et seq.*; *Cliffs Corp. v. United States*, 103 F. 2d 77, 80 (6th Cir. 1939), *cert. denied*. 308 U.S. 575 (1939) (shares transferred under an Ohio voting trust agreement held subject to the Federal stock transfer tax, the court stating that "[s]tock certificates are assignable and pass by indorsement or delivery as do bills of exchange and promissory notes").

14. If it appears that a proxy was signed by another person in the name of the person entitled to vote, the proxy should be rejected in the absence of reliable evidence of the signer's authority to do so. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 569; *contra*, Ward Proxy Rule A-10, *supra* note 1 (where the relationship between the shareholder and the person signing is that of husband and wife, parent and child, or brother and sister, a written statement from the person signing that he or she is authorized to sign for the shareholder should be accepted as satisfactory authority). Written power of attorney or of agency signed by the shareholder usually should be required. Illustrations of this rule are as follows:

- (a) Where a proxy was signed in the name of the shareholder with the initials of another person added thereto in parentheses, the proxy was rejected, and a new proxy obtained signed by the shareholder himself.



- (b) Where the shareholder was "John A. Jones" and the proxy was signed "Mrs. John A. Jones", the proxy was rejected even after receipt of a letter from Mrs. Jones stating that her husband had died several years before and that no executrix of his estate had been appointed and "none was necessary".

See also note 2 *supra*.

15. Titles such as "Mr.", "Mrs.", "Miss", "Dr." or "Rev." may be added or omitted by the stockholder without affecting the validity of a proxy. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 568; Ward Proxy Rule A-7, *supra* note 1.

16. Where there are slight changes or variations in spelling as between the registered name of the stockholder and the signature on a proxy, the proxy should be accepted if the name as signed is phonetically similar to the name as registered. No applicable Virginia provision.

See Ward Proxy Rule A-4, *supra* note 1.

17. Where a married woman has shares standing in her maiden name and signs a proxy in her married name, such proxy should be accepted if the signature contains her maiden name as a part thereof (*i.e.*, "Jane Smith" whose married name is "Jane Smith Jones"). Such a proxy should be rejected where the signature does not contain the stockholder's maiden name as a part of her married name (*i.e.*, "Mrs. John P. Jones"), in the absence of reliable evidence that the signer was the same person as the record holder, her name having been changed by marriage. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 568. For example, proxies for shares registered in the name "Jane Smith" and signed "Jane Smith, now Mrs. John Jones", "Mrs. John Jones, formerly Jane Smith", or "Jane Jones, nee Smith" should be accepted.

18. Where a stockholder signs a proxy, using (a) an initial or initials for his first or middle names of record, or (b) a middle initial or middle name different from his middle initial or middle name of record, or (c) a name or names for the first or middle initials of record, the proxy should be accepted. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 568; 5 Fletcher, *supra* note 1, § 2056 at 221; *Atterbury v. Consolidated Coppermines Corp.*, *supra* note 3; Ward Proxy Rule A-8, *supra* note 1.

19. Where a stockholder signs a proxy, abbreviating one of the

Christian names of record (*i.e.*, "Chas." or "Ch." for "Charles"), the proxy should be accepted. No applicable Virginia provision.

See Ward Proxy Rule A-9, *supra* note 1.

20. Where a stockholder (a) adds to his signature on a proxy "Jr." or "Sr." or a Roman numeral not in his record name or (b) omits from such signature "Jr." or "Sr." or a Roman numeral in his record name, the proxy should be accepted. However, where the stockholder substitutes in his signature on a proxy "Jr." for "Sr.", or "Sr." for "Jr.", or one Roman numeral for another Roman numeral, as compared with the record name of such stockholder, the proxy should be rejected in the absence of reliable evidence that the signer is the registered stockholder or has authority to sign in the name of such stockholder. No applicable Virginia or Ohio provision.

21. Where the list of stockholders contains the names of two persons whose names and addresses are identical, except that a Christian name is used in one instance and an initial in the other (*i.e.*, "Charles" and "C."), a proxy signed in either fashion should be accepted as entitled to be voted for all of the shares registered in both names, in the absence of another proxy signed in either fashion or of reliable evidence that more than one stockholder holds such shares. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 569. For example, a proxy signed by "John C. Jones, 110 Pine Street" should be accepted for the shares registered in the name of "John C. Jones" and "John Jones", where the record address of both is "110 Pine Street".

See Ward Proxy Rule A-5, *supra* note 1. The rule recognizes that many shareholders use their proxies to management to change their addresses.

22. Where the stockholder signs his name on a proxy and then adds an address different from that shown for such stockholder on the stock register, the proxy should be accepted. No applicable Virginia provision.

See Dampeer, *supra* note 1, at 569. For example, a proxy signed by "John Jones" without an address should be accepted for the shares registered in the name of "John Jones, 110 Pine Street" and "John Jones, 220 Brown Street"; but a proxy signed by "John Jones, 110 Pine Street" should be accepted only for the shares registered in the name of "John Jones, 110 Pine Street" and not for the shares registered in the name of "John Jones, 220 Brown Street".

23. Where the stock register contains the names of two persons whose names are identical but whose addresses are different, a proxy signed in

such name without the addition of any address should be accepted as representing the vote of all of the shares registered in both names, in the absence of reliable evidence that more than one stockholder holds such shares. However, a proxy signed in such name, followed by one of such different addresses, should be accepted only as representing the vote of those shares registered in the name of the stockholder with that address. No applicable Virginia provision. See *supra* note 22 for Ohio provision.

#### IV. Signatures—Corporate

24. Shares standing in the name of another corporation, domestic or foreign, may be voted by such officer, agent or proxy as the by-laws of such corporation may prescribe, or, in the absence of such provision, as the board of directors of such corporation may determine. A proxy apparently executed in the name of another corporation shall be presumed to be valid until challenged and the burden of proving invalidity shall rest on the challenger. See Va. Code § 13.1-32.

See Ohio Revised Code, Section 1701.47(A); Dampeer, *supra* note 1, at 567; 1 Davies, *supra* note 1, § 8623-52 at 757-760; Axe, *supra* note 1, at 57-58.

A proxy (1) not signed for a corporation for profit by one of the officers specified in the statute (*i.e.*, an assistant secretary or assistant treasurer of a business corporation and an assistant trust officer of a bank) or (2) merely signed in the name of the corporation without more should be rejected, in the absence of written authority (including a telegram) from the corporation concerned. However, where a bank or trust company submits a proxy signed by a person designated as "authorized signer", the proxy should be accepted, see Ward Proxy Rule G, *supra* note 1.

In the case of a domestic corporation not for profit, a proxy signed by an officer other than one listed in the statute would appear to be valid (1) when it appears from the form of the proxy that such a corporation has none of the officers listed in the statute or (2) when the stencilled address on the proxy or in the stock register contains the name of the officer authorized to sign (*i.e.*, "Mt. Vernon First Congregational Church, John A. Jones, Secretary of Endowment Fund"). Prior to the 1955 revision of the Ohio General Corporation Law (new Section 1702.34(a)), domestic corporations not for profit were not required to

have officers similar to those of a corporation for profit. In any of the above cases, the actual signature of the corporate officer authorized to sign the proxy is required, and a rubber stamp or facsimile of his signature is not sufficient.

25. Where the name of a corporation holding shares of another corporation appears on the face of a proxy for such shares and such name is not repeated as part of the signature, or where the name of such corporation is inserted as part of the signature by rubber stamp or facsimile signature, the proxy should be accepted if it appears to be signed by any officer in accordance with paragraph 24 above. See Va. Code § 13-193.

See Ward Proxy Rules G and L-1, *supra* note 1.

#### V. Signatures—Partnership

26. Shares standing in the name of a partnership may be voted by any partner. A proxy executed in the partnership name shall be presumed to be valid until challenged and the burden of proving invalidity shall rest on the challenger. See Va. Code § 13.1-32.

See Dampeer, *supra* note 1, at 568; Axe, *supra* note 1, at 57; *Schott v. Climax Molybdenum Co.*, 154 A. 2d 221 (Del. Ch. 1959); *Gow v. Consolidated Copper Mines Corp.*, 165 Atl. 136, 147-148 (Del. Ch. 1933); Ward Proxy Rule M, *supra* note 1. Where the proxy is signed "The John H. Faulkner Company" without more, the proxy should be rejected in the absence of some evidence (*i.e.*, a letter from the business concerned) that the shareholder is a partnership.

27. Where the name of the partnership is signed on the proxy by means of a rubber stamp or facsimile signature, whether or not such stamp or signature is followed by the signature of a general partner or other person purporting to act with authority, the proxy should be accepted.

See *supra* note 13. There exists greater likelihood that a partnership will execute a proxy by rubber stamp or facsimile signature and that unauthorized use of such stamp or facsimile will not occur, than in the case of an individual.

#### VI. Dates

28. No proxy shall be valid after eleven months from its date, unless otherwise provided in the proxy. No authorization of an attorney in

fact to execute a proxy shall be valid after 10 years from its date, but such proxies may be accepted as valid in the absence of notice to the contrary. See Va. Code § 13.1-32.

See Ohio Revised Code, Section 1701.48(C); 1 Davies, *supra* note 1, § 8623-53 at 767-768; Dampeer, *supra* note 1, at 568; Axe, *supra* note 1, at 53-54, 64; 5 Fletcher, *supra* note 1, § 2056 at 222.

29. Where a proxy is dated prior to the date of the notice of meeting at which such proxy is to be voted, and the date on the proxy is not more than eleven months before the date of said meeting, the proxy should be accepted. No applicable Virginia provision. See *supra* note 28 for Ohio provision.

30. Where a proxy bears (a) no date, or (b) an illegible date, or (c) a date later than the date of the meeting at which it is to be voted, or (d) a date later than the date of the postmark on the envelope in which it is contained, the proxy should be accepted in the absence of a conflicting proxy, and the date of the postmark, if any, of the envelope in which the proxy is contained should be considered the date of the proxy. For the purposes of paragraphs 31-34 below, a proxy described above in clauses (a)-(d) is considered an undated proxy where any one of such descriptions is applicable. No applicable Virginia provision.

With respect to a proxy bearing (a) no date or (b) an illegible date, see Dampeer, *supra* note 1, at 568. With respect to a proxy bearing (d) a date later than the date of the postmark on the envelope in which it is contained, see *Investment Associates, Inc. v. Standard Power & Light Corp.*, *supra* note 3. Where a proxy bears (c) a date later than the date of the meeting at which it is to be voted, the shareholder clearly has made a mistake, and the proxy should be treated as undated in order that he not be disfranchised. For the proposition that the date of the postmark becomes the date of an undated proxy, see *Investment Associates, Inc. v. Standard Power & Light Corp.*, *supra* note 3; Ward Proxy Rule P-2, *supra* note 1.

31. Where conflicting proxies are submitted without being contained in envelopes or, if so contained, without any indication of the dates of mailing on such envelopes or otherwise, and

- (a) where the conflicting proxies are undated or bear the same date, both should be rejected;
- (b) where the conflicting proxies bear different dates, the proxy with the later and most recent date should be accepted, and the other proxy rejected; or

- (c) where one proxy is dated and the other is undated, the dated proxy should be accepted, and the undated proxy rejected.

No applicable Virginia provision.

See Dampeer, *supra* note 1, at 750; *Standard Power & Light Corp. v. Investment Associates, Inc.*, *supra* note 3; Ward Proxy Rule P-3, *supra* note 1.

32. Where conflicting proxies are both undated or bear the same date, and

- (a) where the postmarks on the envelopes containing such proxies are substantially identical as to the date and hour of mailing (*i.e.*, 3:00 p.m. and 3:30 p.m. on the same date, or less than one hour's difference), both should be rejected; or
- (b) where the postmark on the envelope containing one proxy is later in date, or substantially later in hour, than that on the envelope containing the other proxy, the proxy with the later postmark should be accepted, and the other proxy rejected.

No applicable Virginia provision. See *supra* note 28 for Ohio provision.

33. Where conflicting proxies are contained in envelopes with postmarks substantially identical as to the date and hour of mailing (*i.e.*, 3:00 p.m. and 3:30 p.m. on the same date, or less than one hour's difference), and

- (a) where both proxies are undated, both should be rejected;
- (b) where one proxy is dated and the other undated, the dated proxy should be accepted, and the undated proxy rejected; or
- (c) where both proxies are dated, the proxy which is dated later should be accepted, and the proxy which is dated earlier rejected.

No applicable Virginia provision. See *supra* note 28 for Ohio provision.

34. Where conflicting proxies are both dated, and

- (a) where one proxy is mailed in an envelope postmarked on the same date as, or on a later date than, the date of such proxy, and the other proxy bears a later date than both the date and postmark of the first proxy but is not contained in an envelope with a postmark, the proxy bearing the later date should be accepted, and the proxy bearing the earlier date should be rejected; or

- (b) where the proxy bearing the earlier of the dates inserted on the proxies is contained in an envelope with the later of the postmark dates on the envelopes containing the proxies, and the proxy bearing the later date is contained in an envelope with the earlier postmark date, the proxy bearing the earlier date should be accepted, and the proxy bearing the later date should be rejected.

No applicable Virginia provision. See *supra* note 28 for Ohio provision.

## VII. *Shares Held by Two or More Persons*

35. Shares held by two or more persons as joint tenants or as tenants in common or tenants by the entirety may be voted in person or by proxy by any of such persons. If more than one of such tenants shall vote such shares, the vote shall be divided among them in proportion to the number of such tenants voting in person or by proxy. Va. Code § 13.1-32.

See Ohio Revised Code, Section 1701.46(E)(1); *Atterbury v. Consolidated Coppermines Corp.*, *supra* note 3; 1 Davies, *supra* note 1, § 8623-51 at 755-757; Ward Proxy Rule C-2, *supra* note 1; Axe, *supra* note 1, at 59; 5 Fletcher, *supra* note 1, § 2056 at 222. Since the Ohio statute authorizes one of two joint tenants to execute a proxy for shares registered in their joint names, one tenant also should be able to execute the proxy in the names of both, see Ward Proxy Rules C-3 and 4, *supra* note 1. Where shares are registered in the names of "John Jones and Mary Jones, Joint Tenants" or any variant thereof as set forth in the rule, a proxy therefor signed in the same handwriting in any one of the following fashions should be accepted:

- (a) "Mary Jones, mother of John Jones";
- (b) "John Jones, Executor", "John Jones, Executor of the Estate of Mary Jones", or "John Jones, survivor";
- (c) "John Jones"; or
- (d) "John Jones and Mary Jones", "John Jones, and Mary Jones by John Jones, Agent or Attorney", "John Jones, and Mary Jones by John Jones, Executor", or "John and Mary Jones".

36. Where conflicting proxies are received with respect to shares registered in the name of two or more persons, the proxy submitted by a majority thereof should be accepted with respect to all of such shares,

and the proxy, if any, submitted by a minority thereof should be rejected. Where the same number of such persons execute conflicting proxies, each such proxy should be accepted with respect to an equal number of shares, the sum of which does not exceed the aggregate number of shares held by such persons. However, where a document specifying the terms with respect to the voting of shares registered in the names of two or more persons is submitted to the corporation, such terms, if contrary to the foregoing rules, must be followed, and a proxy not executed in accordance with such terms should be rejected. No applicable Virginia provision.

See Ohio Revised Code, Section 1701.46(E); Dampeer, *supra* note 1, at 569.

### VIII. *Fiduciaries*

37. Fiduciary means:

- (a) guardian
- (b) trustee
- (c) executor
- (d) administrator, or
- (e) committee, receiver or any other person, whether individual or corporate, acting in any fiduciary capacity for a person, trust, or estate.

See Va. Code § 58-77 (7).

See Ohio Revised Code, Sections 1701.28(B)(3) and 1701.46(C) and (D).

38. (a) Shares standing in the name of a receiver or a trustee in proceedings under the National Bankruptcy Act may be voted by him. Shares held by or under the control of a receiver or a trustee in proceedings under the National Bankruptcy Act may be voted by him without the transfer thereof into his name if authority so to do be contained in an order of the court by which he was appointed.
- (b) Neither treasury shares, nor shares held by another corporation if a majority of the shares entitled to vote for the election of directors of such other corporation is held by the corporation, shall be voted at any meeting or counted in determining the total number of outstanding shares at any given time entitled to vote. If a corporation holds shares of its own stock in a fiduciary



capacity, they may, if the corporation is sole fiduciary, be counted to establish a quorum but may not be voted and if the corporation is a fiduciary jointly with another, the other may vote the shares.

See Va. Code § 13.1-32.

See Ohio Revised Code, Sections 1701.46(B) and 1701.47; 1 Davies, *supra* note 1, § 8623-34 at 596-609 and § 8623-51 at 755-757; Axe, *supra* note 1, at 226-231; 5 Fetcher, *supra* note 1, § 2054 at 217-218; Ward Proxy Rules F-1, H, and I-1, *supra* note 1.

39. Fiduciaries or trustees under a voting trust agreement, who are stockholders of record as of a particular record date, may execute proxies with respect to the shares registered in their names without further proof of their appointment as such. See Va. Code § 13.1-32.

See Ohio Revised Code, Sections 1701.46(C), (D), and (H) and 1701.48(D), (E) and 1701.49 (B). Conversely, where a proxy is signed by a fiduciary for a shareholder of record, such proxy should not be accepted until proof of his authority satisfactory to the corporation or the inspectors of election is presented. The proxy signed by the fiduciary would constitute notice to the corporation of the death or incompetency of the shareholder, and an earlier proxy signed by the shareholder himself would have to be rejected as revoked by notice of such death or incompetency, see 1 Davies, *supra* note 1, § 8623-53 at 767-768. Illustrations of the above rules are as follows:

- (a) Authority of a fiduciary was held established by a certified or photostatic copy of the court order appointing such fiduciary, a telegram from the probate judge stating that the fiduciary had been appointed, or a telegram or letter from an attorney-at-law to the same effect.
- (b) Where the executrix of the estate and wife of a shareholder was requested to supply proof of her appointment and returned the corporation's letter with the notation that she had been so appointed several years before and trusted this information was what the corporation wanted to know, a proxy signed by her was accepted.
- (c) Where the wife of a shareholder signed the proxy as executrix and upon inquiry stated that she would be so appointed, but such appointment was not effected prior to the voting of the proxy, a proxy signed by her was rejected.
- (d) Where a shareholder dies after the record date, of which the

corporation has notice, and no fiduciary for his estate is appointed prior to the date of the meeting, a valid proxy for the shares cannot be executed.

- (e) Where the shares are registered in the names of "Jane Jones, c/o John Jones, Guardian", a proxy signed as above or "John Jones, Guardian" should be accepted.

40. Shares held by an administrator, executor, guardian, committee, or curator may be voted by him, either in person or by proxy as provided in this section without a transfer of such shares into his name. Shares standing in the name of a trustee may be voted by him, either in person or by proxy as provided in this section, but no trustee shall be entitled to vote shares held by him without a transfer of such shares into his name. See Va. Code § 13.1-32.

See Ohio Revised Code, Section 1701.46(E); 1 Davies, *supra* note 1, § 8623-51 at 80-81 (Cum. Supp. 1950); Axe, *supra* note 1, at 58; 5 Fletcher, *supra* note 1, § 2056 at 223; Ward Proxy Rules E-4 and 5 and F-2, *supra* note 1.

41. Where two or more fiduciaries or trustees under a voting trust agreement are entitled to vote shares in accordance with paragraphs 39 and 40 above, a proxy signed by one of such fiduciaries or voting trustees in his own name or in the names of all of the fiduciaries or voting trustees should be accepted in the absence of objection from, or reliable evidence that the person signing lacked authority to sign for, such other fiduciaries or voting trustees. See Va. Code § 13.1-32 and § 13-193.

With respect to conflicting claims of fiduciaries, see Ohio Revised Code, Section 1701.28(B)(5). With respect to conflicting claims of voting trustees, see notes 42 and 43 *infra*.

42. Any of the fiduciaries referred to in this section may execute a proxy for the voting of shares provided that it contains an express direction as to how it shall be voted. A proxy apparently executed by one of several of such fiduciaries shall be presumed to be valid until challenged and the burden of proving invalidity shall rest on the challenger. But in any case in which the will, trust agreement, or other instrument under which such personal representative or fiduciary purports to act contains directions for the voting of stock in any corporation, or for the execution and delivery of proxies for the voting thereof, such directions shall be binding upon the personal representative or

fiduciary involved, and upon the corporation if a copy thereof has been furnished the corporation. See Va. Code § 13.1-32.

See Ohio Revised Code, Sections 1701.46(E); 1 Davies, *supra* note 1, § 8623-51 at 80-81 (Cum. Supp. 1950).

43. Where shares are held by more than one of the fiduciaries referred to in this section, the shares shall be voted as determined by a majority of such fiduciaries except that (a) if they are equally divided as to a vote, the vote of the shares shall be divided equally and (b) if only one of such fiduciaries shall be personally present at a meeting and no proxy for the fiduciaries shall have been received the fiduciary present shall be entitled to vote all the shares. However, where the will, trust agreement, or other document specifying the powers of such fiduciaries or voting trustees is submitted to the corporation, the terms thereof with respect to the voting of shares and the execution of proxies therefor, if contrary to the foregoing rules, must be followed, and a proxy not executed in accordance with such terms should be rejected. See Va. Code § 13.1-32 and § 13-193.

See Dampeer, *supra* note 1, at 568; Ward Proxy Rules B-5 and E-3, *supra* note 1. A note in the proxy form that fiduciaries should give their full title as such is not considered mandatory to establish the validity of a signature.

44. Nothing herein contained shall prevent trustees or other fiduciaries holding shares of stock registered in the name of a nominee from causing such shares to be voted by such nominee as the said trustee or other fiduciary may direct. Such nominee may vote stock as directed by a trustee or other fiduciary without the necessity of transferring the stock to the name of the trustee or other fiduciary. Va. Code § 13.1-32 and § 13-193.

## IX. *Minors*

45. A proxy may be executed with respect to shares registered in the name of the guardian of a minor, or in the name of the custodian of shares held for a minor only by such guardian or custodian, in the absence of evidence that such minor has attained the age of 21, in which event only the latter may vote the shares and sign a proxy therefor. See Va. Code § 31-9 and § 31-29.

See Ohio Revised Code, Section 1701.46(B); Dampeer, *supra* note 1, at 566-567; Axe, *supra* note 1, at 225-226; Ward Proxy Rules B-1, 2, and 3, *supra* note 1. With respect to the attainment of majority by a minor,

see Ohio Revised Code, Section 3109.01 and 21 O. J., *Infants* § 2 at 862-863 (1932). A custodian of securities under the Fiduciary Law, Ohio Revised Code, Section 1339.34(D), must deliver the securities to the minor when he reaches the age of 21. Ohio Revised Code, Section 2111.46 provides that, "[w]hen a guardian has been appointed for a minor before such minor is over fourteen years of age, such guardian's power shall continue until the ward arrives at the age of majority. . . ."

46. A proxy may be given with respect to shares registered in the name of a minor only by such minor, unless a guardian therefor complies with the procedure outlined in note 40 above, in which event such guardian may execute a proxy with respect to the shares registered in the name of such minor and may revoke a proxy submitted by such minor. See Va. Code § 31-9 and § 31-29. See *supra* note 45 for Ohio provision.

#### X. *Pledgors and Pledgees*

47. A stockholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred. See Va. Code § 13.1-32 and § 13-193.

See 1 Davies, *supra* note 1, § 8623-44 at 725; Axe, *supra* note 1, at 231-234; Ward Proxy Rules J and K, *supra* note 1; *Cleveland City Ry. Co. v. First National Bank of N. Y.*, 68 O.S. 582, 599 (1903) (pledgee not a shareholder until shares pledged are transferred on stock register to his name); *Schott v. Climax Molybdenum*, 154 A. 2d 221 (Del. Ch. 1959) (Statute controlling which provides that pledgor can vote the stock unless on the books of the company, the pledgee is empowered to do so.); *Henkle v. Salem Mfg. Co.*, 39 O.S. 547, 552-553 (1883) (pledgee, not shareholder of record, not liable to creditors of corporation).

#### XI. *Nominee's and Broker's Proxies*

48. Nominee firms, which are designated by a bank or trust company to take title to shares in the latter's behalf, actual ownership thereof being in persons other than such nominee, and which are stockholders of record with respect to such shares, customarily sign a proxy therefor with the name of the partnership by handwriting, rubber stamp, or facsimile signature, without the addition of the name of an individual partner, and a proxy so signed should be accepted. For the presumption

as to the nominee's being a partnership, see note 26 *supra*. See Va. Code § 13.1-32 and § 13-193.

A nominee "is defined as any individual, partnership, or corporation designated by a bank, trust company, broker, insurance company, or investment company to take title to shares of stock in its behalf, equitable ownership of such stock being in persons other than such nominee", Ward Proxy Rule N-1, *supra* note 1. The "Nominee List" published by the American Society of Corporate Secretaries, Inc. lists nominees alphabetically and by states and British possessions, and should be used to verify the status of a partnership (or corporation) as a nominee.

49. Stock brokerage firms, which are stockholders of record with respect to shares actually owned by other persons, customarily sign a proxy therefor with the name of the partnership by handwriting, rubber stamp, or facsimile signature, without the addition of the name of an individual partner, and a proxy so signed should be accepted. For the presumption as to the broker's being a partnership, see note 26 *supra*. No applicable Virginia provisions.

See Axe, *supra* note 1, at 234-237. *Security Dealers of North America* (Seibert & Co. N.Y.), which is published twice a year, should be used to verify the status of a partnership (or corporation) as a broker. Inspectors of election have accepted proxies from brokerage firms signed as follows:

- (a) "Edward A. Purcell & Co." signed by rubber stamp or facsimile signature.
- (b) "Edward A. Purcell & Co." signed by a rubber stamp or facsimile signature, followed by either (1) "John A. Jones, Partner", (2) "John A. Jones, Attorney", or (3) "John A. Jones, Authorized Signature".

50. Proxies of corporate nominees (*i.e.*, "Roycan Nominees Ltd.", nominee for the Royal Bank of Canada in London) and brokers (*i.e.*, "Pyramid Financial Corp.") should be executed in accordance with notes 24-25 *supra*. No applicable Virginia provisions.

See Ohio Revised Code, Section 1701.47(A); for a contrary rule, see Ward Proxy Rules N-2 and O-3, *supra* note 1. However, where shares were registered in the name of "Walston & Co.", a partnership, and a proxy therefor was signed "Wallston & Co., Wallston & Co., Inc., by John A. Jones, Authorized Signature-Authorized Signature Regis-

tered with New York Stock Exchange", the proxy was accepted by inspectors of election as intended to be that of the partnership.

51. Nominees and stockholders, which are stockholders of record with respect to shares actually owned by other persons, usually execute proxies therefor in accordance with the instructions of such owners. Accordingly, a proxy submitted by a nominee or broker often designates thereon the number of shares to be voted thereby. Such a proxy is called a limited proxy, whereas a proxy which does not designate thereon the number of shares to be voted thereby is called a general proxy. A proxy, whether limited or general, also may bear an account number for the purpose of identifying on the records of the signer the particular person who actually owns the shares. No applicable Virginia provision.

With respect to the necessity for members of the New York Stock Exchange and their nominees to secure instructions from beneficial owners of shares registered in the name of such members, see Exchange Rules 870-875. The number of shares to be voted by the broker's or nominee's proxy usually will be indicated in the lower left-hand corner of a proxy where the stencilled name and address appear or beside the signature of the shareholder of record, either inserted in a stamped legend (*i.e.*, "This proxy limited to X shares") or merely written as "X shares". The stamped legend also may be placed on the reverse side of the proxy, which always should be checked before counting the proxy.

52. When used in paragraphs 53-57 below, "nominees" and "brokers" mean nominees and brokers which are stockholders of record on the date fixed by the board of directors as the record date as of which stockholders are entitled to receive notice of and to vote at a stockholders' meeting, and references therein to the shares held by such nominees and brokers mean the shares of record in their names on that date. No applicable Virginia provision.

53. Where a nominee or broker gives one or more proxies to the same soliciting group or person, and

- (a) where the proxy or proxies given is or are limited and the aggregate number of shares designated thereon exceeds the aggregate number of shares held by such nominee or broker, such proxy or proxies should be accepted with respect to the aggregate number of shares held by such nominee or broker; or
- (b) where the proxies given are partly general and partly limited,

such proxies should be accepted with respect to the aggregate number of shares held by such nominee or broker.

No applicable Virginia provision.

See Dampeer, *supra* note 1, at 570-571; for a contrary rule, see Ward Proxy Rules N-5 (1), O-2 (1), *supra* note 1. Where the broker or nominee inserts a number of shares to be voted by the proxy which exceeds the number of record, clarification should be obtained, if time permits, from the proxy clerk of such broker or nominee. One such clerk of a brokerage house explained to a soliciting committee that his bookkeeping department often gave him a number of shares to be voted in excess of the record number, usually because a transaction in such shares had been completed by the record date on the broker's books but change of ownership was not effected on the books of the corporation by such date. The record number of shares on the corporation's stock register only should be counted for the proxy, see Ohio Revised Code, Section 1701.45 (A) and (D); Dampeer, *supra* note 1, at 566.

54. Where a nominee or broker gives two conflicting proxies, both of which bear different account numbers or at least one of which bears no account number, and

- (a) where an earlier limited proxy designates a number of shares which is less than the aggregate number of shares held by such nominee or broker, and a later general proxy does not specifically revoke the earlier limited proxy, the earlier limited proxy should be accepted with respect to the number of shares designated thereon, and the later general proxy should be accepted with respect to the remainder of the aggregate number of shares held by such nominee or broker;
- (b) where a general proxy is dated earlier than a limited proxy which designates a number of shares less than the aggregate number of shares held by such nominee or broker and which does not specifically revoke the earlier general proxy, the later limited proxy should be accepted with respect to the number of shares designated thereon, and the earlier general proxy should be accepted with respect to the remainder of the aggregate number of shares held by such nominee or broker;
- (c) where an earlier limited proxy is specifically revoked by a later general proxy, the later general proxy should be accepted with

- respect to the aggregate number of shares held by such nominee or broker, and the earlier limited proxy should be rejected;
- (d) where a later limited proxy specifically revokes an earlier general proxy, the later limited proxy should be accepted with respect to the number of shares designated thereon, and the earlier general proxy should be rejected;
  - (e) where an earlier limited proxy designates a number of shares which is the same as or greater than the aggregate number held by such nominee or broker, a later general proxy, whether or not it specifically revokes the earlier limited proxy, should be accepted with respect to such aggregate number of shares, and the earlier limited proxy should be rejected;
  - (f) where the proxies are both general, a later proxy, whether or not it specifically revokes an earlier proxy, should be accepted with respect to the aggregate number of shares held by such nominee or broker, and the earlier proxy should be rejected;
  - (g) where both the proxies are limited and a later proxy specifically revokes an earlier proxy, the later proxy should be accepted with respect to the number of shares designated thereon, and the earlier proxy should be rejected; or
  - (h) where both the proxies are limited and a later proxy does not specifically revoke an earlier proxy, both proxies should be accepted with respect to the respective numbers of shares designated thereon if the sum of such numbers does not exceed the aggregate number of shares held by such nominee or broker, but otherwise both should be rejected in the absence of further written instructions from such nominee or broker.

No applicable Virginia provision.

See Dampeer, *supra* note 1, at 570-571; Ward Proxy Rules N-4 and O-1, *supra* note 1.

55. Where a nominee or broker gives two conflicting proxies both of which bear the same account number, and

- (a) where an earlier limited proxy is or is not specifically revoked by a later general proxy, the later general proxy should be accepted with respect to the aggregate number of shares held by such nominee or broker, and the earlier limited proxy should be rejected;
- (b) where an earlier general proxy is specifically revoked by a later



limited proxy, the later limited proxy should be accepted with respect to the number of shares designated thereon, and the earlier general proxy should be rejected;

- (c) where an earlier general proxy is not specifically revoked by a later limited proxy, the later limited proxy should be accepted with respect to the number of shares designated thereon, and the earlier general proxy should be accepted with respect to the remainder, if any, of the aggregate number of shares held by such nominee or broker;
- (d) where an earlier general proxy is or is not revoked by a later general proxy, the later general proxy should be accepted with respect to the aggregate number of shares held by such nominee or broker, and the earlier general proxy should be rejected;
- (e) where an earlier limited proxy is specifically revoked by a later limited proxy, the later limited proxy should be accepted with respect to the number of shares designated thereon, and the earlier limited proxy should be rejected;
- (f) where an earlier limited proxy is not specifically revoked by a later limited proxy which designates a number of shares equal to or greater than the number designated on the earlier limited proxy, the later limited proxy should be accepted with respect to the number of shares designated thereon, and the earlier limited proxy should be rejected; or
- (g) where an earlier limited proxy is not specifically revoked by a later limited proxy which designates a number of shares less than the number designated on the earlier limited proxy, both proxies should be rejected in the absence of further written instructions from such nominee or broker.

No applicable Virginia provision.

56. Where the aggregate number of shares designated on two or more proxies given by a nominee or broker does not exceed the aggregate number of shares held by such nominee or broker, and no later proxy specifically or by implication revokes an earlier proxy, each such proxy should be accepted with respect to the number of shares designated thereon. No applicable Virginia provision.

57. Where the aggregate number of shares designated on two or more proxies given by a nominee or broker exceeds the aggregate number of shares held by such nominee or broker, and no later proxy

specifically or by implication revokes an earlier proxy, each such proxy should be rejected in the absence of further written instructions from such nominee or broker. No applicable Virginia provision.

## XII. *Transfer of Shares After Record Date*

58. Except as otherwise provided herein, a proxy signed by a transferee for shares for which he is not the record stockholder on a particular record date should be rejected. See Va. Code § 13.1-29.

The Ohio corporation act is clear that only the shareholder of record as of a particular record date has the right to vote the shares registered in his name or to give a proxy therefor, see Section 1701.01(F) (defining "shareholder" as shareholder of record) and Section 1701.45 (A) (1) and (D) (record date for determining shareholders "entitled . . . to vote at a meeting of shareholders"); 1 Davies, *supra* note 1, § 8623-2 at 129, § 8623-47 at 734-735, § 8623-50 at 748, and § 8623-54 at 775; 5 Fletcher, *supra* note 1, § 2053 at 217. In particular, Section 1701.28 of the Ohio statute, entitled "Recognition by corporation of record ownership of shares . . .", provides that:

"(B) A corporation shall incur no liability if:

\* \* \* \*

"(2) It treats any person in whose name shares . . . stand of record on its books as the absolute owner thereof, with full competency, capacity, and authority to exercise all rights of ownership thereof irrespective of any knowledge or notice to the contrary . . .;

\* \* \* \*

"(C) The corporation is not obligated to inquire into the existence of, or to see to the performance or observance of, any duty or obligation to a third person by a holder of record of any of its shares . . . or by anyone whom it may, as provided in this section, treat as the absolute owner thereof.

\* \* \* \*

"(E) The rights, privileges, and immunities afforded to the corporation in this section extend also to . . . its inspectors of election . . ."

Under this section, the only class of persons who can present disputed questions of ownership of shares upon which the corporation is entitled to make a judgment with respect to the voting rights thereof are

fiduciaries (clauses (B) (3), (4), and (5)). The protection of the section does not apply, *inter alia*, to "any liability which it [the corporation] otherwise would have for breach of a contract to which it is a party" (clause (F)); and the corporation is bound to observe the provisions of any court order of which it has notice, if a party to the proceeding, or of which it has a certified copy, if not such a party (clause (G)). See 1 Davies, *supra* note 1, § 8623-33 at 65 (Cum. Supp. 1950).

The Uniform Commercial Code in effect in Ohio specifically provides that, even though title to shares may be transferred without transferring the shares on the stock register, the corporation can recognize the record owner as the person exclusively entitled to vote, see Ohio Revised Code, Section 1308.19, 1 Davies, *supra*, § 8623-50 at 748. See Va. Code § 13.1-401 and § 13.1-423.

Where the record shareholder sells his shares after the record date, the Ohio corporation law "gives the transferor the right to vote the shares transferred and bars the transferee from voting, although the transferee may, obviously, obtain the right to vote by requiring the transferor to give a proxy", Dampeer, *supra* note 1, at 566. In *Wick v. Youngstown Sheet & Tube Co.*, 46 O.A. 253, 261-262 (Mahoning Co. 1932), *petition in error dismissed*, 127 O.S. 379 (1933), the court held that G.C., § 8623-47 (now Revised Code, Section 1701.45) was not unconstitutional because the actual owner of shares subsequent to a particular record date may not be able to vote such shares, and stated in part:

\*\*\* Under section 8623-47, record holders of stock on the record date were possessed of two rights in the corporation, one ownership of stock and the other right to vote. He [the record owner] could sell one and retain the other, or sell both. If the purchaser of this stock wished to control the right to vote . . . , all he had to do was to include in his purchase that right and secure a proxy, withdrawing the one already given and granting the purchaser the right to use the proxy.  
\*\*\*

See *Merman v. Ohio Steel Co.*, 26 O.O. 433, 436-438 (C.P. Cuyahoga Co. 1943) (recognizing the principle of the *Wick* decision but holding that the right to vote in a shareholder of record, who transferred the shares after the record date, does not foreclose the transferee owning the shares at the time of the shareholders' meeting from dissenting from a sale of corporate assets approved at such meeting); In re *S. & S. Mfg.*

& *Sales Co.*, 246 Fed. 1005, 1007 (D.C. Ohio 1917) ("the voting of proxies given by stockholders of record who have transferred their shares does not make illegal or invalid" shareholder action authorizing the filing of a voluntary petition in bankruptcy); *Cleveland City Ry. Co. v. First National Bank of N. Y.*, *supra* note 47 ("\*\*\* A person who holds shares of stock in pledge . . . may protect himself by having the stock transferred to him on the books of the company. Until he does so he does not become a shareholder. \*\*\*").

The question arises whether inspectors of election must accept an irrevocable proxy given by a shareholder of record as of a particular record date to a transferee, where such shareholder gives a later conflicting proxy to another person. In such a situation, the proxy presumably would be coupled with an interest, see 1 Davies, *supra* note 1, § 8623-47 at 735 and § 8623-53 at 764, 767, 768. Ohio Revised Code, Section 1701.49(B), provides that a voting trust agreement creates voting rights coupled with an interest in the shares to which such rights relate if such rights are "granted in connection with: an option, authority, or contract to buy or sell the shares. . . ."

In spite of the general rule that a proxy coupled with an interest is irrevocable, inspectors of election properly should reject such a proxy where a later proxy by the same transferor conflicts therewith. Except in the case of voting trust agreements as specifically covered by statute (Section 1701.49), the inspectors would be exercising judicial, rather than ministerial, duties in passing on the legal sufficiency of an instrument to create an irrevocable right to vote coupled with an interest in the shares involved, and this they should not do. No liability attaches to their refusing, and they are not obligated, to consider any other document to which the corporation is not a party (Section 1701.28(C) and (F)), other than a voting trust agreement or satisfactory proof of the appointment and qualification of a fiduciary. The irrevocability of the proxy is only a matter of contract between the transferor and transferee of the shares to be voted. Should a court enjoin the execution of a second proxy in violation of a prior irrevocable proxy, and a copy of such order be presented to the inspectors, then the latter would have to reject the later proxy. See *In re Giant Portland Cement Co.*, 21 A. 2d 697, 702 (Del. Ch. 1941), in which the court, in construing a Delaware statute with respect to record dates for the voting of shares, stated:

"Ordinarily, the inspectors conducting an election for the selection of directors for the corporation are bound by that section, and cannot question the right of a registered owner to vote stock standing in his name on the books of the corporation. \* \* \* [However,] . . . it is not necessarily controlling on this Court, if inequitable circumstances appear making it improper for the record owner, having the bare legal title, to vote the stock standing in his name. \* \* \*

59. Where a stockholder of record on a particular record date gives an earlier proxy to a transferee for the shares transferred pursuant to an agreement to sell such shares, whether or not such proxy is by its terms irrevocable, and such stockholder then gives a later conflicting proxy, and

- (a) where the transferee holder of the earlier proxy submits a copy of such agreement, the later proxy should be accepted, and the earlier proxy rejected; or
- (b) where the transferee holder of the earlier proxy submits a court order restraining the voting of the later proxy, or the corporation has notice of such order in a proceeding in which it is a party, the earlier proxy should be accepted, and the later proxy rejected.

See *supra* note 58 for applicable Virginia and Ohio provisions.

## APPENDIX B

### APPOINTMENT AND DUTIES OF INSPECTORS OF ELECTION\*

1. The appointment and duties of inspectors of election for an Ohio corporation are covered by detailed provisions of the Ohio Revised Code, Section 1701.50; see 1 Davies, *Ohio Corporation Law*, § 8623-54 at 770-779 (1942).

2. In the absence of controlling provisions in the articles of incorporation or regulations, inspectors may be appointed by the board of directors in advance of the meeting of shareholders, or, in case they are not so appointed, then "the officer or person acting as chairman at any such meeting may, and on the request of any shareholder or his proxy shall, make such appointment", see Section 1701.50(A)(1)-(2). Vacancies among the inspectors can be filled in a similar manner, see Section 1701.50(A)(3). Although formerly permitted by statute, the

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\*There are no applicable Virginia provisions.

selection of inspectors by the shareholders is not provided for under present law except where the articles or by-laws so require, see 1 Davies, *supra* note 1, § 8623-54 at 777.

3. The Ohio statute (Section 1701.50(A)) does not prescribe the exact number of inspectors to be appointed, but apparently contemplates that more than one should be appointed by referring to "inspectors" and not to an "inspector", see 1 Davies, *supra* note 1, § 8623-54 at 778; Dampeer, *Proxy and Ballot Questions Submitted to Inspectors of Election in Shareholders' Contests*, 24 Ohio Bar 464, 565 (1951); In re *Remington Typewriter Co.*, 196 N.Y. Supp. 309, 310 (App. Div. 1922) (if statute requires "inspectors", two or more must be appointed). Section 1701.50(B) provides that where "three or more inspectors" are appointed, they may act by majority vote.

4. No special qualifications are required for inspectors of election, except that they must act "with fairness to all shareholders", see Section 1701.50(C). Persons are not ineligible to act as inspectors because they are employees of the corporation holding the shareholders' meeting, although the courts will consider personal interest and possible bias or partiality of inspectors in reviewing their rulings. See *Bache v. Central Leather Co.*, 81 Atl. 571, 572 (N.J. Ch. 1911) (refusing to appoint master to supervise election of directors merely because inspectors were corporate employees); *Clopton v. Chandler*, 150 Pac. 1012, 1015 (Cal. App. 1915) (personal interest of inspectors in outcome of election noted, but "legality" of their actions, and not their "motive", held controlling on court); 1 Davies, *supra* note 1, § 8623-54 at 777-778; 5 Fletcher, *Cyclopedia of Law of Private Corporations*, § 2018 at 101 (1952 ed.). In the Bache case, the Court stated, 81 Atl. 572:

" \* \* \* There is no charge of fraud or collusion on the part of the present management, and there does not appear to be any irreparable injury growing out of the situation. It is said that the board of directors, by means of a proxy committee, have canvassed the whole field of stockholders for proxies running in the name of three of the officers and directors of the company to vote for the present management, and that at the same time the same board has appointed three inspectors of election, who are mere employes of the company and subject to the direction of the officers, and who therefore can have no independent judgment in making a decision upon the admission or rejection of a challenged vote, and that this amounts in law and in equity to appointing the present management to be judges in their own case. *The*

*practice referred to stands upon the ground of inveterate usage. It is sustainable only upon the ground that they hold the election fairly and honestly and neither commit or permit any fraud to be perpetrated upon the minority stockholders."* (Emphasis supplied.)

See Dampeer, *supra* note 3, at 565:

" \* \* \* There is no requirement that the inspectors be disinterested persons, although the general rule is to designate three inspectors, at least one of whom has no connection with either of the contending parties. \* \* \* "

5. The duties of inspectors, as enumerated in Ohio Revised Code, Section 1701.50(C) and (D), are to

- (a) determine
  - (1) the number of shares outstanding,
  - (2) the voting rights with respect to each share,
  - (3) the shares represented at the meeting,
  - (4) the existence of a quorum at such meeting, and
  - (5) the authenticity, validity, and effect of proxies;
- (b) receive votes, ballots, consents, waivers, or releases;
- (c) hear and determine all challenges and questions arising in connection with the vote;
- (d) count and tabulate all votes, consents, waivers, and releases;
- (e) determine and announce the result of any vote;
- (f) do such acts as are proper to conduct the election or vote with fairness to all shareholders; and
- (g) on request, make a report in writing of any challenge, question, or matter determined by them and execute a certificate of any fact found by them.

Under Section 1701.50(E), "[t]he certificate of the inspectors shall be prima facie evidence of the facts stated therein and of the vote as certified by them." See 1 Davies, *supra* note 1, § 8623-54 at 778-779; Dampeer, *supra* note 3, at 566; Sprowl, *Work of Inspectors of Election in Montgomery Ward Proxy Contest*, 11 Business Lawyer 98 (Nov. 1955).

6. In carrying out their duties, inspectors of election act as ministerial, rather than judicial, officers. "The courts have generally taken the attitude that a meeting of shareholders of a corporation is a business

meeting and not a judicial proceeding, so that inspectors of election are called upon to exercise good business judgment, rather than judgment of a judicial nature", Dampeer, *supra* note 3, at 567. See, to the same effect, 5 Fletcher *supra* note 4, § 2018 at 101-103; *Investment Associates, Inc. v. Standard Power & Light Corp.*, 48 A. 2d 501, 512 (Del. Ch. 1946), *affirmed* 51 A. 2d 572, 580 (Del. Sup. Ct. 1947). In accordance with the above concept of their duties, inspectors may not pass upon the validity or invalidity of a proxy on a claim that the signature is forged or that the proxy has been obtained by fraud or improper expenditure of corporate funds, see Dampeer, *supra* note 3, at 567; *Investment Associates, Inc. v. Standard Power & Light Corp.*, *supra*, 48 A. 2d 512; *Gow v. Consolidated Coppermines Corp.*, 165 Atl. 136, 146-147 (Del. Ch. 1933). In the absence of an appropriate court order restraining the corporation from voting the proxies concerned (Ohio Revised Code, Section 1701.46(G)), inspectors should not pass upon the question of whether or not proxies should be rejected because allegedly solicited in violation of the proxy rules of the Securities and Exchange Commission, and such challenged proxies should be accepted, see *Investment Associates v. Standard Power & Light Corp.*, *supra*, 48 A. 2d 508-510 and 51 A. 2d 579. For a thorough discussion of the latter problem and the authorities thereon, see LOSS, SECURITIES REGULATION 931-1020 (1961).