Changes in the Model Business Corporation Act—Proposed Amendments to Sections 7.30 & 7.32 Removing Automatic 10 Year Limit

By the Corporate Laws Committee, ABA Section of Business Law*

The Committee on Corporate Laws of the ABA Section of Business Law (the “Committee”) develops and from time to time proposes changes in the Model Business Corporation Act (the “Act” or “Model Act”).

The Committee has approved the changes described in this report on second reading and invites comments from interested persons. Comments should be addressed to A. Gilchrist Sparks, III, Chair, Committee on Corporate Laws, 1201 N. Market Street, Wilmington, Delaware 19801-1147, or sent to him by e-mail at asparks@mnat.com. Comments should be received by March 1, 2013, in order to be considered by the Committee before adoption of the amendments on third reading.

The proposed amendments remove the 10 year limits on duration of voting trust agreements and shareholder agreements contained in sections 7.30 and 7.32 respectively of the Act.

The proposed amendments are set forth below. Changes to existing provisions are marked to show changes from the current act. New language is indicated by underscore and deletions are shown by strikeouts.

§ 7.30. Voting Trusts

(a) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust (which may include anything consistent with its purpose) and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee must prepare a list of the names and addresses of all voting trust beneficial owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation’s principal office.

* A. Gilchrist Sparks, III, Chair.
(b) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee’s name. A voting trust is valid for not more than 10 years after its effective date unless extended under subsection (c).

(c) All or some of the parties to a voting trust may extend it for additional terms of not more than 10 years each by signing written consent to the extension. An extension is valid for 10 years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation’s principal office. An extension agreement binds only those parties signing it.

(c) Limits, if any, on the duration of a voting trust shall be as set forth in the voting trust. A voting trust that became effective when this Act provided a 10-year limit on its duration remains governed by the provisions of this section then in effect, unless the voting trust is amended to provide otherwise by unanimous agreement of the parties to the voting trust.

**Official Comment**

A voting trust is a device by which one or more shareholders divorce the voting rights of their shares from the ownership, retaining the latter but transferring the former to one or more trustees in whom the voting rights of all the shareholders who are parties to the trust are pooled. Following the long-established pattern of earlier versions of the Model Act and the statutes of many states, a voting trust under section 7.30(b) is valid for a maximum of 10 years after its effective date. At common law, voting trusts were often viewed with hostility and were narrowly construed. They are, however, a reasonable voting device to accomplish legitimate objectives. As a result, much of the original judicial hostility to these arrangements has disappeared. See, e.g., Oceanic Exploration Co. v. Grynberg, 428 A.2d 1 (Del. 1981). but statutes and courts have increasingly accommodated voting trusts as reasonable contractual devices to accomplish legitimate objectives.

1. **Creation of a Voting Trust**

Section 7.30(a) provides a simple and direct straightforward procedure for the creation of an enforceable voting trust and does not impose narrow or technical requirements. The shareholders sign an agreement to participate in the trust and the shares must be registered in the name of the trustee. Typically, the voting trust agreement provides that all the attributes of beneficial ownership other than the power to vote are retained by the voting trust beneficial owners. In addition, the voting trustees may issue to the voting trust beneficial owners voting trust certificates which may be transferable in much the same way as shares. The 10-year term limit contained in earlier versions of the Act reflected concerns that
have dissipated as statutes and courts have increasingly accommodated voting trusts.

Upon the creation of the voting trust, the trustees must prepare a list of the beneficial owners and deliver it, together with a copy of the agreement, to the corporation’s principal office, where both documents are available for inspection by shareholders under section 7.20. This simple disclosure requirement eliminates the possibility that the voting trust may be used to create “secret, uncontrolled combinations of stockholders to acquire control of the corporation to the possible detriment of nonparticipating shareholders,” Lehrman v. Cohen, 222 A.2d 800, 807 (Del. 1966).

The purpose of section 7.30 is not to impose narrow or technical requirements on voting trusts. For example, a voting trust that by its terms extends beyond the 10 year maximum should be treated as being valid for the maximum permissible term of 10 years.

2. Extension or Renewal Duration of Voting Trust

Section 7.30(c) permits a voting trust to be extended for successive terms of 10 years commencing with the date the first shareholder signs the extension agreement. Shareholders who do not agree to an extension are entitled to the return of their shares upon the expiration of the original term.

Section 7.30 does not limit the duration of a voting trust, consistent with section 7.32 governing shareholder agreements generally. Section 7.30 permits participants to specify limits but does not establish an automatic sunset provision as a matter of law.

Section 7.30(c) addresses voting trusts entered into when the Act limited their duration to 10 years.

§ 7.32. Shareholder Agreements

(a) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Act in that it:

(1) eliminates the board of directors or restricts the discretion or powers of the board of directors;

(2) governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in section 6.40;

(3) establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(4) governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by
or among any of them, including use of weighted voting rights or director proxies;

(5) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;

(6) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;

(7) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or

(8) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

(b) An agreement authorized by this section shall be:

(1) as set forth (A) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement or (B) in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation; and

(2) subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise.

(3) valid for 10 years, unless the agreement provides otherwise.

(c) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by section 6.26(b). If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the
shares are not represented by a certificate, the information statement is
delivered to the purchaser at or prior to the time of purchase of the shares.
An action to enforce the right of rescission authorized by this subsection
must be commenced within the earlier of 90 days after discovery of the
existence of the agreement or two years after the time of purchase of the
shares.

(d) An agreement authorized by this section shall cease to be effective when the
corporation becomes a public corporation. If the agreement ceases to be ef-
fective for any reason, the board of directors may, if the agreement is con-
tained or referred to in the corporation’s articles of incorporation or bylaws,
adopt an amendment to the articles of incorporation or bylaws, without
shareholder action, to delete the agreement and any references to it.

(e) An agreement authorized by this section that limits the discretion or powers
of the board of directors shall relieve the directors of, and impose upon the
person or persons in whom such discretion or powers are vested, liability for
acts or omissions imposed by law on directors to the extent that the discre-
tion or powers of the directors are limited by the agreement.

(f) The existence or performance of an agreement authorized by this section
shall not be a ground for imposing personal liability on any shareholder
for the acts or debts of the corporation even if the agreement or its perfor-
mance treats the corporation as if it were a partnership or results in failure
to observe the corporate formalities otherwise applicable to the matters gov-
erned by the agreement.

(g) Incorporators or subscribers for shares may act as shareholders with respect
to an agreement authorized by this section if no shares have been issued
when the agreement is made.

(h) Limits, if any, on the duration of an agreement authorized by this section
shall be as set forth in the agreement. An agreement that became effective
when this Act provided for a 10-year limit on duration of shareholder agree-
ments, unless the agreement provided otherwise, remains governed by the
provisions of this section then in effect.

**Official Comment**

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6. Section 7.32(h)

Section 7.32 does not limit the duration of a shareholder agreement, departing
from prior language in the Act that provided a 10-year limit unless the agreement
provided otherwise. This approach is consistent with the wide freedom of con-
tact provided to participants in such enterprises. For agreements entered into
during a time that section 7.32 provided for a 10-year term if no other time
limit was specified, subsection (h) provides that its duration will be governed by the provisions of section 7.32 in force at the time the agreement became effective. This would include, for example, both the default termination rule and the authority under subsection (b)(2) that such an agreement’s automatic 10-year term could be amended by all shareholders (unless the agreement had prohibited such amendment).