Changes in the Model Business Corporation Act—Proposed Amendments to Sections 7.22, 7.24, and 7.29

By the Corporate Laws Committee, ABA Business Law Section*

The Corporate Laws Committee of the ABA Business Law Section (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 Karl J. Ege, Chair, Corporate Laws Committee, Perkins Coie LLP, 1201 Third Avenue, Suite 4900 Seattle, Washington 98101-3099, or sent to him by e-mail at kege@perkinscoie.com. Comments should be received by February 28, 2014 in order to be considered by the Committee before adoption of the amendments on third reading.

Section 7.29 deals with the role of inspectors of election in the shareholder voting process. That process and the role of inspectors of election have changed in recent years, at least in the case of public corporations, with the increase in “street name” holdings, the use of a securities depositary system and involvement of intermediaries, and the resulting increased role of vote tabulators. The proposed changes are intended to update the provisions on inspectors of election to reflect what inspectors of election in fact do under the current shareholder voting system.

Section 7.24, dealing with acceptance of votes and other instruments relating to shareholder voting, is proposed to be changed to better conform to and coordinate with new section 7.29. The Official Comment to section 7.29 also has been streamlined, principally by eliminating the examples relating to acceptance and rejection of proxy appointments. These examples are expected to be included in the Historical Background commentary to section 7.29 in the Model Business Corporation Act Annotated.

Section 7.22, dealing with proxies, is proposed to be changed to more accurately reflect the term of proxy appointments, including irrevocable proxy appointments.

The proposed amendments are set forth below. Changes to the existing provisions are marked with deletions shown by strikeout and additions by underscoring.

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§ 7.22. Proxies

(a) A shareholder may vote the shareholder’s shares in person or by proxy.

(b) A shareholder, or the shareholder’s agent or attorney-in-fact, may appoint a proxy to vote or otherwise act for the shareholder by signing an appointment form, or by an electronic transmission. An electronic transmission must contain or be accompanied by information from which the recipient can determine the date of the transmission, and that the transmission was authorized by the sender or the sender’s agent or attorney-in-fact.

(c) An appointment of a proxy is effective when a signed appointment form or an electronic transmission of the appointment is received by the inspector of election or the officer or agent of the corporation authorized to tabulate and count votes. An appointment is valid for 11 months unless a longer period is expressly provided in the appointment form and, if no term is provided, is valid for 11 months unless the appointment is irrevocable under subsection (d).

(d) An appointment of a proxy is revocable unless the appointment form or electronic transmission states that it is irrevocable and the appointment is coupled with an interest. Appointments coupled with an interest include the appointment of:

(1) a pledgee;
(2) a person who purchased or agreed to purchase the shares;
(3) a creditor of the corporation who extended it credit under terms requiring the appointment;
(4) an employee of the corporation whose employment contract requires the appointment; or
(5) a party to a voting agreement created under section 7.31.

(e) The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy’s authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises authority under the appointment.

(f) An appointment made irrevocable under subsection (d) is revoked when the interest with which it is coupled is extinguished.

(g) Unless it otherwise provides, an appointment made irrevocable under subsection (d) continues in effect after a transfer of the shares and a transferee takes subject to the appointment, except that a transferee for value of shares subject to an irrevocable appointment may revoke the appointment if the transferee did not know of its existence when
acquiring the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

(h) Subject to section 7.24 and to any express limitation on the proxy’s authority stated in the appointment form or electronic transmission, a corporation is entitled to accept the proxy’s vote or other action as that of the shareholder making the appointment.

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OFFICIAL COMMENT

Section 7.22 provides that shareholders may vote in person or by proxy and establishes the basic rules for appointing a proxy. As business organizations have increased in size and complexity, the number of shareholders has also increased. As a result, proxy voting is an essential step in the governance of many corporations.

1. Nomenclature

The word “proxy” is often used ambiguously, sometimes referring to the grant of authority to vote, sometimes to the document granting the authority, and sometimes to the person to whom the authority is granted. In the Model Act the word “proxy” is used only in the last sense; the terms “proxy appointment,” “appointment form” and “electronic transmission” are used to describe the document or communication appointing the proxy; and the word “appointment” is used to describe the grant of authority to vote.

2. Appointment of Proxy

A shareholder may appoint a proxy to vote by signing an appointment form, either personally or by the shareholder’s agent or attorney in fact. An electronic transmission which appoints a proxy is deemed the equivalent of a signed appointment form if it contains or is accompanied by information from which it can be reasonably verified that the transmission was authorized by the shareholder or by the shareholder’s agent or attorney in fact. See section 1.41(d). “Electronic transmission” as used in this section means any form or process of communication not directly involving the physical transfer of paper or other tangible medium that (a) is suitable for the retention, retrieval, and reproduction of information by the recipient through an automated process that is used in conventional commercial practice, and (b) is retrievable in paper form by the recipient, unless otherwise authorized in accordance with section 1.41(j). See section 1.40(7C). Sections 7.22(b) and 1.41(d) are intended to sanction the practice whereby shareholders who have been provided in proxy materials with a personal identification number may call in their vote and identifying number to a person who, acting as the shareholder’s agent, causes that information to be transmitted, directly or indirectly, to the inspector of election.
The appointment is effective when an appointment form or an electronic transmission (or documentary evidence thereof, including verification information) is received by the inspector of election or the officer or agent of the corporation authorized to receive and tabulate votes. Subsections 1.41(f)–(i) govern when an electronic transmission is “received” and “effective.” The proxy has the same power to vote as that possessed by the shareholder, unless the appointment form or electronic transmission contains an express limitation on the power to vote or direction as to how to vote the shares on a particular matter, in which event the corporation must tabulate the votes in a manner consistent with that limitation or direction. See section 7.22(h).

3.2. Duration of Proxy Appointment

An appointment form that contains no expiration date is valid for 11 months unless it is irrevocable. See section 7.22(c). This ensures that in the normal course a new appointment will be solicited at least once every 12 months. But an appointment form may validly specify a longer period its term if the parties agree, which may be longer or shorter than 11 months. An irrevocable appointment is valid for so long as it is irrevocable unless it terminates earlier in accordance with its terms.

The appointment of a proxy is essentially the appointment of an agent and is revocable in accordance with the principles of agency law unless it is “coupled with an interest.” See section 7.22(d). Thus, an appointment may be revoked either expressly or by implication, as when a shareholder later signs a second appointment form inconsistent with an earlier one, or attends the meeting in person and seeks to vote on the shareholder’s own behalf. The revised Model Act does not attempt to codify these common law principles of agency law.

While death or incapacity of the appointing shareholder revokes an agency appointment under common law principles, section 7.22(e) modifies the common law rule to provide that the corporation may accept the vote of the proxy until the appropriate corporate officer or agent receives notice of the shareholder’s death or incapacity. In view of the widespread dispersal of shareholders in many corporations, it is not feasible for the corporation to learn of these events independently of notice. On the other hand, section 7.22(e) does not affect the validity of the proxy appointment or its manner of exercise as between the proxy and the personal representatives of the decedent or incompetent. That relationship is governed by the law of agency independent of the Model Act.

4.3. Irrevocable Appointment of Proxies

Section 7.22(d) deals with the irrevocable appointment of a proxy. The general test adopted is the common law test that all appointments are revocable unless “coupled with an interest.” But section 7.22(d) provides considerable certainty since it describes several accepted forms of relationship as examples of “proxies coupled with an interest.” These examples are not exhaustive and other arrangements may also be held to be “coupled with an interest.”

Section 7.22(f) provides that an irrevocable proxy appointment is revoked when the interest with which it was coupled is extinguished—for example, by repayment of the loan or release of the pledge.

A transferee for value of shares Section 7.22(g) clarifies the default rule that are subject to an irrevocable appointment takes free of the appointment if (1) the transferee did not know of the existence of the appointment and (2) the existence of the irrevocable appointment was not noted conspicuously on the certificate or information statement. See section 7.22(g). Under this subsection survives a transfer, but that the grantor may modify that rule. It also clarifies that both the appointment and the irrevocable nature of the appointment must conspicuously appear on the certificate or information statement in order to continue to be irrevocable against a transferee for value that does not know of the existence of the appointment.

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§ 7.24. CORPORATION'S ACCEPTANCE OF VOTES AND OTHER INSTRUMENTS

(i) If the name signed on a vote, ballot, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation, if acting in good faith, is entitled to accept the vote, ballot, consent, waiver, or proxy appointment and give it effect as the act of the shareholder.

(j) If the name signed on a vote, ballot, consent, waiver, or proxy appointment does not correspond to the name of its shareholder, the corporation, if acting in good faith, is nevertheless entitled to accept the vote, ballot, consent, waiver, or proxy appointment and give it effect as the act of the shareholder if:

(1) the shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) the name signed purports to be that of an administrator, executor, guardian, or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, ballot, consent, waiver, or proxy appointment;

(3) the name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, ballot, consent, waiver, or proxy appointment;
(4) the name signed purports to be that of a pledgee, beneficial owner, or attorney-in-fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory's authority to sign for the shareholder has been presented with respect to the vote, ballot, consent, waiver, or proxy appointment; or

(5) two or more persons are the shareholder as co-tenants or fiduciaries and the name signed purports to be the name of at least one of the co-owners and the person signing appears to be acting on behalf of all the co-owners.

(k) The corporation is entitled to reject a vote, ballot, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to count votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory's authority to sign for the shareholder.

(l) The corporation and its officer or agent who accepts or rejects a vote, ballot, consent, waiver, or proxy appointment under this section or section 7.22(b) are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

(m) Corporate action based on the acceptance or rejection of a vote, ballot, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise.

(n) If an inspector of election has been appointed under section 7.29, the inspector of election also has the authority to request information and make determinations under subsections (a), (b), and (c). Any determination made by the inspector of election under those subsections is controlling.

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OFFICIAL COMMENT

Corporations are often asked to accept a written instrument as evidence of action by a shareholder. These instruments usually involve appointment forms for a proxy to vote the shares, but may also include waivers of notice, consents to action without a meeting, requests for a special meeting of shareholders, and similar instruments involving action by the shareholders. Usually the corporation or its officers will have no personal knowledge of the circumstances under which the instrument was executed and no way of verifying whether the signature on the instrument is in fact the signature of the shareholder. This problem is particularly acute in large public corporations with thousands of shareholders.
Section 7.24 establishes general rules permitting the corporation and its officers or agents anyone authorized to count votes, including any inspector of election appointed under section 7.29, to accept these instruments if they appear to be signed by the shareholder or by a person who has authority to sign the instrument for the shareholder and they are accompanied by whatever authenticating evidence the corporation reasonably requests. Section 7.24 also establishes general rules for rejecting these instruments. The rules set forth in this section are not exclusive and may be supplemented by additional rules established by the corporation pursuant to section 2.06(b). Section 7.24(a) authorizes acceptance of an instrument if the name appearing on the instrument “corresponds” to the name of the shareholder, while section 7.24(b) permits the acceptance of an instrument signed by a person other than the shareholder if there is a designation or evidence of the capacity of the person executing the instrument that indicates the act of the person is the act of the shareholder. On the other hand, section 7.24(c) permits rejection of an instrument if the officer or agent tabulating votes has a “reasonable basis for doubt” about the validity of the signature or about the authority of the person acting on behalf of the shareholder. These principles are described in greater detail to follow. An inspector of election has been appointed under section 7.29, the inspector has the authority under section 7.24, as well as the corporation. If there is a difference in a determination by the corporation and the inspector, the inspector’s determination controls.

The purpose of section 7.24 is to protect the corporation and its officers or agents persons authorized to count votes from liability for damages to the shareholder if action is taken in accordance with the section. Thus, under section 7.24(d) provides that there is no liability to the shareholder if the corporation’s officer or agent person authorized to count the vote, acting in good faith, accepts an instrument that meets the requirements of section 7.24(a) or (b) or accepts an electronic transmission authorized by section 7.22(b), even if it turns out that the signing signature or transmission was invalid or unauthorized; similarly, no liability exists if the officer or agent an instrument is rejected in accordance with section 7.24(c) because the person authorized to count the votes, again acting in good faith, rejects an instrument because of has a “reasonable basis for doubt,” even though it turns out that the instrument was properly signed by the shareholder. But section 7.24 does not however, address the question whether an action was properly or improperly taken or approved, and section 7.24(e) makes clear that the validity or invalidity of corporate action is ultimately a matter for judicial resolution through review of the results of an election in a suit to enjoin or compel corporate action. Section 7.29A provides a mechanism for seeking such judicial resolution. It is contemplated that any such suit proceeding will be brought promptly, typically before the corporate action is consummated or the corporation’s position otherwise changes in reliance on the vote, and that any suit proceeding that is not brought promptly under the circumstances would normally be barred because of laches.
Similarly, section 7.24 does not address the liability of the proxy to the shareholder for exercising authority beyond that granted or for disobeying instructions. These matters are governed by the law of agency and not by section 7.24. The American Society of Corporate Secretaries has established principles for the acceptance of proxy appointments in routine elections in which there is no proxy contest. Many of the examples of the application of section 7.24 set forth below are based on these principles.

1. Examples of Signings “Corresponding with” the Name of the Shareholder
   Assuming that shares are registered in the name of an individual, an instrument may be accepted as signed:

   a. whether signed in ink, pencil, ballpoint, crayon, etc.;
   b. regardless of where the signature appears on the instrument (whether or not in the space provided), if there is no reason to doubt the intent to execute;
   c. whether the name is handwritten, handprinted, or rubber-stamped in facsimile signature or printed form;
   d. whether there are deviations between the registered name and the signature, provided that the deviations are not inconsistent with the registered name (for example, if the shares are registered in the name of “John F. Smith,” the following are acceptable: “J. Foster Smith,” “J. Smith,” “J.F. Smith,” “J.S.,” “John F.,” and even simply “Smith.” Similarly, if “John Smith” is the name of the shareholder, “John F. Smith” and “J. Foster Smith” are also acceptable);
   e. if marked by an “X” and witnessed by one other person;
   f. the signature is illegible, unless it cannot reasonably be considered to be the signature of the shareholder (for example, if shares are registered in the name of “John F. Smith,” the signature is not acceptable if the first letter of the signature is clearly an “M” or the first word is “Mark”);
   g. if it is a photocopy, facsimile transmission, or other reliable reproduction of a signed appointment form, provided that such a copy, facsimile transmission, or reproduction is a complete reproduction of the entire appointment form;
   h. if the shares are registered in the maiden name of a woman, e.g., Mary Smith, and the instrument is signed:

   (1) in her married name, clearly indicated as such, e.g., “Mary Smith Jones (formerly Mary Smith)” or “Mary Smith (now Mrs. Mary Smith Jones)”;

   (2) in her married name or in a form that implies her married status, e.g., “Mary Smith Anderson,” “Mrs. Mary S. Anderson,” “Mrs. Mary Smith Anderson,” or “Mrs. Mary Anderson,” or
2. Examples of Signings That “Indicate the Capacity” of the Person Signing

In all the following instances, the corporation may request additional evidence of authority but is not required to do so; officers and agents are protected from liability if they routinely accept the instrument without requiring additional evidence.

a. Assuming that the shares are registered in the name of a partnership, e.g., “Smith Bros.,” an instrument may be accepted if signed either in the form “Smith Bros. by John Able, Partner” or simply “Smith Bros.”

b. Assuming that the shares are registered in the name of a corporation, e.g., “Smith Corporation,” an instrument may be accepted if signed in the name of the corporation, by an officer or agent designated as holding a responsible position, by a person with a surname similar to the corporate name, or simply in the name of the corporation, e.g., “Smith Corporation by John Able, President,” “Smith Corporation by Peter Apt, Agent,” “Smith Corporation by John Smith,” or “Smith Corporation.”

c. Assuming that the shares are registered in the name of an individual who is deceased, incompetent, a minor, in bankruptcy, or in receivership, an instrument may be accepted if it is signed by an executor, administrator, guardian, receiver, or trustee who signs as such. Shares registered in the name of a minor may be voted by a parent if identified as such, e.g., “Ralph Able by John Able, Father.”

d. Assuming that the shares are registered in the name of an individual, an instrument may be accepted if it is signed by another individual who indicates that the individual (1) is signing as an agent or attorney-in-fact for the shareholder (see section 7.22); (2) has a close family or other relationship with the shareholder from which authority can be inferred; or (3) is the beneficial owner, pledge, or donee of the shares. For example: if shares are registered in the name of “Peter Jones,” “Ed Smith, Agent,” “Paul Smith, Son,” “Mary Smith Jones, Wife,” “Emelia Able, Attorney,” “Arthur Peters, Private Secretary,” “Paul Jones, Trustee under Deed of Trust dated April 1, 1980,” or “Mary Smith, Donee,” are all acceptable absent some indication that the signing was unauthorized.

e. Assuming that the shares are registered in the names of two or more persons—as joint tenants or tenants in common, executors or administrators, guardians or conservators, a committee for an incompetent, or trustees—an instrument may be accepted if signed by or on behalf of fewer than all the persons named. This conclusion proceeds on the assumption that the signer or signers have authority to act for the others.
and there is nothing on the face of the instrument that rebuts this assumption.

3. **Examples of “Reasonable Basis for Doubt”**

The phrase “reasonable basis for doubt” about the validity of a signature or about the signer’s authority creates an objective standard for the exercise of the authority granted by section 7.24(c) to reject proffered instruments. In the absence of a proxy fight or a seriously contested issue, instruments should be rejected only if there seems to be no basis for finding the signing regular on its face. In a proxy fight or other contested issue, the possibility of illegal or unauthorized signing is greatly increased, and a more cautious attitude should therefore be adopted. The following are examples in which a “reasonable basis for doubt” could be found to exist:

- **a.** The shares are registered in the name of “John F. Smith” and the instrument is signed by “Joseph F. Smith” or by “Frank W. Smith.”

- **b.** The shares are registered in the name of “Ellen Smith, a Minor” or “John Smith, Custodian for Ellen Smith, a Minor,” and the instrument is signed by “Ellen Smith.” There is no “reasonable basis for doubt,” however, if the instrument is accompanied by evidence satisfactory to the corporation that the shareholder is no longer a minor.

- **c.** A proxy appointment is received that is regular on its face, and the secretary or other corporate officer or agent receives a telephone call from a person who identifies himself or herself as the shareholder and says either that he or she wishes to revoke the appointment or did not authorize its original signing.

- **d.** Shares are registered in the name of two or more persons as co-owners, the instrument is signed by fewer than all of them, and the instrument shows on its face that not all the registered owners granted authority to the signers, as where the instrument states that it was not possible to obtain all the co-owners’ signatures or that some refused to sign. For the normal rule of acceptability of proxies signed by fewer than all co-owners, however, see section 7.24(b)(5) and part 2.e. of this Official Comment.

- **e.** The corporation receives a copy of letters of appointment of a receiver, executor, administrator or other fiduciary, and the instrument is signed in the name of the shareholder rather than by the fiduciary.

4. **Other Principles Applicable to Proxy Appointments**

A corporation may wish to establish guidelines that it will follow in determining whether to accept a vote, ballot, consent, waiver, or proxy appointment in order to provide consistency in the corporation’s application of the general rules set forth in section 7.24.

As indicated in the Official Comment to section 7.22, a proxy is simply an agent of the shareholder, and the proxy’s appointment therefore involves primar-
ily the law of agency. The law of agency determines the rights and duties of the shareholder and the proxy, and it is important to recognize that section 7.24 is not intended to affect these rights and duties. Rather, it recognizes that the great bulk of instruments executed in the name or on behalf of a shareholder are in fact authorized and the corporation and its officers should be encouraged to accept them rather than to adopt unduly narrow requirements.

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§ 7.29. Inspectors of Election

(a) A public corporation shall, and any other corporation may, appoint one or more inspectors to act at a meeting of shareholders and make a written report of the inspectors' determinations in connection with determining voting results. Each inspector shall take and sign an oath certify in writing that the inspector will faithfully execute the duties of inspector with strict impartiality and according to the best of the inspector's ability. An inspector may be an officer or employee of the corporation. The inspectors may appoint or retain other persons to assist the inspectors in the performance of the duties of inspector under subsection (b), and may rely on information provided by such persons and other persons, including those appointed to tabulate votes, unless the inspectors believe reliance is unwarranted.

(b) The inspectors shall:

   (1) ascertain the number of shares outstanding and the voting power of each;
   (2) determine the shares represented at a meeting;
   (3) determine the validity of proxy appointments and ballots;
   (4) count all the votes; and
   (5) make a written report of the results.

(c) An inspector may be an officer or employee of the corporation.

(c) In performing their duties, the inspectors may examine (i) the proxy appointment forms and any other information provided in accordance with section 7.22(b), (ii) any envelope or related writing submitted with those appointment forms, (iii) any ballots, (iv) any evidence or other information specified in section 7.24, and (v) the relevant books and records of the corporation relating to its shareholders and their entitlement to vote, including any securities position list provided by a depository clearing agency.

(d) The inspectors also may consider other information that they believe is relevant and reliable for the purpose of performing any of the duties
assigned to them pursuant to subsection (b), including for the purpose of evaluating inconsistent, incomplete or erroneous information and reconciling information submitted on behalf of banks, brokers, their nominees or similar persons that indicates more votes being cast than a proxy is authorized by the record shareholder to cast or more votes being cast than the record shareholder is entitled to cast. If the inspectors consider other information allowed by this subsection, they shall, in their report under subsection (b), specify the information considered by them, including the purpose or purposes for which the information was considered, the person or persons from whom they obtained the information, when the information was obtained, the means by which the information was obtained, and the basis for the inspectors' belief that such information is relevant and reliable.

(e) Determinations of law by the inspectors of election are subject to de novo review by a court in a proceeding under section 7.29A or other judicial proceeding.

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OFFICIAL COMMENT

“Street name” holdings, the use of a securities depository system and the involvement of intermediaries complicate the vote counting process. See Official Comment to section 7.23. This complexity limits the role of inspectors of election in the case of public corporations because of the multiple steps required by various parties before shares are voted. The inspectors may not have access to information pertaining to each of those steps or from each of the parties involved in the process, such as the voting instruction forms given by beneficial shareholders that lead to voting by the record shareholders. For these reasons, section 7.29 generally permits inspectors to rely on information provided by others.

Section 7.29(a) requires that a public corporation must, and any other corporation may, appoint one or more inspectors of election to act at each meeting of shareholders and make a written report of the determinations made pursuant to section 7.29(b). It is contemplated that the selection of inspectors of election should usually be made by responsible officers or by the directors, as authorized either generally or specifically in the corporation’s bylaws. Alternate inspectors could also be designated to replace any inspector who is unable or fails to act. The requirement of a written report is to facilitate judicial review of determinations made by inspectors. The ability of inspectors to retain other persons to assist them does not limit the ability of the corporation also to appoint others, such as a vote tabulator, to assist in the vote counting process.

In the case of public corporations, inspectors should generally be independent persons who are neither employees nor officers if there is a contested matter to be considered. The use of independent inspectors in these circumstances
enhances shareholder perception of the fairness of the voting process, and the report of independent inspectors can be expected to be given greater evidentiary weight by any court reviewing a contested vote.

Section 7.29(b) specifies the duties of inspectors of election. If no challenge of a determination by the inspectors within the authority given them under this section is timely made, such determination shall be conclusive. In order to determine the validity of proxy appointments and ballots, depending on the issues presented, the inspectors of election may be required to determine whether appointment forms have been validly executed by the record shareholder, to identify the latest executed appointment form and to determine whether the proxy cast more votes than the record shareholder was entitled to cast. The inspectors are expected to apply the provisions of chapter 7 of the Act regarding acceptance of proxy appointments and voting, including those in sections 7.08(d), 7.22(h), and 7.24. In the event of a challenge of any determination by the inspectors in a court of competent jurisdiction, including in a proceeding under section 7.29A, the court should give such weight to determinations of fact by the inspectors as it shall deem appropriate, taking into account the relationship of the inspectors, if any, to the management of the company and other persons interested in the outcome of the vote, the evidence available to inspectors, whether their determinations appear to be consistent and reasonable, and such other circumstances as the court shall regard as relevant. The As provided in subsection (e), the court should review de novo all determinations of law made implicitly or explicitly by the inspectors.

Normally, in making the determinations contemplated by section 7.29(b), the only facts before the inspectors should be appointment forms and electronic transmissions (or written evidence thereof), envelopes submitted with appointment forms, ballots and the regular books and records of the corporation, including lists of holders obtained from depositories. However, inspectors may consider other reliable information for the limited purpose of reconciling appointment forms, electronic transmissions, and ballots submitted by or on behalf of banks, brokers, their nominees, and similar persons which represent more votes than the holder of a proxy is authorized by the record owner to cast or more votes than the shareholder holds of record. If the inspectors do consider such other information, it should be specifically referred to in their written report, including the person or persons from whom they obtained the information, when the information was obtained, the means by which the information was obtained, and the basis for the inspectors' belief that such information is accurate and reliable.

Section 7.29(e) provides that an inspector may be an officer or employee of the corporation. However, in the case of publicly held corporations, good corporate practice suggests that such inspectors should be independent persons who are neither employees nor officers if there is a contested matter or a shareholder proposal to be considered. Not only will the issue of independent inspectors enhance investor perception as to the fairness of the voting process, but also the report of independent inspectors can be expected to be given greater evidentiary
weight by any court reviewing a contested vote) gives the inspectors broad discretion with respect to the information they may consider but does not require that they take any specific action with respect to such information other than to specify in their report the information they considered and the other details listed in subsection (d).