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A Practical Guide to Voting Trusts

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A PRACTICAL GUIDE TO VOTING TRUSTS

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Subsequent to incorporation of a business, the question arises as to how the stockholders are to maintain control of the business. Among those devices available to counsel is the voting trust. The author reviews the history of the voting trust, its treatment by the courts and legislatures, and examines several types of provisions which should be employed in drafting the voting trust agreement.

The corporate practitioner frequently is faced with the problem of structuring devices designed to maintain control of corporations. A list of such devices includes: 1) the classification of shares; 2) cumulative voting of shares; 3) higher voting or quorum requirements for stockholders' or directors' action; 4) the classification of directors; 5) the use of holding companies; 6) stockholders' pooling agreements; and 7) irrevocable proxies.[1] Another device for maintaining control of a corporation is the voting trust.

A voting trust is simply a trust of stock which is created when participating stockholders execute a written trust agreement and, pursuant to the agreement, endorse and transfer their stock certificates and the legal title to their shares to a voting trustee. The trustee, in turn, registers the transfer of the shares on the corporation's books, thus becoming the record holder of the shares. The participating stockholders are issued certificates of beneficial ownership evidencing their remaining equitable interest in the stock held pursuant to the trust agreement. During the term of the voting trust, the trustee votes the shares as directed by the trust agreement. Dividends and other asset distributions of the corporation, although governed by the trust agreement, are usually remitted by the voting trustee to the beneficial owners.

The voting trust is a simple and effective way to transfer voting control of a corporation. The stripping of voting rights from shares is self-executing because the trustee is the legal owner and is registered as such on the stock ledgers of the corporation. Thus the voting trust avoids the problems attendant to pooling agreements and proxies, that of seeking judicial

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1. For a discussion of the various devices available for maintaining corporate control, see W. CARY, CASES AND MATERIALS ON CORPORATIONS 362-451 (4th ed. 1969); 5A Z. CAVITCH, BUSINESS ORGANIZATIONS §§108.01-.05 (1963) [hereinafter cited as CAVITCH]; 1 F. O'NEAL, CLOSE CORPORATIONS §§5.01-.39 (1971) [hereinafter cited as O'NEAL]; W. PAINTER, CORPORATE AND TAX ASPECTS OF CLOSELY HELD CORPORATIONS §§3.1-.6 (1970).

enforcement of the voting commitments.[2] "Adroit Lawyers," Professor Ballantine once commented, "have invented the ingenious device of a voting trust to give what is in essence a joint irrevocable proxy for a term of years the 'protective coloring' of a trust, so that the trustees may vote as owners rather than as mere agents."[3] This separation of voting rights also survives transfers by the beneficial owners of their interests, for they will transfer only the equitable interests represented by the voting trust certificates. Upon the expiration of the term of the voting trust, the beneficial owners normally will exchange their voting trust certificates for stock certificates and they will be reinstated as legal owners, registered as such, on the corporation's books.[4]

In the latter part of the nineteenth and early part of the twentieth century, voting trusts were regarded by some American courts with suspicion, if not outright hostility. For example, in the leading case of *Warren v. Pim*,[5] a New Jersey court described the voting trust as "a masterpiece of professional ingenuity which confides absolute and uncontrolled discretion to a group whose personal stake in the success of the company is so insignificant that it may be disregarded entirely,"[6] and the voting trustee as "only a sham owner vested with a colorable and fictitious title for the sole purpose of permanently voting upon stock that [he] does not own."[7]

These early decisions often held that voting trusts were invalid per se, usually on the ground that the separation of voting rights from stock

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2. See, Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 29 Del. Ch. 318, 49 A.2d 603 (1946), *modified*, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947), for an example of the problems in enforcing a pooling agreement. The lower court granted, in effect, specific performance of a stockholders' pooling agreement. The Chancellor found an implied covenant in the pooling agreement giving the non-breaching party an irrevocable proxy to cast the votes represented by the shares held by the breaching party. On appeal, however, the Delaware Supreme Court differed with the Chancellor as to how the agreement should be enforced. The Supreme Court found no irrevocable proxy to vote the breaching party's shares. Instead, the court held that the breaching party's votes were to be given no effect. Thus, the only effective votes cast at the stockholders' meeting in dispute were the votes of the non-breaching party and those of the remaining 37% stockholder who was not a party to the agreement. For a discussion of the enforceability of irrevocable proxies, see 1 O'NEAL §§5.04, 5.11; Comment, *Irrevocable Proxies*, 43 TEX. L. REV. 733 (1965).
3. H. BALLANTINE, CORPORATIONS §184 (rev. ed. 1946).
4. For discussions of voting trusts, *see generally* J. LEAVITT, THE VOTING TRUST (1941); Ballantine, *Voting Trusts, Their Abuses and Regulation*, 21, TEX. L. REV. 139 (1942); Bergerman, *Voting Trusts and Non-Voting Stock*, 37 YALE L. J. 445 (1928); Burke, *Voting Trusts Currently Observed*, 24 MINN. L. REV. 347 (1940); Finkelstein, *Voting Trusts Agreements*, 24 MICH. L. REV. 344 (1926); Giles, *Is the Voting Trust Agreement a "Dangerous Instrumentality"?* 3 CATH. U. L. REV. 81 (1953); Gose, *Legal Characteristics and Consequences of Voting Trusts*, 20 WASH. L. REV. 129 (1945); Smith, *Limitations on the Validity of Voting Trusts*, 22 COL. L. REV. 627 (1922); Wormser, *The Legality of Corporate Voting Trusts and Pooling Agreements*, 18 COL. L. REV. 123 (1918); Note, *The Voting Trust*, 34 N.Y.U.L. REV. 290 (1959); Annot., 98 A.L.R. 2d 376 (1964).
5. 66 N.J. Eq. 353, 59 A. 773 (1904).
6. *Id.* at 364, 59 A. at 781.
7. *Id.* at 386, 59 A. at 785.

ownership was against public policy.[8] Other decisions, eventually evolving into the majority view, upheld these agreements if grounded upon a proper motive or bona fide business purpose.[9] Even with the eventual judicial approval of the voting trust, a circumspect attitude towards them did not quickly abate. Typical of this attitude was Mr. Justice Douglas' description, during his association with the Securities and Exchange Commission, of the voting trust as "little more than a vehicle for corporate kidnapping."[10] Generally, the SEC opposes the use of voting trusts unless justified by special circumstances,[11] and the New York Stock Exchange refuses to list voting trust certificates.[12]

At present, corporate laws exist in most states[13] and in the District of Columbia, authorizing and regulating the use and terms of voting trusts.[14] The Maryland law governing voting trusts provides:

> Any one or more stockholders of a corporation may confer upon a trustee or trustees the right to vote or otherwise represent their shares for a period not to exceed ten years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing an executed copy of the agreement with the corporation at its principal office, and by transferring their shares to such trustee or trustees for the purposes of the agreement.[15]

Despite statutory authorization, the validity of a particular voting trust continues to depend upon the objectives and purposes of the agreement. Of course, a voting trust agreement may be invalid because it fails to comply with the statutory requirements.

The various state laws generally fail to delineate proper and lawful objectives for a voting trust and the statutes generally do not require that the voting trust agreement actually state a specific business purpose or objective. In a Maryland case, *Holmes v. Sharetts*,[16] the plaintiffs contended that a voting trust was invalid because the trust agreement did not

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8. *See also* Bostwick v. Chapman, 60 Conn. 553, 24 A. 32 (1890); Luthy v. Ream, 270 Ill. 170, 110 N.E. 373 (1915); Bridges v. First Nat'l Bank, 152 N.C. 293, 67 S.E. 770 (1910); Harvey v. Lineville Imp. Co., 118 N.C. 693, 24 S.E. 489 (1896).
9. *See* Mackin v. Nicollet Hotel, Inc., 25 F.2d 783 (8th Cir.), *cert. denied*, 278 U.S. 618 (1928); Bankers Fire & Marine Ins. Co. v. Sloss, 229 Ala. 26, 155 So. 371 (1934); Bowditch v. Jackson Co., 76 N.H. 351, 82 A. 1014 (1912); Alderman v. Alderman, 178 S.C. 9, 181 S.E. 897 (1935); Carnegie Trust Co. v. Security Life Ins. Co., 111 Va. 1, 68 S.E. 412 (1910).
10. W. DOUGLAS, DEMOCRACY AND FINANCE 43 (1969).
11. Unless qualified by the special and unusual circumstances of the case, the Commission has opposed the voting trust because it disenfranchises stockholders who are entitled to a voice in the management of the enterprise.
SEC, Fifteen Annual Report 146 (1948).
12. NYSE COMPANY MANUAL §A15.
13. Except Massachusetts.
14. Citations to the various statutes authorizing voting trusts are collected at ABA-ALI MODEL BUS. CORP. ACT §34, ¶6 (1971); 5A CAVITCH §111.01 n.2.
15. MD. ANN. CODE art. 23, §45 (1973).
16. 228, Md. 358, 180 A.2d 302 (1962).

affirmatively express a proper business purpose. In rejecting this contention, the Court of Appeals held that the Maryland statute does not embody such a requirement.[17]

The question remains, however, what are the permissible and proper business objectives of a voting trust? One legal commentator has suggested that, in the absence of a showing of fraud, unfairness, oppression or other wrong to the stockholders, creditors or the corporation itself, any legitimate purpose, not in contravention of statutory or charter provisions, is permissible.[18]

Voting trusts are commonly used to retain the existing management of the corporation. Perpetuation of control, as an end in itself, however, has been held to be an improper purpose,[19] particularly where the *only* apparent reason for the voting trust has been to insure the retention of "lucrative positions" with the corporation.[20] However, use of the voting trust to insure stability and continuity of management, especially successful management, has been held to be a proper purpose.[21] As might be expected, the line between these two objectives can at times be extremely tenuous and subjective. The validity of a particular voting trust often will depend upon the particular facts surrounding its creation and whether the voting trust results in fraud upon, or unfairness to, non-participating stockholders and creditors of the corporation.

Voting trusts frequently have been used by creditors to insure stable and responsible management during the term of the financial obligation.[22] Such a purpose has met with judicial approval.[23] Used in this manner, the voting trust can be more flexible than conventional contract restrictions in guaranteeing managerial and financial policies approved by the creditors. However, counsel must bear in mind the fact that directors elected by a

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17. *Id.* at 369, 180 A.2d at 307.
18. 5A CAVITCH §111.02.
19. Lebus v. Stansifer, 154 Ky. 444, 157 S.W. 727 (1913); Grogan v. Grogan, 315 S.W.2d 34 (Tex. Civ. App. 1958), *writ of error denied*, 159 Tex. 392, 322 S.W.2d 514 (1959).
20. Grogan v. Grogan, 315 S.W.2d 34 (Tex. Civ. App. 1958), *writ of error denied*, 159 Tex. 392, 322 S.W.2d 514 (1959).
21. Machin v. Nicollet Hotel, 25 F.2d 783 (8th Cir.), *cert. denied*, 278 U.S. 618 (1928); Adams v. Clearance Corp., 35 Del. Ch. 318, 116 A.2d 893 (1955), *aff'd*, 35 Del. Ch. 459, 121 A.2d 302 (1956); Thomas v. Kliesen, 166 Kan. 337, 201 P.2d 663 (1949); Sagalyn v. Meekins, Pachard and Wheat, 290 Mass. 434, 195 N.E. 769 (1935); Herman v. Dereozewski, 312 Mich. 244, 20 N.W.2d 176 (1945); Dal-Tran Serv. Co. v. Fifth Ave. Coach Lines, Inc., 14 App. Div. 2d 349, 220 N.Y.S.2d 549 (1961); Boyer v. Nesbitt, 227 Pa. 398, 76 A. 103 (1910); Alderman v. Alderman, 178 S.C. 9, 181 S.E. 897 (1935).
22. *See, e.g.*, CARY, *supra* note 1, at 401, on the use of a voting trust as a condition for a $165 million loan to Trans World Airlines, the purpose of the trust being to escape Howard Hughes, who creditors regarded as a disruptive influence, from TWA's management.
23. Irving Bank-Columbia Trust Co. v. Stoddard, 292 F. 815 (1st Cir. 1923); Belle Isle Corp. v. Corcoran, 29 Del. Ch. 554, 49 A.2d 1 (1946); Massa v. Stone, 346 Mass. 67, 190 N.E.2d 217 (1963); Hart v. Bell, 222 Minn. 69, 23 N.W.2d 375, *opinion supplemented*, 222 Minn. 69, 24 N.W.2d 41 (1946); Trefethen v. Amazeen, 93 N.H. 110, 36 A.2d 266 (1944); Madsen v. Burns Bros., 108 N.J. Eq. 275, 155 A. 28 (1931); Almiral & Co. v. McClement, 207 App. Div. 320, 202 N.Y.S. 139 (1923), *aff'd*, 239 N.Y. 630, 147 N.E. 225 (1925); Rossmassler v. Spielberger, 270 Pa. 30, 112 A. 876 (1921); Thompson-Starrett Co. v. E.B. Ellis Granite Co., 86 Vt. 282, 84 A. 1017 (1912).

creditor-appointed voting trustee retain a primary obligation to the corporation and must act in the *corporation's* best interest.[24] The voting trust also has been used to insure stability in a reorganized, formerly insolvent, corporation,[25] or to implement a legally required severance of control.[26]

As previously noted, the creation and regulation of voting trusts is governed by statute in all but one state.[27] Because most of these statutes attempt to merely codify the common law, there is a great deal of uniformity among them. In general, most statutes require the following steps to be taken in creating a voting trust:

First, most states, including Maryland,[28] require that the voting trust agreement be in writing. Even in the absence of a statutory requirement, the Statute of Frauds provision relating to contracts not to be performed within one year would require most voting trust agreements to be in writing. Trusts with less than a year's duration are rare because a transfer of voting power for a relatively short period of time is usually accomplished by proxy.

Secondly, most statutes require that a copy or duplicate of the voting trust agreement be filed with the corporation. For example, the Maryland provision requires that an "executed copy" be deposited with the corporation "at its principal office."[29] The purpose of this requirement is to give stockholders, particularly those not participating, an opportunity to inspect the voting trust agreement. In Maryland, shareholders have the specific right to inspect "any voting trust agreement on file in the office of the corporation."[30] This requirement parallels the general statutory right of shareholders to inspect corporate records.[31] Further, Maryland, like most jurisdictions, gives the voting trust certificate holders the same right to inspect corporate records as is given to regular stockholders.[32]

Thirdly, most statutes like the Maryland law, require that the shares subject to the agreement be deposited or transferred to the voting trustee. Some statutes also expressly require the trustee to surrender the stock certificates to the corporation in return for a new certificate issued in the name of the trustee. This latter provision is absent from the Maryland law and it appears that the actual transfer of legal title on the stock ledgers of

24. CARY, *supra* note 1, at 402.
25. *See, e.g., In re* Tower Broadway Properties, 58 F. Supp. 615 (S.D. N.Y. 1945).
26. *See, e.g.*, Cascade Nature Gas Corp. v. El Paso Nature Gas Co., 386 U.S. 129 (1967).
27. See note 13 *supra*.
28. MD. ANN. CODE art. 23, § 45 (1973).
29. *Id.* What happens if one fails to comply with the exact requirements of the Maryland statute, e.g., by filing a photostatic copy of the signed agreement, is unclear. No Maryland cases have considered this question. In a New York case, DeMarco v. Paramount Ice Corp., 30 Misc. 2d 158, 102 N.Y.S.2d 692 (1950), the court held that the failure to file the voting trust agreement with the corporation did not render the agreement *void ab initio*, but simply made it inoperative until there was compliance with the statute. On the other hand, a Louisiana court held that a photostat of the voting trust agreement which did not contain the signature of the stockholders did not satisfy the statutory requirement that a "copy" of the agreement be filed. State v. Keystone Life Ins. Co., 9350. 2d 565 (La. 1957).
30. MD. ANN. CODE art. 23, §51 (1973).
31. *See, e.g.*, ABA-ALI MODEL BUS. CORP. ACT §52 (1971).
32. MD. ANN. CODE art. 23, §51 (1973).

the corporation is unnecessary.[33] As a practical matter, however, the stock certificates transferred to the voting trustee are almost always submitted to the corporation and a new certificate representing the shares held in trust is issued in the name of the trustee. The new certificate should clearly indicate that legal title is held in a trust capacity and that it is subject to a voting trust agreement on file with the corporation. If the corporation is a party to the agreement, such a legend may be mandatory.[34]

Finally, several statutes specifically provide for the issuance of voting trust certificates by the trustee to the participating stockholders.[35] Although the Maryland statute contains no such requirement, their use is apparently assumed by Section 51(c) of the Corporation Code, relating to stockholders' rights of inspection.[36] In any event, in states where there is no such requirement, the use of voting trust certificates is almost a universal practice.

Voting trust certificates usually outline the salient features of the voting trust agreement. Common provisions usually include the following notations: that the voting trust certificate has been issued pursuant to, and the rights of the certificate holder are subject to and governed by, a voting trust agreement of a certain date, a copy of which is on file with the corporation; that the voting trustee shall be entitled to vote the underlying stock on all matters and possess all stockholder rights of every kind, except as otherwise expressly provided in the agreement, until the expiration of the voting trust; that the certificate holder shall be entitled to all dividends received by the voting trustee with respect to the entrusted stock; that the certificate is transferable on the records of the voting trustee; that the trust terminates upon a certain date (or sooner upon conditions set forth in the voting trust agreement); and, that the certificate holder shall be entitled to a certain number of shares of stock in the corporation in exchange for the certificates upon termination of the voting trust.

Voting trust certificates are "securities" as that term is defined by Section 2(1) of the Securities Act of 1933,[37] and by many similar provisions under the various state securities laws. As such, any offer or sale of these certificates must be in compliance with these laws. Therefore, the certificates should have a legend which clearly indicates that any offer to sell, sale or other transfer of the certificates, or the underlying shares of stock, must be in compliance with the Securities Act of 1933 and applicable state law.

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33. *See id.* §44(b). Note, however, that a transfer of the shares into the voting trustee's name on the corporation's stock ledger might be required in order to avoid a conflict with the typical by-law provision that the corporation is entitled to treat the holder of record as the holder in fact of any shares.

34. Every certificate representing shares which are restricted or limited as to transferability by the corporation issuing such shares shall either (i) set forth upon the face or back of the certificate a full statement of such restriction or limitation or (ii) state that the corporation will furnish such a statement upon request and without charge to any holder of such shares. Nothing in this paragraph shall be deemed to affect the provisions of Section 8-204 of Article 95B.
MD. ANN. CODE art. 23, 27(c) (1973).

35. *See* ABA-ALI MODEL BUS. CORP. ACT §34, ¶3.03(2) (1971).

36. See note 31 *supra*.

37. 15 U.S.C. §77b(1) (1970).

It would be difficult to enumerate all possible provisions includable in a voting trust agreement. In fact, such an undertaking would serve little or no purpose because each voting trust agreement should be tailored to its own particular set of facts. Further, it would be difficult, if not impossible, to cover the multitude of circumstances that might necessitate a voting trust agreement. Instead, a checklist of general considerations, set forth in summary fashion, is offered below, in order to assist the practitioner in the initial stages of drafting a voting trust agreement.[38]

(1) *Parties to the agreement; right of other stockholders to join the voting trust.* The voting trust agreement typically begins with a recital that the agreement is between and among certain named stockholders and trustees. The agreement will also contain the number and class of shares placed in the voting trust, usually adjacent to the stockholders' signatures at the end of the document. Often the corporation issuing the shares will be a party to the agreement, particularly where the corporation undertakes obligations towards the participating stockholders and voting trustees. Some states require voting trusts to be open to all stockholders who wish to participate.[39] Such a requirement was deleted from Maryland's statute in 1971 because it was thought that an "open end" voting trust constituted an "offering" under the securities laws.[40] As a general rule, an "open end" provision should be avoided unless there is a compelling reason for its use, and, if there is a need for provision allowing any stockholder to join in the future, care should be exercised to insure that the resulting "offering" is exempt under state and federal securities laws.

(2) *Recital of purpose.* It is common to insert a purpose clause in the agreement, even though purpose clauses are not required[41] and seem to be ineffective. The recital of a laudable purpose will not redeem a voting trust created to accomplish an improper purpose. However, a purpose clause will have some value in instances where the agreement is ambiguous. Thus, a tightly-drawn purpose clause may serve as an additional safeguard where participating stockholders desire to limit the powers of the voting trustee.

(3) *Term of agreement.* Most jurisdictions limit the duration of the voting trust. The majority of the statutes have a 10 year limitation, although some statutes have limitations that vary from 5 to 21 years. Maryland has adopted a 10 year limitation. In *Holmes v. Sharretts*, the voting trust agreement failed to state that it would terminate after 10 years, although the agreement did state that it was to be construed in accordance with Maryland law. The Court of Appeals held that a 10 year limitation was implicit in the agreement because of this reference to Maryland law, as well as the fact that the surrounding circumstances indicated that the voting

38. For forms of voting trust agreements, see 6 AM. JUR. LEGAL FORMS 2d, §74:1345-65 (1972); E. BELSHEIM, MODERN LEGAL FORMS §3012 (1966); NICHOLS CYCLOPEDIA OF LEGAL FORMS §§9.770-.773r (1963); 6 J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS, Nos. 15.59-.62 (1971).

39. *See* 5A CAVITCH §111.08 n.1.

40. MD. ANN. CODE art. 23, §45 (1973), Comment. *See also* 1 L. LOSS, SECURITIES REGULATION 656 (1961).

41. *See* Holmes v. Sharretts, 228 Md. 358, 180 A.2d 302 (1962).

trust would certainly terminate within the 10 year limit.[42] Despite the holding of *Holmes*, a well drafted agreement should set forth the term of the voting trust. If the trust is to terminate upon the happening of a certain contingency, the agreement should provide for termination upon the earlier of either the happening of the contingency or the 10th anniversary of the trust.

(4) *Renewal or extension of voting trust.* Many statutes authorize the extension or renewal of voting trusts.[43] These statutes generally provide that, within a certain time before expiration of the original term, or last extension, any one or more of the voting trust certificate holders may, by written agreement, and with the written consent of the voting trustee, extend the voting trust agreement with respect to the stock subject to their beneficial interest for an additional term, not to exceed a certain number of years.[44] In addition, these statutes usually provide that the rights and obligations of voting trust certificate holders who decline to participate in an extension are not effected.[45] It is clear that even without specific statutory authorization, upon termination of a voting trust any of the parties may participate in a succeeding trust.[46]

Of course, any party to the first voting trust has the right to decline to participate in the succeeding trust. The only benefit of the statutory authorization is that it abrogates the necessity of formally dissolving the original trust and creating a new one. An interesting question that arises is whether a voting trust agreement can provide that, upon the expiration of the initial term, either a certain percentage of the voting trust certificate holders or the voting trustee can elect to extend or renew the term of the trust and thereby bind all parties. It would seem that in jurisdictions having statutory provisions for renewal, any clause in the agreement in contravention of the particular statute would be invalid.[47] On the other hand, in

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42. 228 Md. 358, 367-68, 180 A.2d 302, 305-06 (1962).
43. *See* 5A CAVITCH §111.05[1] n.9.
44. A typical extension provision is:

> At any time within two years prior to the time of expiration of any voting trust agreement as originally fixed or as last extended as provided in this subsection, one or more beneficiaries of the trust under the voting trust agreement may, by written agreement and with the written consent of the voting trustee or trustees, extend the duration of the voting trust agreement for an additional period not exceeding ten years from the expiration date of the trust as originally fixed or as last extended in this subsection. The voting trustee or trustees shall, prior to the time of expiration of any such voting trust agreement, as originally fixed or as previously extended, as the case may be, file in the registered office of the corporation in this State a copy of such extension agreement and of his or their consent thereto, and thereupon the duration of the voting trust agreement shall be extended for the period fixed in the extension agreement; but no such extension agreement shall affect the rights or obligations of persons not parties thereto.

DEL. CODE ANN. tit. 8, §218(b) (1975).

45. *But see* OHIO REV. CODE §1701.49(B) (1964), which permits the majority in interest of the beneficial owners to extend, if the agreement so provides, and makes no provision for withdrawal by dissenters.
46. Mannheimer v. Keehn, 30 Misc. 584, 41 N.Y.S.2d 542 (Sup. Ct. 1943), *modified on other grounds*, 268 App. Div. 845, 51 N.Y.S.2d 750 (1944).
47. *Cf.* Belle Isle v. Corcoran, 29 Del. Ch. 554, 49 A.2d 1 (Sup. Ct. 1946).

jurisdictions, like Maryland, where there are no specific statutory provisions governing extension, it seems that the validity of such a clause should depend upon whether the provision causes the aggregate term of the voting trust to extend beyond the maximum permitted by statute.[48]

(5) *Revocation of voting trust.* Participating stockholders may wish to retain the power of termination by providing that a prescribed majority in interest may terminate the voting trust at any time or upon any other express condition.[49]

(6) *Filing copy of voting trust agreement with the corporation.* The agreement should specifically require the voting trustee to file an executed copy of the voting trust agreement with the corporation at its principal office.

(7) *Transfer of stock to voting trustee; transfer on the corporation's records.* The agreement should set forth the mechanics by which the shares subject to the agreement are to be assigned to the voting trustee. The agreement should also authorize the trustee to submit the endorsed stock certificates to the corporation for cancellation and transfer on the corporate books, and for issuance of a new certificate in the name of the voting trustee.

(8) *Issuance of voting trust certificates.* The voting trust agreement should also set forth the procedure by which the trustee should issue voting trust certificates, as well as the form and characteristics of such certificates.[50] It is advisable to attach a specimen certificate to the agreement as an exhibit, or to set forth in the agreement the complete text printed on the face of the voting trust certificates.

(9) *Transfer of voting trust certificates.* The agreement should establish the method by which voting trust certificates are to be transferrred. The agreement should also require the voting trustee to maintain a ledger listing the names and addresses of all voting trust certificate holders and the number of shares held by each. There should be a provision in the agreement for inspection of the trustee's records by certificate holders and other stockholders. The agreement should note any restrictive legends to be placed on the certificates in compliance with federal and state securities laws. In addition, if the underlying shares are subject to any charter provision or stockholder agreement restricting their transferability, such restrictions should also be legended on the voting trust certificates.

(10) *Exchange of voting trust certificate for shares of stock upon termination of voting trust.* A significant aspect of the equitable interest in the trust is the right, upon the trust's termination, to receive a share of stock for each share represented by the voting trust certificate. The agreement should set forth the right and mechanics of accomplishing the

48. *But see* 1 G. HORNSTEIN, CORPORATION LAW AND PRACTICE §215, at 297 (1959).

49. It should be noted that the California statute permits a majority of the participating stockholders to revoke the trust at any time despite contrary provisions in the trust agreement. CAL. CORP. CODE §2231 (West 1954). *See also* MINN. STAT. ANN. §301.27(1) (1969), which permits a majority of participating stockholders to revoke unless otherwise provided in the voting trust agreement.

50. See p. 250 *supra* with respect to provisions that should be on the voting trusts certificates.

exchange. The agreement should also address the situation where a beneficiary is missing or for some other reason fails to surrender the voting trust certificate. For example, the voting trustee could be given the right to turn the stock certificate over to the issuing corporation to hold on behalf of the participating stockholder, thereby relieving the trustee of liability.

(11) *Distributions by the corporation.* Normally voting trust certificate holders retain their right to receive dividends in cash or property. However, the right to receive any distributions will depend on the purpose of the voting trust. The agreement should specifically address the handling of liquidating distributions. In addition, any distribution of voting stock should become subject to the trust.

(12) *Successor voting trustees.* The voting trust agreement should provide for successor voting trustees, either by specifically naming the successors or by providing some method of choosing successors when a trustee dies, resigns, is removed for cause, or is incapacitated or otherwise unable to act.[51] Under normal circumstances, the agreement should also give the voting trustee the right to resign and indicate the method of resignation.

(13) *Casting shareholder votes when there are several voting trustees.* When the agreement appoints two or more trustees to serve concurrently, a procedure for voting the underlying shares should be established, particularly where the voting trustees are equally divided over an issue. In the latter case, the vote could be equally divided among the voting trustees, or a third party, whose decision will bind all of the trustees, could be appointed. As a third alternative, the agreement could provide that the stock will not be voted unless there is unanimity among the trustees. This last approach is dangerous because the corporation might then be controlled by a small minority of non-participating stockholders.[52] Further, if all of the corporation's shares are held by the trustees, the corporation as well as the trust would be deadlocked.

(14) *Power of the voting trustee.* The voting trust agreement should delineate the duties and powers of the trustee.[53] In particular, the

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51. Several statutes provide that vacancies among the trustees shall be filled by the remaining trustees unless otherwise provided in the trust agreement. *See, e.g.*, IDAHO CODE ANN. §30-135(7)(c) (1967); LA. REV. STAT. §12:78(F)(3) (1969); MINN. STAT. ANN. §301.27(3) (1969); OKLA. STAT. ANN. tit. 18, §1.66(F)(3) (1953).

52. Assuming that, in spite of the trustee's deadlock, they are present at the stockholders' meeting so that quorum requirements are met.

53. It is important to note that most jurisdictions, including Maryland, view a voting trust as subject to the law applicable to equitable trusts and the trustee as a trustee in the equitable sense. Brown v. McLanahan, 148 F.2d 703 (4th Cir. 1945). Therefore, the trustee's exercise of powers granted under the voting trust agreement is subject to the obligations an equitable trustee owes to beneficiaries. Cavitch lists the following obligations as being charged to a voting trustee:

    (1) They have a fiduciary oblication to administer for the best interests of all the beneficiaries or cestuis que trust.
    (2) When they represent different classes of shareholders, they may not favor one class at the expense of another.
    (3) Similarly, voting trustees may not exercise their powers to further their own interests to the detriment of some or all of the beneficiaries.
    (4) Voting trustees may also have the power and even the duty to protect the in-

agreement should clearly indicate whether the trustee may vote the underlying shares only on such matters as the election of directors, approval of auditors and other routine affairs, or whether the trustee's voting rights extend to more fundamental matters such as mergers, redemptions, sales of assets, amending the articles of incorporation or by-laws, increasing the authorized number of shares, creating new classes of stock or dissolving the corporation. These provisions go to the heart of the voting trust agreement. Consequently, the courts tend to deny powers asserted by the trustee which are not clearly and expressly conferred, particularly with respect to the right to decide upon fundamental changes in corporate structure.[54] The voting trust statute in one jurisdiction requires that the participating stockholders reserve the voting power on such fundamental matters,[55] while most jurisdictions permit assignment of this power to the trustee.

(15) *Voting instructions to the voting trustee.* Frequently, the agreement will direct the trustee to vote for certain persons as directors, or in a certain way on a particular issue. In Maryland, this device may also be used to insure the election of certain individuals as officers, because officers can be elected by the stockholders if the by-laws so provide.[56]

(16) *Compensation of voting trustee; reimbursement for expenses of trust.* The voting trust agreement should indicate whether the voting trustee is to receive compensation. Most trustees serve without compensation. The agreement should also establish the trustee's right to reimbursement by the participating stockholders for expenses incurred in administering the trust. Agreements commonly give the trustee the right to deduct expenses from any dividends received before redistributing them to the voting trust certificate holders.

(17) *Limitation on personal liability of voting trustee; indemnification.* Voting trust agreements will often attempt to limit the personal liability of the trustee to the beneficiaries for his votes and other actions. These exculpatory clauses generally provide that the voting trustee shall not be liable for any error of law or for any act committed or omitted, except for willful misconduct or gross negligence. Any attempt to completely exonerate the trustee from liability is generally ineffective on public policy grounds which will refuse "to relieve the trustee of liability for breach of trust committed in bad faith or intentionally or with reckless indifference to

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tegrity of the trust by defending against a suit to invalidate it when they have reasonable grounds to believe that the attack is without justification.

1 CAVITCH §111.06[3] (citations omitted).

54. *See, e.g.*, Kullgren v. Navy Gas and Supply Co., 110 Colo. 454, 135 P.2d 1007 (1943); Nelson v. Amling, 319 Ill. App. 571, 49 N.E.2d 868 (1943); Ohio Nat'l Life Ins. Co. v. Struble, 82 Ohio App. 480, 81 N.E.2d 622, *appeal dismissed*, 150 Ohio St. 409, 82 N.E.2d 856 (1948).

55. Notwithstanding the provisions of this Section ... the holders of record of the voting trust certificates shall have the same rights as if they were shareholders of record with respect to voting upon any amendment of the charter, amendment of the bylaws, reduction of stated capital, sale of the entire assets, merger, consolidation or dissolution....

N.C. GEN. STAT. §55-72(c) (Supp. 1974).

56. *See* MD. ANN. CODE art. 23, §60(a) (1973).

the interests of the beneficiary, or of liability for any profit which the trustee has derived from a breach of trust."[57] It is also common for the agreement to provide that the beneficiaries of the trust shall indemnify and hold harmless the trustee from liability incurred by the trustee in actions brought by non-participating stockholders.

(18) *Trustees as officers and directors; interested transactions; proxies; trustee's rights to join the trust.* There are several miscellaneous matters which also should be covered by the voting trust agreement. First, there should be a provision specifying whether the trustee can serve as an officer or director of the corporation. In addition, it is advisable to specifically permit the voting trustee or any firm of which he is a member, or any corporation of which he is a stockholder, director or officer, or any firm, association or corporation in which he has an interest, to contract with the corporation or to become pecuniarily interested in any matter or transaction in which the corporation may be involved. Further, agreements will generally authorize the trustee to vote by proxy, although it seems that Maryland law would permit the voting trustee to use a proxy even without specific authorization in the agreement. Finally, the agreement will usually permit the voting trustee to be a participating stockholder.

(19) *Acceptance of the trust.* As a matter of formality, the voting trust agreement usually contains a provision whereby the trust is accepted by the voting trustee. Such a provision seems to be superfluous because the execution of the agreement by the trustee evidences his acceptance of the trust and of his duties.

There are some disadvantages inherent in the use of voting trusts in lieu of other corporate control devices. A major disadvantage is the fact that a voting trust will disqualify a corporation as a "small business corporation" under Subchapter S of the Internal Revenue Code.[58] To qualify for Subchapter S status, a corporation must not have "as a shareholder a person (other than an estate) who is not an individual...."[59] The regulations specifically treat voting trusts as disqualifying shareholders,[60] although the position taken by the regulations has been rejected by one District Court.[61] Another disadvantage in using a voting trust is the 10 year limitation found in most statutes. There is also the problem of strictly complying with the technical statutory requirements which must be satisfied to assure the trust's validity. Finally, there is the disadvantage of "public disclosure" of the agreement resulting when it is filed with the corporation. But in spite of these disadvantages, the voting trust is often a useful and appropriate device for maintaining corporate control. Its

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57. RESTATEMENT (SECOND) OF TRUSTS §222(2) (1959).
58. INT. REV. CODE OF 1954, §§1371-79.
59. *Id.* §1371(a)(2).
60. *Treas. Reg.* §§1.1371-1(d)(1), 1.1371-1(e) (1959). *See also* Rev. Rul. 63-226, 1963-2 CUM. BULL. 341.
61. A & N Furniture & Appliance Co. v. United States, 271 F. Supp. 40 (S.D. Ohio 1967).

self-executing nature gives it a distinct advantage over other control devices. Moreover, by vesting voting rights in a trustee with rather broad discretionary powers to vote the underlying stock, the voting trust is more flexible than other control devices which may inadequately anticipate problems that may arise in the future requiring stockholder action.