

# OD/PH Module 4: Additional Responsibilities of Proxy Holders and Voting Trustees Student Guide

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## Module 4 Introduction

In Module 4, we will discuss the additional responsibilities of the Proxy Holders and Voting Trustees; which includes their exclusive rights, powers, and authority to exercise all voting rights with respect to the shares of the corporation.

This is accomplished in a way that ensures that the foreign shareholder can be effectively insulated from the cleared company. Although the Proxy Holders and Voting Trustees have similar responsibilities, there are some differences that will be covered in this module.

## Objectives

The objectives of this module are:

- Identify differences between the Proxy Agreement and Voting Trust Agreement;
- Understand the additional responsibilities of the Proxy Holders and Voting Trustees; and
- Discuss:
  - Meetings with the foreign shareholder(s);
  - Approved visits and communications with the Affiliates;
  - Accepting shares or dividends;
  - Voting discretion;
  - Compensation of Proxy Holders and Voting Trustees; and
  - Annual Implementation and Compliance Report and Annual Meeting

Please note that throughout this Module, the term “Affiliate” refers to both the foreign parent (foreign shareholder) and other companies owned by the foreign parent, including those located in the U.S.

## Proxy Holders and Voting Trust Agreements

The Proxy Agreement (PA) and Voting Trust Agreement (VTA) may be used when a cleared company is effectively owned or controlled by a foreign entity. The Proxy Agreement and the Voting Trust Agreement are substantially identical arrangements where the voting rights of the foreign-owned stock are vested in cleared U.S. citizens approved by the Federal Government (Defense Counterintelligence and Security Agency (DCSA)). Neither arrangement imposes any restrictions on the company's ability to have access to classified information or to compete for classified contracts.

The difference between the Proxy Agreement and the Voting Trust Agreement is that under the Voting Trust Agreement the foreign owner transfers legal title in the company to the Voting Trustees that are approved by DCSA.

A company could use either a Proxy Agreement or a Voting Trust Agreement to mitigate the Foreign Ownership, Control, or Influence (FOCI) when the foreign shareholder is controlled by the foreign government OR if the government customer requests a stronger mitigation and requires access to proscribed information.

For further information regarding the Proxy Agreement or Voting Trust Agreement, refer to the FOCI Agreement for your company or your DCSA representative.

## Meetings with Foreign Shareholder(s)

The Voting Trustees and the Proxy Holders share similar responsibilities regarding meetings with their foreign shareholder(s). For instance:

- Meetings are scheduled on a quarterly or annual basis.
- Additional meetings may be scheduled to discuss the financial condition and/or operation of the company.
- Foreign shareholder representatives may attend if requested by the Proxy Holders or Voting Trustees.
- A meeting with the foreign shareholder may be convened at any time as long as the agenda is limited to the matters described in the Proxy Agreement or Voting Trust Agreement.
- Prior to the meeting, a written agenda should be prepared and submitted to DCSA for approval. Meeting approval must be received from DCSA prior to the meeting.
- Minutes of meetings in which foreign shareholder representatives are in attendance shall be prepared and retained by the Government Security Committee (GSC) for review by DCSA.
- Classified and export-controlled information should not be disclosed to the foreign shareholder(s) except as specifically authorized by applicable law or regulation.
- Suggestions or requests by the foreign shareholder representatives present at these meetings should not be binding on the Proxy Holders/Voting Trustees or the company.

In addition, for each meeting, the Voting Trustees are responsible to also:

- Complete a written agenda in advance, which includes items requested by the foreign shareholder for the Voting Trustees' approval; and
- Obtain written consent of the foreign shareholder on any issue that may adversely affect an investor, before voting the shares.

## Visits and Communication

The Proxy Agreement and the Voting Trust Agreement establish requirements for visitation and communication between the FOCI company and the Affiliates. They include meetings at:

- Any location within or outside the U.S.;
- Any facility owned or operated by the company;
- Any of the Affiliates at the discretion of the GSC

Any deviations from the Agreement must be approved prior to implementation by DCSA. DCSA requires advance approval of visits; however, defers to the GSC to determine the appropriate advance notice. Once the GSC has determined the suitable advance notice for the visit it must be formalized in writing to DCSA.

The Visitation Procedures by the designated Proxy Holders or Voting Trustees is the same process discussed in Module 3 in the Government Security Committee, except:

- The Proxy Agreement typically does not have routine visits and designates at least one (1) Proxy Holder to approve the visit(s).
- The Voting Trust Agreement does not have routine visits and designates at least two (2) Voting Trustees to approve visits.
- DCSA will defer to the GSC on what constitutes an unforeseen exigency visit, so long as

visits are reviewed and approved after the event.

## **Accepting Shares or Dividends**

What does it mean to a Proxy Holder or Voting Trustee to accept shares or dividends on behalf of a company?

### **Proxy Holder Shares or Dividends**

The foreign shareholder appoints the Proxy Holders as its proxies to have all the rights, powers, and authority to exercise all the voting rights with respect to the shares. The shareholders will annotate all certificates representing the shares with the legend. All certificates representing the shares should be deposited with the Proxy Holder at their office in trust for the shareholder and available for review by DCSA, and receipt for the certificates provided to the shareholder. In the event the Proxy Holder receives any shares as a dividend, the Proxy Holder should accept such shares. The shareholder is entitled to receive payments equal to cash dividends, if any, for those shares from the Proxy Holder.

### **Voting Trustee Shares or Dividends**

The shareholder has transferred and assigned to the Voting Trustee, all of the shares of the corporation, and the shares are registered in the name of the Voting Trustees. During the term of the Agreement, no shares of the corporation should be held by the shareholder, but all shares should be deposited with the Voting Trustees. In the event the Voting Trustee receives any shares of capital stock of the corporation, the Voting Trustee should accept the shares and issue Voting Trust Certificates. The shareholder, or any successor shareholder, is entitled from time to time to receive from the Voting Trustees payments equal to cash dividends, if any, for those shares.

## **Proxy Holders Voting Discretion**

The Proxy Holders are entitled to exercise their sole and absolute discretion, with respect to any and all of the shares at any time covered by the Proxy Agreement. Proxy Holders have the right to vote or consent to any and every act of the corporation as if they were absolute owners of the shares. All decisions and actions by the Proxy Holders should be based on their independent judgment and free of any control or influence from the foreign shareholder.

The Proxy Holders should consult with the shareholder concerning these actions so the shareholder may have sufficient information to ensure that all such actions will be taken in accordance with applicable United States laws and regulations.

## **Voting Trustees Voting Discretion**

The Voting Trustees must make decisions for the company independent of the foreign shareholder(s). When the Voting Trustees meet for the purpose of voting the shares, only the Voting Trustees may vote and they cannot give that responsibility to any other board member. The Voting Trustee must protect the legitimate economic interests of the foreign shareholder in the corporation as an ongoing business concern.

The Voting Trustees are entitled to exercise in their sole and absolute discretion, the right to vote the same or to consent to any and every act of the corporation based on their independent judgment with respect to the shares covered under the Voting Trust Agreement. The shareholder has the right, however, to forward written suggestions for the Voting Trustees consideration, except for suggestions on persons to be nominated as successor Voting Trustees. Each written notice from the shareholder should be immediately provided to DCSA for review.

The Voting Trustees should consult with the shareholder on these actions so that the shareholder may have sufficient information to ensure that all such actions will be taken in accordance with applicable United States laws and regulations.

## **Proxy Holders and Voting Trustees Compensation**

The terms of compensation include any and all benefits (including travel and other administrative expenses) that are negotiated between the Proxy Holders/Voting Trustees and the foreign shareholder. These benefits should be paid by the company and remain in effect throughout their tenure as Proxy Holders/Voting Trustees.

A copy of the compensation terms should be provided to DCSA. This compensation should be paid promptly by the company according to the provisions in the Agreement.

## **Annual Implementation and Compliance Report and Meeting**

The Voting Trust Agreement and Proxy Agreement are required to have an Annual Implementation and Compliance Report and Annual Meeting, as outlined in Module 6.

The Voting Trustees should also include in the report the signed Voting Trust Certificate which is approved by the Voting Trustees and subject to approval by DCSA. In the event a Voting Trust Certificate becomes mutilated, destroyed, lost or stolen, the Voting Trustees may, in their sole discretion, issue and deliver a new Voting Trust Certificate representing a like number of the shares of the cleared corporation. There are two ways to reissue the Certificate:

- If the Certificate is mutilated, the Voting Trust Certificate should be exchanged and canceled.
- If the Certificate was destroyed, lost, or stolen, then the Voting Trust Certificates should be issued upon production of evidence of such destruction, loss or theft that is satisfactory to the Voting Trustees and upon receipt of indemnity satisfactory to them.

## **Module 4 Conclusion**

You have completed Module 4 which covered the:

- Differences between the Proxy Agreement and Voting Trust Agreement;
- Additional responsibilities of the Proxy Holders and Voting Trustees;
- Meetings with the foreign shareholder(s);
- Approved visits and communications with the Affiliates;
- Accepting shares or dividends;
- Voting discretion;

- Compensation of Proxy Holders and Voting Trustees; and
- Annual Implementation and Compliance Report and Annual Meeting.