



## Challenges to Association Elections: Facts and Consequences

The Who, What, When and Why of Election Disputes

### Introduction

Electing a Board of Directors to manage the Association is a complex and time consuming process. Despite the best of intentions, sometimes things slip through the cracks, whether it's the qualifications of someone on the ballot or the manner in which votes are collected and tallied. When this occurs, the appointment of a specific director or the election as a whole can be challenged by a member. This resource discusses the basics of such a challenge, including who has standing to bring a challenge, when a challenge can be brought, and how such a challenge can affect the Association.

### Why Might an Election be Challenged?

A member may challenge an election for a myriad of reasons. Common claims behind a challenge include the following: (1) that a specific director was not qualified to run at the time of the election, (2) that the tallying of votes was done in an improper manner, (3) that improper notice of the election was given to the membership, and (4) that improper use of proxies occurred. Unfortunately, however, the true issue often underlying a challenge involves the member's disapproval of those elected.



### Who May Challenge an Election?

The individuals entitled to challenge an election are set forth in the California Corporations Code Section 7616(a), and include the following: (1) any director of the Association, (2) any member of the Association, and (3) any person who had the right to vote in the election at issue. Prior to addressing the validity of any challenge to a director's qualifications or an election as a whole, the Board should first determine whether the individual bringing the challenge falls into one of the three categories listed above.



### When Can a Challenge to an Election be Brought?

Corporations Code Section 7527 provides that a challenge to an election may be brought anytime within nine (9) months of the election date. Thereafter, assuming that no fraud has occurred, the election, appointment or removal of a director is conclusively presumed to be valid. It should be noted, however, that a slight conflict exists in the law with respect to the exact period in which a challenge may be brought. Civil Code Section 1363.09(a) provides that a civil action may be brought within one (1) year for a violation of the election procedures set forth therein. Despite this inconsistency, both Section 1363.09(h) of the Civil Code and unpublished court decisions indicate that the nine (9) month deadline controls.

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### What Options are Available to a Board, if a Challenge Reveals that a Director is Unqualified?

If a challenge to a director's qualifications is brought within nine (9) months of an election, and it is revealed that the director was in fact not qualified at the time of the election, the Board may opt to correct the situation by removing the unqualified director. Under Corporations Code Section 7221, "The board by majority vote of the directors who meet all of the required qualifications to be a director, may declare vacant the office of any director who fails or ceases to meet any required qualification that was in effect at the beginning of that director's current term in office." It is important to note that this Section does not require the removal of the director, but rather permits it. However, by opting to remove the director, the Board may prevent a prolonged dispute.

## Validity of Actions Taken by the Board During the Period when an Unqualified Director was Serving

If a challenge is brought, and it is revealed that a director was not qualified to serve on the Board, there may be a question as to the validity of the Board's actions during the period that director served. To the extent that a majority of the Board (excluding the unqualified director's vote)

**"...there may be a question as to the validity of the Board's actions..."**

voted on any specific action, thereby making the unqualified director's vote irrelevant, it is unlikely that a challenge to such an action would be successful. However, if that director's vote was critical to an item of business acted upon or approved by the Board, it may be prudent for the Board to take additional steps to reaffirm the Board's decision. Specifically, the qualified directors may wish to retroactively reaffirm and approve each such action during a proper meeting of the membership.

### Summary

Various factors must be considered when an election or a director's qualifications are challenged by a member. The standing of the individual bringing the challenge and the time in which the challenge is brought are both threshold questions that should be given immediate consideration. As noted above, where the reasoning behind a challenge is valid, several options are available to remedy the situation before it escalates. When such a challenge is likely, or has already taken place, Boards should contact their Association's legal counsel for guidance.

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