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*Final Analysis*  
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(As Passed by the General Assembly)

**Reps. D. Miller, Schuler, DePiero, Opfer, Trakas, Ford, Sullivan, Gerberry, Boyd, Jones, Stapleton, O'Brien, Winkler, Mottley, Schuck, Allen, Willamowski, Jacobson, Callender, Womer Benjamin, Salerno, Peterson, Buchy, Olman, Sykes, Coughlin, Krupinski, Flannery, Bender, Damschroder, Barnes, Verich, Metelsky, Householder, Maier, Terwilleger, Logan, Barrett**

**Sens. Latta, Drake, Spada, Mumper**

**Effective date: September 13, 1999**

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**ACT SUMMARY**

- Specifies in the General Corporation Law that a proxy may be appointed by a verifiable communication authorized by the person making the appointment.
- Specifies that any transmission that creates a record capable of authentication, including electronic mail or an electronic, telephonic, or other transmission that appoints a proxy, is a sufficient verifiable communication to appoint a proxy.
- Specifically prohibits any person in purchasing securities from knowingly engaging in any act or practice that is declared illegal, defined as fraudulent, or prohibited in the Ohio Securities Law.
- Modifies the conditions under which certain securities may be offered for sale and sold without complying with certain registration requirements of the Securities Registration Law.
- Modifies the conditions under which a person may act as an investment adviser representative.

- Authorizes the Attorney-inspector of the Division of Securities of the Department of Commerce to represent the Division in other matters in addition to prosecutions.
- Specifies that "private civil action" for the purposes of class actions dealing with securities does not include an action for rescission.

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## CONTENT AND OPERATION

### Appointment of proxy

#### Prior law

Formerly, under the General Corporation Law, a person who was entitled to attend a shareholders' meeting, to vote at the meeting, or to execute consents, waivers, or releases could be represented or could vote at the meeting, execute consents, waivers, and releases, and exercise any other rights, by proxy or proxies appointed by a writing signed by that person. A telegram or cablegram appearing to have been transmitted by the person appointing the proxy, or a photographic, photostatic, or equivalent reproduction of a writing, appointing a proxy was a sufficient writing. (Sec. 1701.48(A) and (B).)

#### Operation of the act

The act specifies that a proxy or proxies may be appointed by a writing signed by the person making the appointment (prior law) or by a verifiable communication authorized by the person making the appointment (added by the

act) (sec. 1701.48(A)). The act makes a distinction between the following methods of appointing a proxy or proxies (sec. 1701.48(B)):

(1) A signed writing (prior law). A photographic, photostatic, facsimile transmission (added by the act), or equivalent reproduction of a writing that is signed by a person as described in "Prior law," above, and that appoints a proxy is a sufficient writing to appoint a proxy.

(2) An authorized verifiable communication. Any transmission creating a record capable of authentication, including, but not limited to, a telegram or cablegram (prior law), electronic mail, or an electronic, telephonic, or other transmission (added by the act), that appears to have been transmitted by a person as described in "Prior law," above, and that appoints a proxy is a sufficient verifiable communication to appoint a proxy.

The act provides that no appointment of a proxy is valid after the expiration of 11 months after it is made unless the writing or "verifiable communication" specifies the date on which it is to expire or the length of time it is to continue in force (sec. 1701.48(C)).

### **Revocation of appointment of proxy**

Prior law authorized the person appointing a proxy, without affecting any vote previously taken, to revoke a revocable appointment by a later appointment received by the corporation or by giving notice of revocation to the corporation in writing or in open meeting. The act provides that notice of revocation to the corporation also may be given in a "verifiable communication." (Sec. 1701.48(D).)

### **Powers of proxy**

Prior law provided that unless the writing appointing a proxy otherwise provides (sec. 1701.48(F)):

(1) Each proxy had the power of substitution and, if three or more proxies are appointed, a majority of them or of their substitutes could appoint one or more substitutes to act for all.

(2) If more than one proxy was appointed, then (a) with respect to voting or executing consents, waivers, or releases, or objections to consents at a shareholders' meeting, a majority of the proxies who attend the meeting, or if only one attends then that one, could exercise all the voting and consenting authority at the meeting; and if one or more attend and a majority did not agree on any particular issue, each proxy so attending was entitled to exercise that authority

with respect to an equal number of shares, (b) with respect to exercising any other authority, a majority could act for all.

The act retains these powers of a proxy unless the writing or "verifiable communication" appointing a proxy otherwise provides (sec. 1701.48(F)).

### **Fraudulent acts in the purchase of securities**

#### **Prior law**

Prior law provided that the Ohio Securities Law prohibited any person in *selling* securities from knowingly engaging in any act or practice that is declared as illegal, defined as fraudulent, or prohibited in that Law (sec. 1707.44(G)). (See **COMMENT 1**.) The Ohio Securities Law defined "fraud," "fraudulent acts," "fraudulent practices," or "fraudulent transactions" as anything recognized on or after July 22, 1929, as such in courts of law or equity; any device, scheme, or artifice to defraud or to obtain money or property by means of any false pretense, representation, or promise; any fictitious or pretended purchase or sale of securities; and any act, practice, transaction, or course of business relating to the *sale* of securities that is fraudulent or that has operated or would operate as a *fraud upon the purchaser* (sec. 1707.01(J)).

#### **Operation of the act**

The act retains the preexisting provisions described above and applies the Ohio Securities Law's prohibitions against fraudulent and other illegal acts or practices to the *purchase* of securities. It specifically prohibits any person in *purchasing* securities from knowingly engaging in any act or practice that is declared illegal, defined as fraudulent, or prohibited in the Ohio Securities Law (sec. 1707.44(G)). The act modifies the definition of "fraud," "fraudulent acts," "fraudulent practices," or "fraudulent transactions" in existing law by including within the meaning of those designated terms any act, practice, transaction, or course of business relating to the *purchase* of securities that is fraudulent or that has operated or would operate as a *fraud upon the seller* (sec. 1707.01(J)).

The act defines "purchase" for purposes of the Ohio Securities Law in the following manner (sec. 1707.01(MM)(1) and (2)) (see **COMMENT 2**):

(1) It has the full meaning of "purchase" as applied by or accepted in courts of law or equity.

(2) It includes every acquisition of, or attempt to acquire, a security or an interest in a security.

(3) It includes a contract to purchase, an exchange, an attempt to purchase, an option to purchase, a solicitation of a purchase, a solicitation of an offer to sell, a subscription, or an offer to purchase, directly or indirectly, by agent, circular, pamphlet, advertisement, or otherwise.

(4) It means any act by which a purchase is made.

The act specifies that any security given with, or as a bonus on account of, any purchase of securities is conclusively presumed to constitute a part of the subject of that purchase (sec. 1707.01(MM)(3)).

### **Sale of securities exemptions**

Prior law provides that certain transactions in certain securities may be carried on and completed without compliance with the registration requirements contained in sections 1707.08 to 1707.11 of the Revised Code. Securities that are permissibly transferred without compliance with the registration requirements are termed "exempt," and generally must comply with specified criteria. Exemptions do not apply to those securities in which the right to buy, sell, or deal in has been suspended or revoked under an existing order of the Division of Securities or under a cease and desist order.

Former R.C. 1707.03(B) through (X) set forth categories of exempt securities transactions, including, but not limited to the following: (1) a sale of securities by or on behalf of a bona fide owner who is not a dealer or issuer that is made in good faith and not to avoid R.C. Chapter 1707. and is not made in the course of repeated and successive transactions of a similar character, (2) certain sales of securities by executors, administrators, receivers, trustees, or anyone acting in a fiduciary capacity, (3) a sale to the issuer, to a dealer, or to an institutional investor, (4) a sale in good faith and not to avoid R.C. Chapter 1707. by a pledgee of a security pledged for a bona fide debt, (5) a sale at public auction by a corporation of shares of its stock because of a delinquency in payment for the shares, (6) certain sales of notes, bonds, or other evidences of indebtedness secured by a mortgage lien upon real property, leasehold estate other than oil, gas, or mining leasehold, or tangible personal property, (7) certain sales of securities by a bank, savings and loan association, savings bank, or credit union if at a profit to that seller on not more than 2% of the total sale price, (8) certain sales by a licensed dealer acting as principal or agent of securities issued and outstanding before the sale unless the sale is specifically made not exempt, and (9) the sale of a security when the Division finds by rule that registration is not necessary or appropriate in the public interest or for the protection of investors.

Former R.C. 1707.03(Y) stated that the offer or sale of securities was exempt if certain conditions or restrictions set forth in that Division were satisfied

and certain procedures were complied with, including, but not limited to the following: (1) the sale is made only to persons who are or the issuer reasonably believes are accredited investors as defined in Rule 501 of Regulation D under the Securities Act of 1933, (2) the issuer reasonably believes that all purchasers are purchasing for investment and not with a view to or for sale in connection with a distribution of the security, (3) generally no telephone solicitation is done, (4) a general announcement of the proposed offering can be made by any means but only certain information can be included, and (5) the issuer must file with the Division notice of the offering within 15 days after notice of the offering is made *to the public* or a general announcement is made *to the public* in this state. (See **COMMENT 3** for complete list of conditions and requirements to be exempt under R.C. 1707.03(Y).)

The act modifies the exemption in R.C. 1707.03(Y) to specify that the offer or sale of securities *by an issuer* may be carried on and completed without compliance with Securities Registration Law (is exempt) if all existing provisions of R.C. 1707.03(Y) are met. The act also modifies the R.C. 1707.03(Y) condition described in (5) above to require the issuer to file with the Division notice of the offering within 15 days after notice is made or a general announcement is made in this state (removes requirement of notice to the public). (R.C. 1707.03(Y) and (Y)(10).)

### **Investment adviser representative qualifications**

Prior law provided that no person could act as an investment adviser representative unless anyone of specified criteria were met. The act adds to the criteria that permit a person to act as an investment adviser representative by permitting a person to act as an investment adviser representative if the person is employed by or associated with an investment adviser that is excepted from notice filing by R.C. 1707.141(B)(3) of the Securities Dealer Licensure Law or if the person is a licensed investment adviser who is properly excepted from licensure as an investment adviser representative. The act also specifies that nothing in the Investment Adviser Representative Qualification Law is to be construed as prohibiting a natural person from being licensed as both a securities dealer and an investment adviser representative. (R.C. 1707.161(A)(4) and (B)(4).)

### **Attorney-inspector duties**

Prior law created in the Division of Securities a position known as Attorney-inspector, which could only be held by an attorney at law. The duties of this position were to investigate and report upon all complaints and alleged violations of laws relating to the issue and sale of securities and to represent the Division in prosecutions arising from such complaints and alleged violations. The

act permits the Attorney-inspector of the Division of Securities of the Department of Commerce to represent the Division in *other matters* (not just prosecutions) arising out of complaints and alleged violations of Ohio Securities Law and the rules promulgated thereunder. (R.C. 1707.36.)

**Availability of rescission actions in securities class action suits**

The act provides that, for the purposes of sections 1707.432 through 1707.439 of the Revised Code (dealing with securities class action suits), "private civil action" does not include an action for rescission (R.C. 1707.439).

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**COMMENT**

1. The Ohio Securities Law generally defines "sale" in the following manner (R.C. 1707.01(C)(1) and (2)):

(1) It has the full meaning of "sale" as applied by or accepted in courts of law or equity.

(2) It includes every disposition, or attempt to dispose, of a security or of an interest in a security.

(3) It includes a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a solicitation of an offer to buy, a subscription, or an offer to sell, directly or indirectly, by agent, circular, pamphlet, advertisement, or otherwise.

(4) "Sell" means any act by which a sale is made.

Formerly, under the Ohio Securities Law, any security given with, or as a bonus on account of, any purchase of securities is conclusively presumed to constitute a part of the subject of that purchase and has been "sold." "Sale" by an owner, pledgee, or mortgagee, or by a person acting in a representative capacity, includes sale on behalf of that party by an agent, including a licensed dealer or salesman. (R.C. 1707.01(C)(5) and (6).)

2. The act's proposed definition of "purchase" in the Securities Law is a counterpart of that Law's existing general definition of "sale" as described in **COMMENT 1.**

3. R.C. 1707.03(Y) reads as follows:

(Y) The offer or sale of securities is exempt provided that all of the following apply:

(1) The sale of securities is made only to persons who are, or who the issuer reasonably believes are, accredited investors as defined in rule 501 of Regulation D under the Securities Act of 1933.

(2) The issuer reasonably believes that all purchasers are purchasing for investment and not with a view to or for sale in connection with a distribution of the security. Any resale of a security sold in reliance on this exemption within twelve months of sale shall be presumed to be with a view to distribution and not for investment, except a resale to which any of the following applies: (a) the resale is pursuant to a registration statement effective under section 1707.09 or 1707.091 of the Revised Code; (b) the resale is to an accredited investor, as defined in rule 501 of Regulation D under the Securities Act of 1933; (c) the resale is to an institutional investor pursuant to the exemptions under division (B) or (D) of R.C. 1707.03.

(3) The exemption under this division is not available to an issuer that is in the development stage and that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entities or persons.

(4) The exemption under this division is not available to an issuer, if the issuer, any of the issuer's predecessors, any affiliated issuer, any of the issuer's directors, officers, general partners, or beneficial of ten per cent or more of any class of its equity securities, any of the issuer's promoters presently connected with the issuer in any capacity, any underwriter of the securities to be offered, or any partner, director, or officer of such underwriter: (a) within the past five years, has filed a registration statement that is the subject of a currently effective registration stop order entered by any state securities administrator or the securities and exchange commission; (b) within the past five years, has been convicted of any criminal offense in connection with the offer, purchase, or sale of any security, or involving fraud or deceit; (c) is

currently subject to any state or federal administrative enforcement order or judgment, entered within the past five years, finding fraud or deceit in connection with the purchase or sale of any security; (d) is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the past five years, that temporarily, preliminarily, or permanently restrains or enjoins the party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of any security.

(5) Division (Y)(4) of R.C. 1707.03 is inapplicable if any of the following applies: (a) the party subject to the disqualification is licensed or registered to conduct securities business in the state in which the order, judgment, or decree creating the disqualification was entered against the party described in division (Y)(4) of R.C. 1707.03; (b) before the first offer is made under this exemption, the state securities administrator, or the court or regulatory authority that entered the order, judgment, or decree, waives the disqualification; or (c) the issuer did not know and, in the exercise of reasonable care based on reasonable investigation, could not have known that a disqualification from the exemption existed under division (Y)(4) of R.C. 1707.03.

(6) A general announcement of the proposed offering may be made by any means; however, the general announcement shall include only the following information, unless additional information is specifically permitted by the division by rule: (a) the name, address, and telephone number of the issuer of the securities; (b) the name, a brief description, and price of any security to be issued; (c) a brief description of the business of the issuer; (d) the type, number, and aggregate amount of securities being offered; (e) the name, address, and telephone number of the person to contact for additional information; and (f) a statement indicating all of the following: (i) sales will only be made to accredited investors as defined in rule 501 of Regulation D under the Securities Act of

1933; (ii) no money or other consideration is being solicited or will be accepted by way of this general announcement; (iii) the securities have not been registered with or approved by any state securities administrator or the securities and exchange commission and being offered and sold pursuant to an exemption from registration.

(7) The issuer, in connection with an offer, may provide information in addition to the general announcement described in division (Y)(6) of R.C. 1707.03, provided that either of the following applies: (a) the information is delivered through an electronic database that is restricted to persons that are accredited investors as defined in rule 501 of Regulation D under the Securities Act of 1933; (b) the information is delivered after the issuer reasonably believes that the prospective purchaser is an accredited investor as defined in rule 501 of Regulation D under the Securities Act of 1933.

(8) No telephone solicitation shall be done, unless prior to placing the telephone call, the issuer reasonably believes that the prospective purchaser to be solicited is an accredited investor as defined in rule 501 of Regulation D under the Securities Act of 1933.

(9) Dissemination of the general announcement described in division (Y)(6) of R.C. 1707.03 to persons that are not accredited investors, as defined in rule 501 of Regulation D under the Securities Act of 1933, does not disqualify the issuer from claiming an exemption under this division.

(10) The issuer shall file with the division notice of the offering of securities within fifteen days after notice of the offering is made to the public or a general announcement is made to the public in this state. The filing shall be on forms adopted by the division and shall include a copy of the general announcement, if one is made regarding the proposed offering, and copies of any offering materials, circulars, or

prospectuses. A filing fee of one hundred dollars also shall be included.

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## HISTORY

| ACTION   | DATE     | JOURNAL ENTRY |
|--|----------|---------------|
| Introduced                                     | 01-20-99 | p. 85         |
| Reported, H. Civil &<br>Commercial Law         | 03-09-99 | p. 270        |
| Passed House (96-0)                            | 03-17-99 | pp. 307-308   |
| Reported, S. Judiciary                         | 05-13-99 | pp. 425-426   |
| Passed Senate (33-0)                           | 05-13-99 | pp. 428-429   |
| House concurred in Senate<br>amendments (93-0) | 05-18-99 | pp. 670-671   |

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