



Lisa Sandberg

Bill Analysis
Legislative Service Commission

S.B. 110

124th General Assembly
(As Introduced)

Sen. Johnson

BILL SUMMARY

- Authorizes a corporation to create and issue option rights or securities having conversion or option rights that entitle the holders of the securities to purchase or acquire shares, option rights, securities having conversion or option rights, or obligations, of any class or series, or assets of the corporation, or to purchase or acquire from the corporation shares, option rights, securities having conversion or option rights, or obligations, of any class or series, owned by the corporation and issued by any other person.
- Modifies the general duties of a director of a corporation and the acts of a director relating to the acquisition of control of a corporation.

CONTENT AND OPERATION

Creation and issuance of option rights

The bill modifies a corporation's existing authority to grant options to subscribe for or to purchase shares of any authorized class. Under the bill, unless the articles of incorporation otherwise provide, a corporation by its directors may create and issue option rights or securities having conversion or option rights that entitle the holders of the securities to purchase or acquire shares, option rights, securities having conversion or option rights, or obligations, or any class or series, or assets of the corporation, or to purchase or acquire from the corporation shares, option rights, securities having conversion or option rights, or obligations, of any class or series, owned by the corporation and issued by another person, at the times and on the terms that are set forth in the securities, or in the contracts, warrants, or other instruments evidencing those option rights, securities having conversion or option rights, or obligations. Those contracts, warrants, or other interests may be transferable or nontransferable and may be separable or inseparable from securities under the same conditions as provided under existing

law, except that the bill replaces the references in those conditions to "options" with "option rights or securities having conversion or option rights." (R.C. 1701.16(A).)

Terms included in securities, contracts, warrants, or other instruments

The securities, contracts, warrants, or instruments that evidence the options to subscribe or purchase shares (existing law) or that evidence option rights, securities having conversion or option rights, or obligations of a corporation (the bill) may contain any terms not repugnant to law for the protection of the holders of the options (existing law) or the option rights, securities having conversion or option rights, or obligations of the corporation (the bill), including certain specified terms. Under the bill, these terms include, but are not limited to, the following (R.C. 1701.16(B)(1) (new language in italics)):

(1) Restrictions upon the authorization or issuance of additional shares, *option rights, securities having conversion or option rights, or obligations*;

(2) Provisions for the adjustment of the *conversion or option rights* price;

(3) Provisions concerning rights *or adjustments* in the event of reorganization, merger, consolidation, sale of the entire assets of the corporation, *exchange of shares, or other fundamental changes*;

(4) Provisions for the reservation of authorized but unissued shares *or other securities* to satisfy the *option or conversion rights*;

(5) Restrictions upon the declaration or payment of dividends or distributions or *related party transactions*;

(6) Conditions, including, *but not limited to*, subject to the limitation specified in **Express or implied authority** (discussed below), conditions that preclude *or limit any person or persons owning or offering to acquire* a specified number or percentage of the outstanding common shares, *other shares, option rights, securities having conversion or option rights or obligations* of the corporation *or any transferee or transferees of the person or persons* from exercising, *converting, transferring, or receiving the shares, option rights, securities having conversion or option rights, or obligations of the corporation, including conditions that limit or condition the right of directors who are not disinterested directors, as defined in R.C. 1701.59(C)(2)(c), to modify or redeem the shares, option rights, securities having conversion or option rights, or obligations.*

The bill also applies these terms to instruments evidencing any option rights, securities having conversion or option rights, or obligations of a corporation (R.C. 1701.16(B)(2)).

Express or implied authority

The bill modifies the provision addressing the express or implied authority conferred as discussed in "**Terms included in securities, contracts, warrants, or other instruments**," above, by including other instruments evidencing option rights, securities having conversion or option rights, or obligations of a corporation. The bill also modifies existing law by providing that this express or implied authority applies only to the following (R.C. 1701.16(B)(2) (new language in italics)):

(1) A corporation that has issued and outstanding shares listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association;

(2) A corporation that has adopted a close corporation agreement pursuant to which *option rights or securities having conversion or option rights* are issued, if the securities, contracts, warrants, or *other instruments evidencing the option rights, securities having conversion or option rights, or obligations of the corporation* contain a condition *as described in (6) above*.

General duties of a director of a corporation

Under existing law, a director must perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances (R.C. 1701.59(B)).

The bill modifies existing law regarding whether a director has violated the director's duties described above. A director may not be found to have violated the director's duties described above unless it is proved by clear and convincing evidence that the director has not acted in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances, in any action brought against a director, including actions involving or affecting any of the following (R.C. 1701.59(C)(1) (new language in italics)):

(1) A change or potential change in control of the corporation, including a determination to resist a change or potential change in control made pursuant to R.C. 1701.13(F)(7), *or a decision not to redeem any rights under, or to modify or render inapplicable, any shareholder rights plan, including, but not limited to, a plan adopted with the conditions described in (6) above;*

(2) A termination or potential termination of the director's service to the corporation as a director;

(3) The director's service in any other position or relationship with the corporation;

(4) *A decision not to render inapplicable, or to make determinations under, the provisions of R.C. Chapter 1704. or R.C. 1701.831 (control share acquisitions) or any other provisions in R.C. Title XVII that related to or affect acquisitions of control or potential or proposed acquisitions of control of the corporation;*

(5) *A decision not to act as a director solely because of the effect that action may have on an acquisition of control or potential or proposed acquisition of control of the corporation or on the consideration that may be offered or paid to shareholders in that acquisition or potential or proposed acquisition.*

The bill also provides that, in the absence of a breach of fiduciary duty, lack of good faith, or self-dealing, any act of a director is presumed to be in the best interests of the corporation. In assessing whether the standards set forth above have been satisfied, there may not be any greater obligation to justify, or higher burden of proof with respect to, any act as a director relating to or affecting an acquisition of control or potential or proposed acquisition of control of the corporation that is applied to any other act as a director. (R.C. 1701.59(C)(2)(a).)

Notwithstanding the above provision, any act of a director relating to or affecting an acquisition of control or potential or proposed acquisition of control of the corporation to which a majority of the disinterested directors of the corporation have assented is presumed to satisfy the standards set forth in the bill, unless it is proved by clear and convincing evidence that the disinterested directors did not assent to that act in good faith after reasonable investigation. (R.C. 1701.59(C)(2)(b).)

Disinterested director

Under the bill, "disinterested director" means a director of a corporation other than any of the following (R.C. 1701.59(C)(2)(c)):

(1) A director who has a direct or indirect financial or other interest in the person acquiring or seeking to acquire control of the corporation or who is an affiliate or associate of, or was nominated or designated as a director by, a person acquiring or seeking to acquire control of the corporation;

(2) Depending upon the specific facts surrounding the director and the act under consideration, an officer or employee or a former officer or employee of the corporation.

A person may not be considered as other than a disinterested director solely by reason of any or all of the following (R.C. 1701.59(C)(2)(d)):

(a) The ownership by the director of shares in the corporation;

(b) The receipt by the director as a holder of any shares of a class or series of any distribution made to all owners of shares of that class or series;

(c) The receipt by the director of director's fees or other consideration as a director;

(d) Any interest that the director may have in retaining the status or position of director;

(e) The former business or employment relationship of the director with the corporation;

(f) The receipt of, or the right to receive, retirement or deferred compensation from the corporation due to service as director, officer, or employee of the corporation.

Best interests of the corporation

The bill modifies what the director may consider in determining what the director reasonably believes to be in the best interests of the corporation. Under existing law, the director must consider the interests of the corporation's shareholders and, in the director's discretion, may consider various things. The bill maintains this provision and also states that the director may consider any of the following (R.C. 1701.59(E) (new language in italics)):

(1) *The effects of any action upon any or all groups affected by that action, including the corporation's employees, suppliers, creditors, and customers;*

(2) The economy of the state and nation;

(3) Community and societal considerations;

(4) The long-term as well as short-term interests of the corporation and its shareholders, including *the benefits that may accrue to the corporation from its long-term plans and* the possibility that these interests may be best served by the continued independence of the corporation;

(5) *The past, stated, and potential resources, intent, and conduct of any person seeking to acquire control of the corporation;*

(6) *All other pertinent factors.*

The bill also states that, in determining the best interests of a corporation or the effects of any action, a director may not be required to regard any corporate interest or the interests of any particular group affected by that action as a dominant or controlling interest or factor. The consideration of interests and factors in the manner described here and above does not constitute a violation of the duties of a director under "**General duties of a director of a corporation,**" above. (R.C. 1701.59(F).)

Under the bill, the duties of a director under "**General duties of a director of a corporation,**" above, are solely to the corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation. Those duties may not be enforced directly by a shareholder or by any other person or group. Notwithstanding this provision, the provisions discussed above under this subject do not impose upon a director any legal or equitable duties, obligations, or liabilities or create any right or cause of action against, or basis for standing to sue, a director. (R.C. 1701.59(G).)

The bill also provides that, except as otherwise expressly provided above and in the existing law dealing with a director's duties and liabilities, the articles and regulations may not contain any provision that relaxes, restricts, is inconsistent with, or supercedes any of those provisions (R.C. 1701.59(I)).

Conforming amendments

The bill makes conforming amendments in other sections of the General Corporation Law, including R.C. 1701.15 (pre-emptive rights), 1701.17 (sales of shares to employees of a corporation), 1701.35 (purchase by a corporation of its own shares), 1701.70 (amendment to articles of a corporation), and 1701.75 (judicial reorganization of a corporation). These amendments generally refer to a corporation's issuance of option rights or securities having conversion or option rights instead of the grant of options under the current sections.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-15-01	p. 372

S0110-I.124/jc

