



Sub. S.B. 110*

124th General Assembly
(As Reported by H. Civil and Commercial Law)

Sens. Johnson, Hottinger, Amstutz, Oelslager

BILL SUMMARY

- Provides that any amendment of the regulations, amended or new regulations, or amendment of the articles that would change or eliminate the classification of directors of an issuing public corporation whose directors are classified must be adopted by the shareholders only at a meeting held for that purpose, by the affirmative vote of holders of shares entitling them to exercise the corporation's voting power that is required under existing law, and also by the affirmative vote of the holders of a majority of disinterested shares voted on the proposal.
- Restricts the shareholders' right to remove classified directors of an issuing public corporation to removal for cause.
- Specifies that securities, contracts, warrants, or instruments that evidence options to subscribe for or to purchase shares of any authorized class may contain conditions on the exercise or *redemption* of the options, and specifies when a condition's preclusion of the holder or holders of at least a specified number or percentage of the outstanding common shares from exercising or *redeeming* options apply.

CONTENT AND OPERATION

Changing classification of directors--amended or new regulations

The existing General Corporation Law provides that regulations governing a corporation may be amended, or new regulations may be adopted, in either of the

* This analysis was prepared before the report of the House Civil and Commercial Law Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

following ways: (1) by the shareholders at a meeting held for that purpose, by the affirmative vote of the holders of shares entitling them to exercise a majority of the voting power of the corporation on the proposal, or (2) without a meeting, by the written consent of the holders of shares entitling them to exercise 2/3 of the voting power of the corporation on the proposal. If the articles or regulations that have been adopted so provide or permit, regulations may be adopted or amended or new regulations may be adopted by the affirmative vote or written consent of the holders of shares entitling them to exercise a greater or lesser proportion but not less than a majority of the voting power of the corporation. (R.C. 1701.11(A)(2) and (3).)

The bill generally modifies the manner of amending regulations or adopting new regulations by shareholders of an issuing public corporation whose directors are classified. The bill requires that any amendment of regulations and any amended or new regulations adopted by shareholders of an *issuing public corporation whose directors are classified* (see **COMMENT 1**) that would change or eliminate the classification of directors be adopted by the shareholders only at a meeting held for that purpose, by the affirmative vote of holders of shares entitling them to exercise the voting power of the corporation that is required for shareholders at a meeting as described above under existing law, and also by the affirmative vote of the holders of a majority of *disinterested shares* voted on the proposal determined as specified in current law (see **COMMENT 2**). (R.C. 1701.11(A)(4).)

Changing classification of directors--amendment of articles

The General Corporation Law generally authorizes the shareholders, at a meeting held for that purpose, to adopt an amendment to the articles, including any amendment that could be adopted by the directors, by the affirmative vote of the holders of shares entitling them to exercise 2/3 of the voting power of the corporation on the proposal or, if the articles provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of such voting power, and by the affirmative vote of the holders of shares of any particular class that is required by the articles (R.C. 1701.71(A)(1)).

The bill generally modifies the manner of amending the articles by shareholders of an issuing public corporation whose directors are classified. The bill requires that any amendment that would change or eliminate the classification of directors of an *issuing public corporation whose directors are classified* (see **COMMENT 1**) be adopted by the shareholders only at a meeting expressly held for that purpose, by the affirmative votes required as described above in existing law, and also by the affirmative vote of the holders of at least a majority of *disinterested shares* voted on the proposal determined as specified in current law (see **COMMENT 2**). (R.C. 1701.71(A)(1).)

Removal of classified directors

Under the General Corporation Law, if the shareholders have a right to vote cumulatively in the election of directors, then, unless the articles or the regulations expressly provide that no director may be removed from office or that removal of directors requires a greater vote than that specified in this sentence, all the directors, all the directors of a particular class, or any individual director may be removed from office, *without assigning any cause*, by the vote of the holders of a majority of the voting power entitling them to elect directors in place of those to be removed, except that, unless all the directors, or all the directors of a particular class, are removed, no individual director may be removed if the votes of a sufficient number of shares are cast against the director's removal that, if cumulatively voted at an election of all the directors, or all the directors of a particular class, as the case may be, would be sufficient to elect at least one director (R.C. 1701.58(C)). If the shareholders do not have the right to vote cumulatively as a result of an amendment to the articles permitted by law, then, unless the articles or the regulations expressly provide that no director may be removed from office or that removal of directors requires a greater vote than that specified in this sentence, all the directors, all the directors of a particular class, or any individual director may be removed from office, *without assigning any cause*, by the vote of the holders of a majority of the voting power entitling them to elect directors in place of those to be removed (R.C. 1701.58(D)).

The bill creates an exception to existing law as described above by providing that in the case of an *issuing public corporation whose directors are classified* (see **COMMENT 1**), the shareholders may effect a removal of that type of director *only for cause* (R.C. 1701.58(C) and (D)).

Redemption of options

The General Corporation Law generally authorizes a corporation by its directors to grant options to subscribe for or to purchase shares of any authorized class at the times and on the terms set forth in the securities, or in the contracts, warrants, or instruments that evidence the options upon specified conditions. The securities, contracts, warrants, or instruments that evidence the options may contain any terms not repugnant to law for the protection of the holders of the options, including, but not limited to, certain provisions or restrictions, or conditions on the *exercise of the options*. (R.C. 1701.16(B)(1).)

The bill modifies existing law with respect to the conditions on the exercise of the options as described below (italicized phrases are added by the bill). The securities, contracts, warrants, or instruments that evidence the options may contain conditions on the exercise *or the redemption* of the options, including, subject to the limitation described in the following paragraph, conditions that

preclude the holder or holders of at least a specified number or percentage of the outstanding common shares of a corporation from exercising *or redeeming* the options.

The express or implied authority conferred as described above or by any other section in the General Corporation Law for securities, contracts, warrants, or instruments that evidence options to contain a condition on the exercise *or redemption* of options that precludes the holder or holders of at least a specified number or percentage of the outstanding common shares of a corporation from exercising *or redeeming* options apply only to the following: (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 or (2) a corporation that has adopted a close corporation agreement pursuant to which options are granted, if the securities, contracts, warrants, or instruments that evidence the options contain a condition that precludes the holder or holders of at least a specified number or percentage of the outstanding common shares of that corporation from exercising *or redeeming* the options. (R.C. 1701.16(B).)

COMMENT

1. An "issuing public corporation" means a domestic corporation with 50 or more shareholders that has its principal place of business, its principal executive offices, assets having substantial value, or a substantial percentage of its assets within Ohio, and as to which no valid close corporation agreement exists under the existing general provision requiring the existence of a close corporation agreement to be noted conspicuously on the face or the back of every certificate for shares of the corporation and that a purchaser or transferee of shares represented by a certificate on which such a notation so appears be conclusively considered to have taken delivery with notice of the close corporation agreement (R.C. 1701.01(Y) and 1701.591(H)--not in the bill).

Generally, unless the articles or the regulations provide for a different term (which may not exceed three years from the date of election and until the successor is elected), each director holds office until the next annual meeting of the shareholders and until the successor is elected, or until the director's earlier resignation, removal from office, or death. The articles or the regulations may provide for the *classification* of directors into either two or three classes consisting of not less than three directors each, provided that if all shares of a corporation entitled to elect a class of directors are owned of record by one or two shareholders, the number of directors of each class may be less than three, but not less than the number of shareholders entitled to elect directors of such class. The terms of office of the several classes need not be uniform, except that the term

cannot exceed the maximum period specified in the second preceding sentence. (R.C. 1701.57--not in the bill.)

2. "Disinterested shares" means voting shares beneficially owned by any person who is not an interested shareholder or an affiliate or associate of an interested shareholder. "Interested shareholder," with respect to an issuing public corporation, means a person other than the issuing public corporation, a subsidiary of that issuing public corporation, any employee stock ownership or benefit plan of the issuing public corporation or a subsidiary of that issuing public corporation, or any trustee or fiduciary with respect to any such plan acting in that capacity who is the beneficial owner of a sufficient number of shares of the issuing public corporation that, when added to all other shares of the issuing public corporation in respect of which that person may exercise or direct the exercise of voting power, would entitle that person, directly or indirectly, alone or with others, including affiliates and associates of that person, to exercise or direct the exercise of 10% of the voting power of the issuing public corporation in the election of directors after taking into account all of that person's beneficially owned shares that are not currently outstanding. (R.C. 1704.01(C)(8) and (9)--not in the bill.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-15-01	p. 372
Reported, S. Judiciary on Civil Justice	06-21-01	pp. 687-688
Passed Senate (31-1)	06-21-01	p. 691
Reported, H. Civil & Commercial Law	---	---

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