Ohio Legislative Service Commission

Bill Analysis

Aida S. Montano

Am. S.B. 202

130th General Assembly
(As Passed by the Senate)

Sens. Obhof and Kearney, Seitz, Coley, Bacon, Eklund, Hughes, Oelslager, Schiavoni

BILL SUMMARY

- Provides additional exceptions to the Control Share Acquisition Act.
- Requires approval from the board of directors of an issuing public corporation before the shareholders can amend the corporation's regulations or articles of incorporation to opt out of the Control Share Acquisition Act.
- Modifies the definition of "interested shareholder" to include a three-year look back period to determine if a person remains an interested shareholder.
- Requires the approval of the board of directors of an issuing public corporation before the shareholders can amend the corporation's articles of incorporation to opt out of a Chapter 1704. transaction.

CONTENT AND OPERATION

Control Share Acquisition Act – background

Continuing law defines a "control share acquisition" to generally mean the acquisition, directly or indirectly, by any person of shares of an issuing public corporation that, when added to all other shares of the issuing public corporation in respect of which the person may exercise or direct the exercise of voting power, would entitle the person, immediately after the acquisition, directly or indirectly, alone or with others, to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of such voting power:[1]

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[1] R.C. 1701.01(Z).

- One-fifth or more but less than one-third of such voting power;
- One-third or more but less than a majority of such voting power;
- A majority or more of such voting power.

Existing law does enumerate several acquisitions that do not constitute a control share acquisition.

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.[2]

Under the Control Share Acquisitions Act, unless the articles, the regulations adopted by the shareholders, or the regulations adopted by the directors of the issuing public corporation provide that the Act does not apply to control share acquisitions of shares of that corporation, any control share acquisition of an issuing public corporation must be made only with the prior authorization of the shareholders of that corporation in accordance with the Act.[3] Any person who proposes to make a control share acquisition must deliver an acquiring person statement to the issuing public corporation at the issuing public corporation's principal executive offices. The acquiring person statement must set forth the following:[4]

- The identity of the acquiring person;
- A statement that the acquiring person is given pursuant to the Control Shares Acquisition Act;
- The number of shares of the issuing public corporation owned, directly or indirectly, by the acquiring person;
- The range of voting power under which the proposed control share acquisition would, if consummated, fall;
- A description in reasonable detail of the terms of the proposed control share acquisition;

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[2] R.C. 1701.01(Y).

[3] R.C. 1701.831(A), not in the bill.

[4] R.C. 1701.831(B), not in the bill.

- Representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.

Within ten days after receipt of an acquiring person statement that complies with requirements described above, the directors of the issuing public corporation must call a special meeting of shareholders of the issuing public corporation for the purpose of voting on the proposed control share acquisition. Unless the acquiring person and the issuing public corporation agree in writing to another date, such special meeting of shareholders is held within 50 days after receipt by the issuing public corporation of the acquiring person statement. If the acquiring person so requests in writing at the time of delivery of the acquiring person statement, such special meeting must be held no sooner than 30 days after receipt by the issuing public corporation of the acquiring person statement. Such special meeting of shareholders must be held no later than any other special meeting of shareholders that is called, after receipt by the issuing public corporation of the acquiring person statement, in compliance with Ohio law.[5]

If, in connection with a proposed control share acquisition, the acquiring person changes the percentage of the class of shares being sought, the consideration offered, or the security dealer's soliciting fee; extends the expiration date of a tender offer for the shares being sought; or otherwise changes the terms of the proposed control share acquisition, then the directors of the issuing public corporation may reschedule the special meeting of shareholders. If the proposed control share acquisition is to be made pursuant to a tender offer, then the meeting may be rescheduled to a date that is not later than the expiration date of the offer. If the proposed control share acquisition is to be made other than pursuant to a tender offer, the meeting may be rescheduled to a date that is not later than ten business days after notice of the change is first given to the shareholders.[6]

The acquiring person may make the proposed control share acquisition if both of the following occur:[7]

- The shareholders of the issuing public corporation who hold shares as of the record date of such corporation entitling them to vote in the election of directors authorize the acquisition at the special meeting held for that

[5] R.C. 1701.831(C)(1), not in the bill.

[6] R.C. 1701.831(C)(2), not in the bill.

[7] R.C. 1701.831(E), not in the bill.

purpose at which a quorum is present by an affirmative vote of a majority of the voting power of such corporation in the election of directors represented at the meeting in person or by proxy, and a majority of the portion of the voting power excluding the voting power of interested shares represented at the meeting in person or by proxy. A quorum is present at the special meeting if at least a majority of the voting power of the issuing public corporation in the election of directors is represented at the meeting in person or by proxy.

- The acquisition is consummated, in accordance with the terms so authorized, no later than 360 days following shareholder authorization of the control share acquisition.

Acquisitions that do not constitute "control share acquisitions"

The bill provides that the acquisition by any person of any shares of an issuing public corporation does not constitute a control share acquisition if it results from the person's being engaged in business as an underwriter of securities who acquires the shares directly from the issuing public corporation or an affiliate or associate of the issuing public corporation through its participation in good faith in a firm commitment underwriting registered under the "Securities Act of 1933," and not for the purpose of circumventing the Control Shares Acquisition Act.[8]

Amendments to regulations for the government of a corporation, the conduct of its affairs, and the management of its property

Continuing law describes the ways regulations for the government of a corporation, the conduct of its affairs, and the management of its property, consistent with law and the articles, may be adopted, amended, or repealed. For example, such regulations may be adopted 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 if the articles or regulations that have been adopted so provide, by the affirmative vote of the holders entitling them to exercise a greater proportion than a majority of the voting power of the corporation on the proposal.[9] The bill provides that any amendment of regulations and any amended or new regulations adopted by shareholders of an issuing public corporation that

[8] R.C. 1701.01(Z)(2)(g).

[9] R.C. 1701.11(A)(1).

would provide that the Control Share Acquisition Act does not apply to control share acquisitions of shares of the issuing public corporation must be adopted as follows:[10]

- Upon the recommendation by the affirmative vote of a majority of the authorized number of directors of the issuing public corporation in favor of such amendment or new regulation;

- By the shareholders 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 the meeting of the shareholders described in the above example.

Amendments adopted by the shareholders

Continuing law generally permits the shareholders, at a meeting held for that purpose, to adopt an amendment, including any amendment that could be adopted by the directors, by the affirmative vote of the holders of shares entitling them to exercise two-thirds 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.[11] The bill requires that any amendment that would provide that the Control Shares Acquisition Act does not apply to control share acquisitions of shares of an issuing public corporation be adopted as follows:[12]

- Upon the recommendation by the affirmative vote of a majority of the authorized number of directors of the issuing public corporation in favor of such amendment; and

- By the shareholders only at a meeting expressly held for the purpose, by the affirmative votes required by continuing law above.

Interested shareholders

Under existing law, "interested shareholder," for the purposes of Ohio law regarding transfers involving interested shareholders and 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

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[10] R.C. 1701.11(A)(3).

[11] R.C. 1701.71(A)(1)(a).

[12] R.C. 1701.71(A)(1)(c).

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 such 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.[13]

The bill provides that an "interested shareholder" can also mean 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 such capacity who, at any time within the three-year period immediately prior to the date on which it is sought to be determined whether the person is an interested shareholder, was 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 have exercised or directed the exercise of voting power at the time it beneficially owned such shares, entitled 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 election of directors after taking into account all of the person's beneficially owned shares that were not, at the time it beneficially owned such shares, currently outstanding.[14]

Exceptions to law regarding transactions involving interested shareholders

Existing law provides certain exceptions to the law governing transactions involving interested shareholders (Chapter 1704. transactions). Among other exceptions, this law does not apply to a Chapter 1704. transaction if the original articles of the issuing public corporation state, or if the articles of the issuing public corporation have been amended in compliance with Ohio law regarding amending the articles of incorporation to state, by specific reference to the law regarding transactions involving interested shareholders, that this law does not apply to the corporation and if any of the following applies:[15]

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[13] R.C. 1704.01(C)(8).

[14] R.C. 1704.01(C)(8)(b).

[15] R.C. 1704.05(F)(1).

(1) The corporation had fewer than 50 shareholders or was not an issuing public corporation when the statement initially was set forth in the articles.

(2) No shareholder of the corporation qualified as an interested shareholder when the statement was initially set forth in the articles.

(3) The statement was contained in an amendment to the articles and the amendment was approved by the holders of two-thirds of all outstanding shares of the corporation entitled to vote in the election of directors and by the holders of two-thirds of all outstanding disinterested shares of the acquiring public corporation entitled to vote in the election directors.

The bill amends (3) above by providing that the amendment was approved by the holders upon the recommendation by the affirmative vote of a majority of the authorized number of directors of the corporation in favor of such amendment.[16]

HISTORY

ACTION	DATE
Introduced	10-08-13
Reported, S. Civil Justice	10-30-13
Passed Senate (33-0)	11-06-13

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[16] R.C. 1704.05(F)(1)(c).