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**Significant 2006 Amendments to Ohio Business Organization Statutes ¶19.1]**

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Important changes liberalizing and modernizing several aspects of Ohio's General Corporation Law and statutes governing other business entities were made by the General Assembly effective October 12, 2006.<sup>1</sup> These amendments follow a pattern initiated by the Corporation Law Committee of the Ohio State Bar Association to adapt Ohio's statutory business framework to modern conditions. Other recent amendments, for example, allow directors to amend the Articles of Incorporation without shareholder approval in several aspects not deemed important to share-

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holders, most notably to change the name of the corporation.<sup>2</sup> Others have provided for utilization of electronic communications and notices and the holding of shareholders meetings by electronic means.<sup>3</sup>

The 2006 amendments allow directors for the first time to amend the Regulations in certain respects without shareholder approval.<sup>4</sup> In Ohio, Regulations are what are in most states referred to as Bylaws. These amendments also allow for certain required notices by public companies to be made through inclusion of the information in filings with the Securities and Exchange Commission as opposed to being physically sent to shareholders.<sup>5</sup> In addition, holding company formations and spin-offs may now be accomplished by directors without shareholder approval and changes of entity may be accomplished by conversion rather than through complex transactions such as mergers.<sup>6</sup> The amendments also simplify steps for Ohio business entities to change from one type

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of entity to another.<sup>7</sup> Other amendments allow for the delegation of option granting authority to officers,<sup>8</sup> establish standards of reliance upon certificates of good standing for seven days after issuance,<sup>9</sup> and provide flexibility in payment for shares.<sup>10</sup>

#### **Amendments to Regulations**

Prior to the amendments, all changes to Regulations were required to be accomplished by shareholder action.<sup>11</sup> The 2006 amendments liberalized the law to allow directors to amend the Regulations without shareholder approval in various areas that are not deemed to impact fundamental shareholder rights. The amendments first require the shareholders to grant amending authority to the directors through the Articles or Regulations.<sup>12</sup> However, the amendment reserves to the shareholders the sole authority to amend the Regulations in various areas, such as those defining, limiting or regulating the exercise of the authority of shareholders,<sup>13</sup> setting the percentage of shareholders entitled to call special meetings,<sup>14</sup> establishing notices of meetings<sup>15</sup> and qualifications of shareholders,<sup>16</sup> establishing quorum definitions,<sup>17</sup> setting terms and classifications of directors,<sup>18</sup> and removing directors and filling vacancies in the Board of Directors.<sup>19</sup> Shareholders can always override amendments made by directors and Regulations may never divest shareholders of the power to adopt, amend, or repeal Regulations.<sup>20</sup>

The directors, once granted general authority by shareholders, will therefore be free to amend the Regulations in such

areas as the establishment of the fiscal year, the time and place of meetings, establishment of officers and committees and enactment of indemnification provisions.

#### **Notices by Public Corporations**

Provisions of Ohio law allowing directors to amend Articles in such areas as the change of name and to amend the Regulations require notice to be given to shareholders of those actions.<sup>21</sup> Recognizing the cost burden that mail notice places on public corporations, the new law allows issuing public corporations to provide notice of amendments by directors to Articles and Regulations in reports filed with the Securities and Exchange Commission.<sup>22</sup> The notice obligation is met by including the information in an SEC filing made within twenty days following adoption of the amendment.<sup>23</sup>

#### **Formations of Holding Companies and Spin-offs**

The formation of holding companies by public corporations previously required shareholder approval, with such actions normally taking the form of a merger with a subsidiary.<sup>24</sup> Situations in which the shareholder base of the holding company is exactly the same as the subsidiary did not seem to warrant the cost and expense involved in holding company formation, particularly in the case of public corporations. The amendments allow directors to form holding corporations if the shareholder base of the subsidiary is the same as the holding company following the formation and the resulting shares have terms identical in all

material respects to those converted in the merger.<sup>25</sup> In addition, the Articles and Regulations of the resulting holding company must contain provisions identical in all material respects to those contained in the parent corporation immediately prior to the time of the effectiveness of the formation of the holding company.<sup>26</sup> Moreover, the original parent corporation must become a direct or indirect wholly-owned subsidiary of the holding company.<sup>27</sup> The directors also must remain the same.<sup>28</sup>

The spin-off of subsidiaries by Ohio corporations required shareholder approval under a statute governing the sale or disposition of substantially all of the assets of the corporation.<sup>29</sup> The amendments now allow directors of an issuing public corporation<sup>30</sup> to accomplish a spin-off directly without shareholder approval if only one class of shares is involved.<sup>31</sup> Similarly, corporations are now permitted to take any action necessary to fulfill a bankruptcy or reorganization that has been confirmed by a decree or order of a court without further action by either directors or shareholders.<sup>32</sup>

#### Entity Conversions

The amendments simplify steps necessary for Ohio business entities to change from one type of organization to another and for such conversions to be done by foreign entities with Ohio entities and vice versa. These entities include corporations, limited liability companies and general, limited liability and limited partnerships and allow all such entities to change their form by conversion into a

foreign entity as well as a domestic entity.<sup>33</sup> Previously such changes required creation of a second entity with which the first entity was merged.<sup>34</sup> The amendments allow the conversion to occur directly through a change of entity form adopted by the original entity.<sup>35</sup> The changes preserve existing voting requirements and dissenter's rights in such actions.<sup>36</sup> The conversion statute does not apply to non-profit entities.

The amendments accomplish their objectives through a definition of "entity" that includes for profit corporations,<sup>37</sup> business trusts or associations, real estate investment trusts, common law trusts, unincorporated businesses, including general or limited partnerships, and limited liability companies.<sup>38</sup> The basic steps for the conversion are the adoption and filing of a written declaration of conversion setting forth certain items required by statute, regarding name, governing provisions, such as, for example, Articles of Incorporation or a partnership agreement, consents to service if a foreign entity, the terms of conversion and the method of carrying them into effect.<sup>39</sup> The approval of directors and shareholders, partners or other members of the converting entity is required to effect the conversion.<sup>40</sup> In the case of corporations, the vote required is the same as provided for a merger and voting rights of separate classes that would exist in such situations are preserved.<sup>41</sup>

General and other domestic partnerships or other domestic or foreign entities may be merged into the surviving domestic partnership.<sup>42</sup> This amendment replaces the term "general partnership"

with the term "partnership" in sections governing partnership mergers.<sup>43</sup> This change eliminates the uncertainty in current law relating to limited liability partnership mergers by clarifying that limited liability partnerships can rely on these partnership merger provisions.

#### Miscellaneous

The amendments allow directors to delegate to officers the authority to issue shares or options to employees.<sup>44</sup> The resolution authorizing the delegation must specify the total number of shares or options that may be awarded and the terms on which shares may be issued or sold or the terms of any options.<sup>45</sup> This authority is limited so that officers may not grant shares or options to themselves.<sup>46</sup> In addition, Committees of the Board of Directors created by the Board can now create their own subcommittees.<sup>47</sup>

Substantial uncertainty had arisen in the past as to the utilization of certificates of good standing issued by the Secretary of State. In many cases the certificate was issued for a closing several days before the actual closing itself and there was a gap between obtaining the certificate of good standing and delivering it at closing. The amendments allow for reliance upon certificates for seven days after their issuance.<sup>48</sup>

Previous requirements limiting the types of consideration for the issuance of corporate shares and contributions to limited liability companies have been eliminated by the new legislation. Consideration now may include cash, property, services rendered, promissory

notes or any other binding obligation to contribute cash or property or to perform services or the provision of any present or future benefit to the corporation.<sup>49</sup>

Persons providing goods or services for a corporation or limited liability company owe no duties to and incur no liabilities or obligations to and are not deemed to be in privity with the shareholders or creditors of that corporation by reason of such a provision without an express agreement to the contrary.<sup>50</sup> Persons performing services for shareholders of a corporation similarly owe no duties and incur no liabilities or obligations to and are not in privity with the corporation, its other shareholders or its creditors by reason of such a provision without an express agreement to the contrary.<sup>51</sup>

References in Ohio's Blue Sky Laws to U.S. statutes, rules, regulations or forms promulgated by a federal agency mean those items as they exist at the time of the act, omission, event or transaction to which they are applied under the Blue Sky Laws.<sup>52</sup> This enactment is an attempt to allow the utilization, particularly in statutory exemptions in the Blue Sky Laws, of changes to federal statutes, rules, regulations and forms. Provisions of the Blue Sky Law imposing liabilities, penalties, sanctions, or disqualifications do not apply to acts done or omitted in good faith in conformity with federal statutes, rules, regulations or forms incorporated by reference.<sup>53</sup> This exemption applies even if the application of the incorporation by reference provision is later determined to be unconstitutional or invalid.<sup>54</sup>

The amendments mandate that Ohio licensed securities dealers comply with the financial responsibility and record keeping requirements contained in Sections 15 and 17 of the Securities Exchange Act of 1934 as well as any rules promulgated by the Securities and Exchange Commission.<sup>55</sup> However, the Ohio Division of Securities may allow small brokers and dealers to elect less burdensome alternatives.<sup>56</sup> These amendments are necessary to prevent Ohio's broker-dealer requirements from being held invalid under the uniformity requirements of Section 15(h) of the Securities Exchange Act.

Ohio's Tender Offer Rules are amended to allow the Division of Securities to react to changes to offers within the ten business day offer extension period provided by federal law.<sup>57</sup> This is accomplished by a supplemental filing, a hearing within three calendar days of the date of filing and a determination within three calendar days after completion of the hearing.<sup>58</sup>

Judgment creditors of a member of an LLC who obtain a charging order from the court may only acquire the rights of an assignee of the membership interest.<sup>59</sup> This prevents a personal creditor of a member of an LLC from obtaining management rights in the LLC without the consent of the other LLC members. This amendment conforms this section to the analogous provision in the Limited Partnership Law.<sup>60</sup>

1. H.B. 301, 126th Gen. Assem., Reg. Sess. (Ohio 2006). Certain provisions do not become effective until April 10, 2007.

2. OHIO REV. CODE ANN. § 1701.70(B)(6) (West 2004).
3. OHIO REV. CODE ANN. § 1701.41(A) (West 2002).
4. OHIO REV. CODE ANN. § 1701.11(A)(1)(d) (West 2006).
5. *Id.* at §§ 1701.11(D)(2); 1701.73(A)(3).
6. *Id.* at § 1701.802.
7. *Id.* at §§ 1701.782; 1701.792.
8. *Id.* at § 1701.17(B).
9. *Id.* at § 1701.92(D).
10. *Id.* at § 1701.18(A)(1).
11. OHIO REV. CODE ANN. § 1701.11(A)(1)(b) (West 2004).
12. OHIO REV. CODE ANN. § 1701.11(A)(1)(d) (West 2006).
13. *Id.* at § 1701.11(B)(11).
14. *Id.* at § 1701.40(A)(3).
15. *Id.* at § 1701.41(A).
16. *Id.* at § 1701.44(B).
17. *Id.* at § 1701.51(A).
18. *Id.* at § 1701.57.
19. *Id.* at § 1701.58(C) - (D).
20. *Id.* at § 1701.11(A)(1)(d).
21. OHIO REV. CODE ANN. § 1701.11(D)(1) (West 2004).
22. OHIO REV. CODE ANN. § 1701.11(D)(2) (West 2006). An issuing public corporation is an Ohio corporation with 50 or more shareholders with its principal place of business, principal executive offices, assets having substantial value or substantial percentage of assets within Ohio. *Id.* at § 1701.01(Y).
23. *Id.* at § 1701.11(D)(2).
24. OHIO REV. CODE ANN. § 1701.80(C) (West 2002).
25. OHIO REV. CODE ANN. § 1701.802 (West 2006).
26. *Id.* at § 1701.802(B)(3).
27. *Id.* at § 1701.802(B)(4).
28. *Id.* at § 1701.802(D)(5).
29. *Id.* at § 1701.76(A)(1)(b).
30. *Id.* at § 1701.01(Y).
31. *Id.* at § 1701.76(G)(2).

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| <p>32. <i>Id.</i> at § 1701.75.</p> <p>33. OHIO REV. CODE ANN. §§ 1701.78; 1701.79 (West 2004).</p> <p>34. <i>Id.</i></p> <p>35. OHIO REV. CODE ANN. §§ 1701.782(A); 1701.792 (West 2006).</p> <p>36. <i>Id.</i> at § 1701.84(F).</p> <p>37. <i>Id.</i> at § 1701.01(EE)(1).</p> <p>38. <i>Id.</i> at § 1701.01(EE)(2)(a)-(e).</p> <p>39. <i>Id.</i> at §§ 1701.782; 1701.792.</p> <p>40. <i>Id.</i></p> <p>41. <i>Id.</i></p> <p>42. <i>Id.</i> at § 1775.45.</p> <p>43. <i>Id.</i></p> <p>44. <i>Id.</i> at § 1701.17(B)(1).</p> <p>45. <i>Id.</i></p> | <p>46. <i>Id.</i> at § 1701.17(B)(2).</p> <p>47. <i>Id.</i> at § 1701.63(G).</p> <p>48. <i>Id.</i> at § 1701.92(D).</p> <p>49. <i>Id.</i> at § 1701.18(A)(1).</p> <p>50. <i>Id.</i> at § 1701.921(A).</p> <p>51. <i>Id.</i> at § 1701.921(B).</p> <p>52. <i>Id.</i> at § 1707.20(A)(2).</p> <p>53. <i>Id.</i> at § 1707.20(E)(2).</p> <p>54. <i>Id.</i> at § 1707.20(E)(2)(b).</p> <p>55. <i>Id.</i> at § 1707.142 (A).</p> <p>56. <i>Id.</i> at § 1707.142 (D).</p> <p>57. <i>Id.</i> at § 1707.041(A)(5).</p> <p>58. <i>Id.</i> at § 1707.041(A)(7).</p> <p>59. <i>Id.</i> at § 1705.19.</p> <p>60. <i>Id.</i> at § 1782.41(A).</p> |
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## LEGISLATIVE NEWS

[¶19.2] Here is a list of statutes appearing in this report that have been amended or added.

### OHIO

*GCL amended*

<p>1701.01</p> <p>1701.10</p> <p>1701.11</p> <p>1701.17</p> <p>1701.18</p> <p>1701.19</p> <p>1701.40</p>	<p>Definitions</p> <p>[Organizational meeting]</p> <p>Regulations adopted by shareholders; emergency regulations</p> <p>Sale of shares to employees of a corporation</p> <p>Consideration for shares and liability of shareholders therefor</p> <p>Valuation of property or services</p> <p>[Calling meeting of shareholders; place of meeting]</p>	<p>1701.41</p> <p>1701.44</p> <p>1701.51</p> <p>1701.54</p> <p>1701.57</p> <p>1701.58</p> <p>1701.62</p> <p>1701.63</p> <p>1701.73</p> <p>1701.75</p>	<p>[Notice of meeting of shareholders]</p> <p>[Voting rights of shares]</p> <p>[Quorum for shareholders' meetings]</p> <p>Action without meeting</p> <p>Term and classification of directors</p> <p>Removal of directors; bylaws and filling vacancies</p> <p>Quorum for directors' meeting</p> <p>[Executive and other committees of directors]</p> <p>Signing and filing</p> <p>Reorganization</p>
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1701.76	Sale or other disposition of entire assets	1701.811	[Certificate of conversion]
1701.81	Certificate of merger or consolidation; filing of copy of agreement by foreign corporation	1701.821	[Application after conversion becomes effective]
1701.831	Shareholder review of proposed control share acquisitions	1701.921	[Duty, liability and obligation of persons providing goods and services to corporation]
1701.84	Dissenting shareholders entitled to relief	<i>[Regulations of Transactions Involving Interested Shareholders] amended</i>	
1701.85	Relief for dissenting shareholders; qualification; procedures	1704.02	[Restrictions of chapter 1704, transactions for issuing public corporations]
1701.92	Evidence of incorporation, articles and proceedings	1704.03	[Issuing public corporation engaging in chapter 1704. transactions; requirements]
<i>GCL added</i>			
1701.782	[Declaration of conversion; conversion of domestic or foreign entity not a domestic corporation or nonprofit corporation into domestic corporation]	<i>LLCA amended</i>	
		1705.09	[Contributions]
		1705.19	[Judgment creditor]
		1705.40	[Rights of dissenting member]
		1705.41	[Demand for payment; valuation]
1701.792	[Declaration of conversion; conversion of domestic corporation into domestic or foreign entity]	1705.42	[Appraisal rights]
		<i>LLCA added</i>	
1701.802	[Holding company; direct and indirect wholly owned subsidiary; agreement of merger]	1705.361	[Declaration of conversion; conversion of domestic or foreign entity other than domestic limited liability company into domestic limited liability company]

1705.371	[Declaration of conversion; conversion of domestic limited liability company into domestic or foreign entity other than domestic limited liability company]	1705.391	[Application after conversion becomes effective]
		1705.61	[Duty, liability and obligation of persons providing goods and services to limited liability company]
		<i>RC amended</i>	
1705.381	[Certificate of conversion]	111.16	Fees to be collected by secretary of state

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