# Act Amendatory of the General Corporation Act

One of the least controversial but most important to the private practitioner of the acts of the recent legislature was the one enacting a series of amendments to the Ohio General Corporation Act.[1] The new act is the fruition of several years of study and work of The Ohio State Bar Association Committee on Corporation Law under the leadership of Paul J. Bickel of the Cleveland Bar. In the main, the amendments do not affect substantive liability. Rather they clarify certain technical phases of corporation law. They rewrite where corporation procedure is not clear, they spell out details which heretofore have been the subject of speculation and vexation, they do away with steps which appear to be unnecessary and have proved a trap to the unwary. No attempt is made here to set forth the detailed minutiae necessarily involved in the amendatory act. Reports[2] of the Bar Association Committee on Corporation Law cover practically all the changes and constitute an excellent legislative history.[3] Nor is there any attempt to appraise the value of the amendments. Here will be merely a sketch of the highlights of the amendments as they relate to various corporate topics.

## Corporate Power and Authority

The doctrine of ultra vires as it relates to third parties and the corporation is completely abolished by an amendment to Section 8 of the "Act".[4] Under the Act prior to the amendment the defense of ultra vires apparently could be raised either by the corporation or a third person if the third person knew that the corporation did not have authority to enter into the particular transaction. Under the Act as amended the state is the only outside party which may attack transactions of the corporation as ultra vires. Of course, in actions between members of the corporate family — the corporation, its stockholders, its directors and its officers, the common-law rules of ultra vires still apply. Any statutory contractual liability, however, that may have existed under old Section 8 is done away with. The provisions concerning ultra vires are for the first time

[1] Ohio Gen. Code § 8623-1 et seq.

[2] *Reports* of Committee on Corporation Law to the Ohio State Bar Association or the Council of Delegates thereof, 20 Ohio Bar 64 (May 12, 1947); 21 Ohio Bar 64 (May 3, 1948); 21 Ohio Bar 357 (Oct. 18, 1948); 21 Ohio Bar 628 (February 28, 1949).

[3] See *Nonlegislative Intent as an Aid to Statutory Interpretation*, 49 Col. L. Rev. 676 (1949).

[4] Wherever the word "Act" is used hereinafter it will refer to the Ohio General Corporation Act, Ohio Gen. Code § 8623-1 *et seq.* The references to sections omit the numerical prefix: "8623-."

made applicable to actions brought in Ohio upon any contacts made in Ohio by foreign corporations.

By virtue of another amendment to Section 8, it is made clear that a corporation may invest its funds not currently needed in its business in the securities of any other business so long as the corporation does not acquire control of a business the functions of which are not incidental to the purposes of the investing corporation.

CONSIDERATION FOR SHARES AND LIABILITY OF SHAREHOLDERS

The sections of the Act that treat of this subject are extensively rewritten.[5] For the most part the result is merely a better statement of the existing provisions. The procedure contained in Section 16 for selling par value shares below par after the corporation has been in existence for two years has been eliminated. That procedure was, in effect, a codification of *Handley v. Stutz*[6] and is scarcely necessary in days of blank stock, no par stock and $1 par value stock. Under Section 22 as rewritten, a discount may be made in sale of par value shares only to the extent of a reasonable compensation for the sale or underwriting of the shares. Furthermore, it is made certain that par value stock, save where convertible shares are converted, may not be issued or disposed of in any guise if as a result a deficit would be created in the surplus account of the corporation or if an existing deficit would be increased. Moreover, under revised Section 22 a person who agrees to perform services as the consideration for shares does not become a shareholder until the services are performed. Consequently, the last sentence of Section 10 stating when subscribers became shareholders is deleted. New Section 23 designates premiums paid on par value stock as paid-in surplus.

A possible liability of holders of no par stock lurking in the present Act is removed. One of the principal reasons for no par value stock was the elimination of liability for watered stock. The second paragraph of Section 24 of the Act appears to create a statutory liability even for no par shares.[7] Section 24 as amended makes it plain that there is only a contractual liability for the agreed consideration of no par shares. This is further emphasized by an amendment to Section 4 of the Act providing that the amount of consideration need no longer be stated where the incorporators fix the consideration for no par shares in the form of property or services rather than money. In addition to the contractual liability for the agreed consideration for par value revised Section 24 provides for a statutory liability to the corporation for the par value of such

[5] §§ 16, 17, 18, 19, 22, 23 and 24.

[6] 139 U.S. 417 (1891).

[7] See Israels, *Problems of Par and No-Par Shares: A Reappraisal*, 47 COL. L. REV. 1279, 1300 (1947).

shares even where the corporation is solvent. The board of directors in new Section 27a is given authority to determine whether and upon what terms the subscription of any subscriber shall be released, settled or compromised. When such action is taken the shares are retired and an automatic reduction in stated capital results. The requirement of a certificate for reduction of stated capital is obviated.

### Convertible Shares

Strangely enough the Act has contained no detailed provisions dealing with convertible shares although it contained adequate coverage of options to purchase shares in Section 20 and convertible obligations in Section 76. This defect is remedied in new Section 19a where the entire subject matter is now treated. Briefly, the section permits insertion in the express terms and provisions of such shares any statements needed to protect the right of conversion such as restrictions on creation or issuance of additional shares, adjustments of the conversion price, reservation of shares to meet the conversion rights, and restrictions on dividends. It is further provided that the corporation shall not issue convertible shares with or without par value unless at that time the surplus of the corporation is equal to any increased stated capital of the corporation which would result if all the conversion rights were exercised. This surplus is required to be set aside as a reserve. The right to convert, however, is not dependent on the successful maintenance of the reserve. The parenthetical statement concerning convertible shares in Section 4 of the Act has indicated that conversion rights could not be exercised if at the time conversion was requested sufficient surplus did not exist which could be applied to any increased stated capital that might result from the conversion. This parenthetical statement is removed. The similar problem that exists with respect to convertible obligations under Section 76 is not remedied.

Upon conversion the convertible shares are deemed retired and may not be reissued, and under an amendment to Section 15 of the Act the board of directors may adopt an amendment to the articles to reduce the authorized number of shares of the class converted and if an entire class is converted may by amendment to the articles eliminate all reference to that class of shares. This procedure is substituted for the one heretofore provided in paragraph 11 of Section 39 wherein an officer of the corporation could upon conversion file a certificate with the Secretary of State which had the effect of an amendment to the articles. Under the amendments, as heretofore, if the shares into which the convertible shares are converted represent stated capital in an amount less than the convertible shares, an automatic reduction in stated capital results upon conversion.

### Redeemable Shares

Treatment similar to that given convertible shares is applied to redeemable shares. The parenthetical reference to this type of share in Section 4 is eliminated. A new section, Section 19b, gathers the loose ends together. In addition redemption of only a part of the outstanding shares must be pro rata or by lot in a manner deemed by the board of directors to be equitable. Again, on redemption such shares acquire the status of retired shares. The same amendment to Section 15 which permits the board of directors partially or wholly to do away with convertible shares upon conversion by amendment to the articles, permits the same action with respect to redeemable shares. Again this does away with the procedure prescribed by paragraph 11 of Section 39. That paragraph is deleted. An automatic reduction of stated capital takes place upon redemption without the necessity of board action as was formerly the case.

### Treasury Shares

The provisions of the eliminated Section 18 providing that treasury shares can be sold at considerations fixed by the board of directors are now contained in Sections 19 and 22. The loophole whereby a corporation may continue to use the same surplus to embark on an extensive purchasing program of its own stock is continued and procedurely made easier. New section 19c provides that unless otherwise provided in the articles, the board of directors have authority to retire treasury shares. While this provision is not new, it is the provision that primarily provides the loophole.[8] No longer, however, need a certificate of reduction of stated capital be filed when the treasury shares are retired. The retirement results in an automatic reduction of stated capital.

### Reduction of Stated Capital

The change of primary importance in Section 39 dealing with reduction of stated capital is the one which eliminates in all cases the necessity of filing a certificate of reduction of stated capital with the Secretary of State. Important and extensive changes, however, are made to paragraph 5 of old Section 39. The methods of reducing stated capital which required amendment to the articles, *i.e.*, reducing the par value of issued shares or changing issued shares with par value into shares with par value of same or different class are removed from Section 39 and placed in paragraph 4 of Section 15. Thus the same shareholder vote that was required for this type of reduction of stated capital is maintained. If this type of action is taken pursuant to Section 14 and 15, a reduction of stated capital again automatically follows. In this connection it

[8] 1 Davies, Ohio Incorporation Law, 694, 695 (1942).

should be noted that the last paragraph of Section 14 requiring action under Section 39 if the result of an amendment was a reduction of stated capital is removed. There is retained as paragraph 1 (f) of new Section 39 that part of paragraph 5 of former Section 39 the methods of reducing stated capital by writing down that part of stated capital represented by no par shares and by voluntary exchange of shares. Missing entirely is reference to the method of reducing stated capital by purchasing shares in the open market or at private sale. Under that method shares could be purchased even where there was no surplus.[9] The effect upon stated capital of a compromise of shareholder's liability, of converting shares, of redeeming shares and of retiring treasury shares has been set forth in the discussion of those topics.

### Amendments to the Articles

In addition to the changes made in Sections 14 and 15 referred to in the discussion of convertible shares, redeemable shares and reductions of stated capital, there are two additional changes made in Section 15 which should be mentioned. In paragraph number 6, it is now provided that the board of directors may in lieu of or in addition to adopting an amendment to the articles, adopt amended articles in situations where they otherwise have authority to adopt an amendment to the articles. In the same paragraph provision is made that the statements required by paragraph number 5 concerning the number and class of shares which are changed upon an amendment to the articles need not be restated upon a later adoption of amended articles in connection with any other type of amendment to the articles.

### Stock Certificates

A number of variations are written into Section 30 dealing with certificates for shares. Since corporations need not use seals, the provision with reference to facsimile seals is deleted. A facsimile signature of an officer is only permitted where an incorporated transfer agent or registrar is used. The chairman of the board is added as an officer authorized to sign stock certificates. Scrip may be issued over facsimile signatures. Shares which are represented by scrip become treasury shares when the right to turn in the scrip expires. The use of the phrase "as joint tenants with right of survivorship and not as tenants in common" is permitted to indicate joint tenancy. More significantly the corporation may pay off fractional shares in cash rather than issue scrip therefor.

Another attempt to restate the liability of a corporation, its transfer agent and its registrar to holders of record, fiduciaries and beneficiaries is contained in the new Section 33 which replaces old

[9] 1 Davies, Ohio Incorporation Law, 696, 697 (1942).

Sections 33 and 33a. The section conforms substantially to existing sections 8509-1 and 2 of the Ohio General Code. New Section 33 appears to be better stated than those sections however. The new section extends to obligations in registered form as well as to shares. This means that sections 8509-1 and 2 apply to all securities of foreign corporations and obligations of domestic corporations not in registered form.

### Shareholders' Meetings, Notices

Section 43 is clarified. It may no longer be contended that by provision in the articles or regulations a percentage of shareholders may not call a meeting. The various classes of people who by the present section 43 are authorized to call meetings are clearly in the alternative. The articles or regulations, however, may specify a smaller or larger proportion than the statutory twenty-five percent of shareholders who hold the voting power. Furthermore the vice-president may not call a meeting unless the president is absent, dead or disabled. When a person or persons authorized to call a meeting request a call in writing and serve it by registered mail or personal delivery on the president or secretary the latter must give notice of a meeting to be held not less than ten days nor more than sixty-days thereafter. If they do not give notice of a meeting within twenty days after the receipt of the request, the person requesting the meeting may do so.

When waivers are obtained pursuant to Section 45 the amendments specify that they need only be obtained from those absent from the meeting. Attendance at a meeting is a waiver of notice unless a protest for want of notice is made.

A new Section 45a born of the recent war and it can be hoped a poor prophecy of the future, provides that notices to persons residing outside the United States need not be sent if sending the notice is prohibited by, or dependent upon a license under, an Act of Congress or executive action under authority thereof.

The right of stockholders to request a list of shareholders at a meeting of stockholders as provided in Section 48 is made subject to the reasonable and proper purposes test of Section 63. Furthermore, the stockholders present at any meeting constitute a quorum thus authorizing them to take any action at a meeting except to vote on any proposal which by the Act, articles or regulations calls for approval by a greater number of shares than those present at the meeting.

A new Section 49a is added to the effect that shareholders may revoke or rescind any action they take by the same vote required for the original action subject to intervening contract rights. The

last paragraph of old section 19 on the same subject but narrower in its coverage is deleted.

### VOTING

In the first place it is provided in an amendment to Section 50 that if a record date is not fixed the date for determining the shareholders of record who may vote is the day preceding the date of the meeting. Next, new Section 50a states that only persons who are nominated as candidates are eligible for election as a director. Again the same section provides that if a shareholder gives notice of cumulative voting, within twenty-four hours prior to the meeting (the present statutory provision) the chairman or secretary of the meeting or the shareholder giving notice on someone on his behalf may give the announcement of the notice at the meeting in order that cumulative voting may be used.

Section 51 dealing with voting by fiduciaries is the subject of considerable change. The section is correlated with new section 33 dealing with the liability to holders of record, fiduciaries and beneficiaries on transfer of shares. Briefly, the corporation may recognize for voting purposes any shareholder of record. If, however, an executor, administrator, guardian of a ward or incompetent, a trustee in bankruptcy or statutory or judicial receiver proves that he is such and if in addition, any other fiduciary proves his authority, such fiduciary may vote. Again if a decree of a court of competent jurisdiction affecting the voting rights is presented to the corporation before the vote is taken, the decree, of course, must be recognized. The Section also provides for rules that govern where there are multiple fiduciaries. In short, if more than one of the multiple fiduciaries attend the meeting or give consents to corporate action, the majority prevail as to all shares controlled by the fiduciaries. If only one is present or consents, his action binds all. If there is an even split on an issue, the shares are split for voting purposes. The section also applies the same rules to joint tenants and tenants in common.

Section 52 is amended so that the chairman of the board and the treasurer in addition to the president, vice-president and secretary, shall have authority to vote shares owned by one corporation in another. Further in a banking or trust corporation the cashier and trust officer are given this authority. Another amendment to the section provides that when shares cannot be voted by a corporation because it is the issuing corporation or is controlled by the issuing corporation such shares shall not be considered to be outstanding for the purpose of computing the voting power of the corporation or of any class of shares of the corporation.

The provisions treating of proxies are changed somewhat. The

paragraph in Section 12 permitting proxies to be controlled by the code of regulations is omitted. Section 53 is changed so that the rules of voting by multiple proxies conform to those for multiple fiduciaries and joint tenants in Section 51. The authorization for revocation of proxies after a vote if the inspectors at the election permit is done away with.

### Directors

Directors no longer remain in office until their successors qualify. As formerly directors have sixty days in which to qualify. If they do not they may be removed and a vacancy exists. The code of regulations may no longer govern the causes for and manner of removal of directors. Instead Section 56 now provides that the entire board or a single director may be removed without assigning cause by a vote of shareholders holding a majority of the shares which elected the directors to be removed. If less than the entire board is to be removed no individual director may be removed if enough votes are cast against the proposed action to have elected him at an election of the entire board if the voting were on a cumulative basis. At the same meeting new directors may be elected to fill the unexpired terms. If they are not, a vacancy exists which may be filled by the remaining directors.

### Officers

An amendment is made in Section 12 in order that the code of regulations may provide for the manner of election and removal of officers. Amendments to Section 62 specify (a) that a vice-president who is not a director may not succeed to the office of president; (b) that the office of president and vice-president may not be occupied by the same person; (c) that as between the corporation and the officers, the latter have the authority given by the board; (d) that the board may remove any officer with or without cause subject to the officer's contract rights; and (e) that the board may fill officer vacancies.

### Financial Statements

In Section 64 the distinction between a balance sheet and a profit and loss statement is more sharply drawn than formerly and officers and accountants need not certify that the financial statement is true and correct but only that it conforms to generally accepted accounting practices. The shareholders may as of right obtain copies only of the financial statement which pertain to the current annual meeting.

### Sale of Assets

In taking action for sale of assets it is made clear that either the directors or the shareholders may act first. Action by both has al-

ways been required. Furthermore it is set forth that the board of directors may only rescind a proposed sale when it has the consent of the shareholders. The provisions dealing with the distribution of the proceeds of the sale are removed.

### Consolidations and Mergers

Domestic corporations which are merged or consolidated into a foreign corporation need no longer comply with the minimum stated capital requirement of the Ohio Act nor in such cases need a certificate be filed with the Secretary of State to the effect that the laws of the foreign state have been complied with. An amendment to Section 68 spells out that a new domestic corporation may be designated as the consolidated corporation and in such cases the consolidation agreement may operate as original articles of the corporation.

### Agents for Service of Process

Although Section 129 is almost completely rewritten the changes while significant are not many. It is now provided that a statutory agent may resign. If he does and the corporation fails to appoint a successor, service may be made on the Secretary of State. As a conditon of revoking the appointment of a statutory agent, the corporation must appoint a successor. The president, vice-president or secretary are to sign the certificate of appointment of the statutory agent. Where service may be made on the Secretary of State it need not be served personally on the Secretary of State or the Assistant Secretary as formerly but may be left at the office of the Secretary of State.

### Pre-1927 Corporations

Apparently some instances have been disclosed wherein corporations formed prior to the existing general corporation act have not complied with a requirement then extant to the effect that a certificate of subscription must be filed with the Secretary of State. New Section 135a provides that notwithstanding their failure to comply with that requirement such corporations shall be considered de jure.

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