



## Ohio Revised Code

### Section 1701.832 State's responsibility as to tender offers.

Effective: November 21, 1997

Legislation: House Bill 170 - 122nd General Assembly

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(A) In enacting Amended Substitute House Bill No. 822 of the 114th general assembly, which amended sections 1701.01, 1701.11, 1701.37, 1701.48, 1707.01, 1707.23, 1707.26, 1707.29, and 1707.99 and enacted sections 1701.831 and 1707.042 of the Revised Code, the general assembly found and continues to find that:

(1) Existing Ohio corporate law was designed to deal with traditional methods of transfer of control of Ohio corporations. The tender offer has evolved as an alternative device to acquire control of a public corporation that has been in widespread use in the past several decades. The acquisition of significant blocks of the securities of a public company in the open market or private transactions in connection with actual or apparent efforts to acquire control has become more common in recent years and has further complicated the impact of tender offers upon a corporation and its shareholders. Numerous Ohio corporations have been the subject of tender offers and accumulations of significant blocks of securities.

(2) The accumulation of a large block of a corporation's voting shares, or other securities convertible into voting shares, through direct or indirect acquisition from one or more existing shareholders of the corporation has not been subject to the normal corporate approval mechanisms involved in other typical types of acquisition transactions such as mergers, consolidations, combinations, and majority share acquisitions. Such accumulations, however, can result in shifts of effective corporate control and hence, from a business and financial perspective, directly or indirectly, can result in significant changes in a variety of basic corporate circumstances identical or substantially similar to those arising as a result of the above-mentioned transactions. For instance, a change in corporate control accompanying a large accumulation of shares will very often result in a fundamental change in the ongoing business of the corporation and a concomitant fundamental change in the nature of the shareholders' investment in it. Thus the potential that such changes in corporate circumstances will occur gives rise to basic issues concerning the internal affairs of the corporation typical of those arising in mergers, consolidations, combinations, and majority share acquisitions. The form of the transaction in which such issues arise should not alter the basic corporate mechanisms by which such



issues are presented and resolved.

(3) Tender offers almost always involve a change in corporate control and, therefore, give rise to these same basic issues concerning internal corporate affairs. Although tender offers in theory offer shareholders the opportunity to consider such issues in deciding whether or not to tender their shares, in practice they do not. Tender offers are coercive in the sense that shareholders are normally concerned that a majority of their fellow shareholders will tender their shares, leaving them in a minority position with one controlling shareholder. Thus, shareholders often feel compelled to tender their shares, regardless of how they feel about the corporate control issues inherent in any tender offer. The opportunity for reasoned decision-making is further hindered by the short time periods in which tender offers can be consummated, the structures of many recent tender offers, which are designed to encourage prompt tenders, and the fact that individual shareholders typically receive or obtain tender offer materials much later than institutional shareholders.

(4) It is in the public interest for shareholders to have a reasonable opportunity to express their views by voting on a proposed shift of control, an opportunity currently available under Ohio general corporation law, Chapter 1701. of the Revised Code, in transactions with similar effects. The general assembly also believes that it is in the public interest for Ohio securities laws, Chapter 1707. of the Revised Code, to provide evenhanded protection of offerors and shareholders from fraudulent and manipulative transactions arising in connection with control acquisitions.

(5) Initial state efforts to deal with tender offer developments have been questioned by the federal courts. The general assembly observes that responsibility for general corporate laws is the function of state legislation and that no federal law of corporations exists. The general assembly observes that securities law protection of state residents has long been recognized as an appropriate subject of state law regulation under the federal system. The general assembly acknowledges an in loco parentis responsibility to shareholders who invest in corporations created under the laws of Ohio and to shareholders generally who reside in Ohio.

(B) Sections 1701.01, 1701.11, 1701.37, 1701.48, 1707.01, 1707.23, 1707.26, 1707.29, and 1707.99, as amended by Amended Substitute House Bill No. 822 of the 114th general assembly, and sections 1701.831 and 1707.042, as enacted by that act, were a recognition of the state's responsibility with respect to the subject matter of the act. Nevertheless, with a view to avoiding an undue burden on



interstate commerce, as expressed in recent court decisions, the amendments were designed to have the minimum impact upon interstate commerce consistent with Ohio responsibility in respect to the subject matter. Accordingly, the security law amendments made by that act to sections 1707.23, 1707.26, 1707.29, and 1707.99 and in newly enacted section 1707.042 of the Revised Code were limited to application to Ohio resident investors, and the corporate law amendments made by that act to sections 1701.01, 1701.11, 1701.37, and 1701.48 and in newly enacted section 1701.831 of the Revised Code were limited to corporations created under the laws of Ohio with the strong Ohio ties provided in the amendments. The corporate legislation does not include a requirement for Ohio resident investors because of the difficulty of ascertainment by potential acquirers and others of the residence of shareholders. The general assembly finds that corporations satisfying the jurisdictional nexus provided by the amendments may be deemed to have a substantial and significant shareholder base in the state.

(C) The general assembly confirms all of the findings of this section as enacted by Amended Substitute House Bill No. 822 of the 114th general assembly, except that the general assembly declares that, from the effective date of this amendment, November 2, 1989, and the concurrent amendment of section 1701.11 of the Revised Code by the addition of division (B)(9)(a)(ii) to that section, the standards of that division are permitted, as an alternative to the ties with Ohio essential to the status of a control share acquisition, to qualify for the authorized restrictions on transfer of shares. The general assembly further finds that the omission of a reference to "1701.01" immediately following the phrase "the corporate law amendments in sections" in the enactment of division (B) of this section was inadvertent.

(D) The general assembly confirms all of the findings of this section as enacted by Amended Substitute House Bill No. 822 of the 114th general assembly, and as amended by Amended Substitute House Bill No. 358 of the 118th general assembly, and further finds all of the following:

(1) Although Ohio general corporation law, Chapter 1701. of the Revised Code, requires that a special meeting be held to enable shareholders of an issuing public corporation to vote on any control share acquisition, it describes meeting procedures, like other states, primarily in general terms.

(2) Where the law, or the articles of incorporation and code of regulations of the issuing public



corporation, do not mandate specific meeting procedures, the directors of the corporation must define appropriate procedures consistent with their fiduciary duties as provided in section 1701.59 of the Revised Code. In carrying out these duties, practices and procedures have developed from experience in this state and elsewhere to ensure fair and efficient meetings. These practices and procedures include the use of a variety and number of presumptions and forms of proxy.

(3) The use of presumptions and forms of proxy reflects the fact that, in this state and other states with similar laws, efficiency and finality are necessary priorities over precision and certitude in the conduct of a meeting. It is the responsibility of the directors to utilize practices and procedures, including presumptions and forms of proxy, that are consistent with their fiduciary duties.