

Acredula

BRICKER & ECKLER LLP

100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2300
FAX (614) 227-2390

info@bricker.com
www.bricker.com
www.Acredula.com
www.BoardandExecutive.net

Bricker & Eckler LLP's *Acredula* is available to clients and friends of the firm, and highlights information of particular importance to boards and executives. The information contained in this newsletter is not to be construed as legal advice or opinion.

We invite you to photocopy and distribute this newsletter as you wish. Or, request additional copies from us.

Acredula is the Latin word for "owl," connoting wisdom. This newsletter is intended as wise counsel for boards and executives.

Ohio Expands Its Anti-Takeover Protections

Enacted February 13, 2002, Senate Bill 110 expands Ohio's anti-takeover protections by:

- Allowing certain Ohio-incorporated corporations to prohibit elimination of a classified board without a vote of disinterested shares or removal of classified directors except for cause; and
- Expressly allowing boards of certain Ohio-incorporated corporations to issue options, warrants, or other rights with conditions precluding certain holders, in the event of a change or threatened change in control, from exercising or redeeming the options or rights.

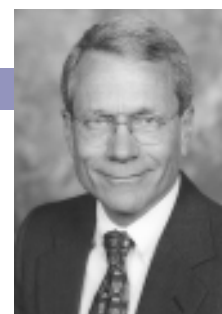
S.B. 110 amends Ohio law to make it more difficult to remove a classified board of an issuing public corporation. As a result, any amendment to an issuing public corporation's articles of incorporation or code of regulations that would change or eliminate the classification of directors may only be made by shareholders at a meeting held for that purpose and only if approved by the affirmative vote of the holders of at least a majority of the disinterested shares voted on the proposal. Further, unless otherwise provided, the shareholders of an

Editor's Note

Ohio-incorporated corporation that constitutes an issuing public corporation may only remove a classified director for "cause."

S.B. 110 further amends Ohio law to allow provisions that preclude shareholders from exercising or redeeming their options or rights. As a result, an Ohio-incorporated corporation has express statutory authority permitting "dead-hand" or "dead-hand-from-the-grave" poison pills that cannot be redeemed or otherwise extinguished before the expiration of their term by the corporation if the corporation has issued outstanding shares listed on a national securities exchange or regularly quoted in an over-the-counter market, or if the provisions are adopted pursuant to a close corporation agreement.

Due to S.B. 110, Ohio-incorporated corporations have statutory authority to classify their boards and issue options or warrants as poison pills to deter takeover bids. This month's feature article addresses these poison pills and Ohio's other anti-takeover protections.



John P. Beavers
Partner,
Bricker & Eckler LLP

Ohio's Anti-Takeover Statutes in a Nutshell

John P. Beavers, Bricker & Eckler LLP

Ohio adopted its first anti-takeover statute with an Ohio tender offer statute in 1969. Since then, the tender offer statute has evolved into a Control Bid Statute to which Ohio has added a Control Share Acquisition Statute, a Merger Moratorium Statute, and a Control Bid Profit Recovery Statute.

Ohio modified its Options to Purchase Statute to expressly authorize "dead-hand" or "dead-hand-from-the-grave" poison pills that cannot be redeemed or otherwise extinguished before the expiration of their term by the corporation.

With the passage of S.B. 110, Ohio recently modified its Classified Director Statutes to allow certain Ohio-incorporated corporations to prohibit the elimination of a classified board without a vote of disinterested shares or removal of classified directors except for cause, making the classified board a deterrent to takeovers. Ohio also modified its Options to Purchase Statute to expressly authorize "dead-hand" or "dead-hand-from-the-grave" poison pills that cannot be redeemed or otherwise extinguished before the expiration of their term by the corporation.

Ohio's anti-takeover statutes apply to two groups of entities incorporated or situated in Ohio:

1. **Ohio-Incorporated Corporations**, which are corporations incorporated in Ohio under Chapter 1701. Most of these provisions apply only to an Ohio-incorporated corporation that is an issuing public corporation. An issuing public corporation is an Ohio-incorporated corporation that has 50 or more shares *and* has *any* of the following in Ohio:
 - Its principal place of business;
 - Its principal executive offices;
 - Assets having substantial value; or
 - A substantial percentage of its assets.

An additional requirement to constitute an issuing public corporation is that no close corporation agreement exist with respect to the Ohio domestic corporation.

2. **Ohio-Situated Companies**, which are companies that issue securities, regardless of whether they are formed as a corporation or another type of organization. With respect to Ohio, these companies:
 - Either (i) have their principal place of business or principal executive offices located in Ohio, or (ii) own or control assets located in Ohio that have a fair market value of at least \$1 million; *and*
 - Either (i) have more than 10 percent of their beneficial or record equity security holders residing in Ohio, (ii) have more than 10 percent of their equity securities owned, beneficially or of record, by residents of Ohio, or (iii) have 1,000 beneficial or record equity security holders who are residents of Ohio.

Control Bid Statute

Ohio's oldest anti-takeover statute, the Control Bid Statute is designed to give security holders of an Ohio-situated company full disclosure of all material information relating to a control bid for shares made pursuant to a tender offer. A control bid is the purchase (or offer to purchase) of any equity security of an Ohio-situated company from a resident of Ohio if, after the purchase, the buyer would own more than 10 percent of any class of the issued and outstanding equity securities of the company. A control bid also occurs when the person purchasing (or offering to purchase) the equity security is the Ohio-situated company itself, the purchase or offer is made at a time when a control bid from another person is pending, or the purchase would reduce the number of issued and outstanding shares of the company by more than 10 percent.

The Control Bid Statute prohibits an offeror from making a control bid for securities of an Ohio-situated company pursuant to a tender offer until the offeror has filed specified information with the Ohio Division of Securities. In addition, the offeror is required to deliver a copy of such information to the subject company no later than the offeror's filing with the Ohio Division of Securities. The offeror must also deliver that information along with the material terms of the proposed offer to all offerees in

Continued on page 5

The Post-Enron Environment: What We Need Is Honesty and Integrity, Not More Rules

John P. Beavers, Bricker & Eckler LLP

This special insert begins *Acredula's* focus on the impact of Enron on boards and executives. Our initial topic is President Bush's ten-point plan for providing better information to investors, increasing accountability of corporate officers, especially CEOs, and developing a stronger audit system. The white paper accompanying President Bush's March 7, 2002 speech summarized these three key areas for improvement:

Better Information for Investors

Investors base critical investment decisions on the financial information that the company provides. Each investor must have the opportunity to analyze the performance of the company, and the risks associated with an investment. Without proper disclosure, it is impossible for investors to make informed investment decisions, hold senior management accountable, and ensure that capital is efficiently allocated to firms. The American system of corporate disclosure is the best in the world. Yet, sometimes it seems that the needs of the average investor are forgotten by some companies. These disclosure practices can and should be significantly improved to better suit the needs of investors.

Making Corporate Officers Accountable

Unlike shareholders or even directors, corporate officers work full-time to promote and protect the well-being of the firm. The CEO, in particular, has a duty to oversee the entire firm on a full-time basis. Accordingly, the CEO bears particular responsibility for informing the firm's shareholders of its financial health. This obligation goes well beyond complying with "check-the-box" accounting. The CEO must be held responsible for informing investors about the financial condition of the public company and the risks it faces.

Developing a Stronger, More Independent Audit System

Just as they do with corporate officers, investors depend on the judgment, integrity and competence of independent auditors. While auditors cannot prevent intentional deceit, they are a critical external check on corporate management. Accordingly, a sound audit system is essential to maintain investor confidence.

Ten-Point Plan

Taking into account these key areas, President Bush established his ten-point plan:

1. Each investor should have quarterly access to the information needed to judge a firm's financial performance, condition, and risks. The SEC should ensure that public companies are responsible for providing investors a true and fair picture of themselves, and that this information is provided in "plain English."
2. Each investor should have prompt access to critical information. The SEC should expand the list of significant events requiring prompt disclosure between reporting periods.
3. CEOs should personally vouch for the veracity, timeliness, and fairness of their companies' public disclosures, including their financial statements. CEOs would personally attest each quarter that the financial statements and company disclosures accurately and fairly disclose the information, of which the CEO is aware, that a reasonable investor should have to make an informed investment decision.
4. CEOs or other officers should not be allowed to profit from erroneous financial statements. CEO bonuses and other incentive-based forms of compensation should be disgorged in cases of accounting restatements resulting from misconduct.
5. CEOs or other officers who clearly abuse their power should lose their right to serve in any corporate leadership positions. The SEC should have the power to ban individuals from serving as officers or directors of publicly held corporations if they engage in serious misconduct.
6. Corporate leaders should be required to tell the public promptly whenever they buy or sell company stock for personal gain within two business days of the execution of any such transaction.
7. Investors should have complete confidence in the independence and integrity of companies' auditors. The SEC should establish guidelines for audit committees to prohibit an external auditor from performing any other

service to an audit client, if the service compromises the independence of the audit. The SEC should also set forth prohibitions against the performance by an outside auditor of internal audit functions for the same client. In addition, the client would be forced to disclose in greater detail all fees paid to the auditing firm and its affiliates.

Finally, the audit committees should directly report their recommended choice of auditor to the shareholders.

8. An independent regulatory board, under the supervision of the SEC, should ensure that the accounting profession is held to the highest ethical standards. This board would have the ability to monitor, investigate, and where needed, enforce its ethics principles by punishing individual offenders.
9. The authors of accounting standards must be responsive to the needs of investors. The SEC should exercise more effective and broader oversight of the Financial Accounting Standards Board, insure its independence, and require prompt promulgation of standards that reflect economic reality rather than compliance with technical requirements.
10. Firms' accounting systems should be compared with best practices, not simply against minimum standards. Auditors should be required to compare the quality of a company's financial controls with the best practices of the industry and communicate its findings to the audit committee. The audit committee should be obligated to discuss these findings and the improvement of practices with management, the board of directors, and the auditor, and to act independently to require improvement where necessary.

Response to Plan

The Bush proposal may only be a starting point if Congress and the media have their way. Democrats have criticized the Bush proposal for failing to create a form of new federal liability personally for officers' failure to cause publicly held entities to provide adequate accounting controls to account more fully, rather than just fairly, for the entities' liabilities and to maintain accountability for its assets. Senate Majority Leader Thomas Daschle (D-SD) was reported by the March 8, 2002 edition of the *Washington Post* as saying the Bush

proposal "falls short of what I think would have to be the minimum standards. The lack of any penalty for corporate fraud is a glaring omission, I think, that has to be addressed." A *New York Times* editorial on March 8, 2002 similarly criticized the Bush proposal for "lacking sufficient enforcement mechanisms."

In virtually all transactions, whether with customers or with colleagues, we rely on the word of those with whom we do business. If we could not do so, goods and services could not be exchanged efficiently.

-Alan Greenspan

The thrust of those criticizing the Bush proposal is that new rules are needed to hold someone personally or criminally liable for Enron types of problems. Even Treasury Secretary Paul O'Neill and SEC Chairman Harvey Pitt seem to have at least one foot on a bandwagon for greater legislation. Both O'Neill and Pitt would limit indemnification by publicly held entities of their directors and officers for suits involving inadequate disclosure or misuse of assets.

One voice of reason among all of this clamor is that of Federal Reserve Board Chairman Alan Greenspan. Typically the media reports every word that Greenspan speaks, but his recent speech

at the Stern School of Business, New York University, has received little attention. Greenspan observed that:

[I]t has increasingly fallen to corporate officers, especially the chief executive officer, to guide the business, hopefully in what he or she perceives to be in the best interests of shareholders . . . After considerable soul-searching and many congressional hearings, the current CEO-dominant paradigm, with all its faults, will likely continue to be viewed as the most viable form of corporate governance for today's world. The only credible alternative is for large — primarily institutional — shareholders to exert far more control over corporate affairs than they appear to be willing to exercise. . . [R]ules cannot substitute for character. In virtually all transactions, whether with customers or with colleagues, we rely on the word of those with whom we do business. If we could not do so, goods and services could not be exchanged efficiently. Companies run by people with high ethical standards arguably do not need detailed rules to act in the long-run interests of shareholders."

What we need is business leaders with honesty and character, not more rules.

Continued from page 2

Ohio as soon as practicable after the offeror's filing with the Ohio Division of Securities.

Within five calendar days of the filing, the Ohio Division of Securities may, by order, summarily suspend the continuation of the control bid if it determines that the offeror has not provided all of the specified information or that the control bid materials provided to offerees do not provide full disclosure of all material information concerning the control bid. If the Ohio Division of Securities summarily suspends a control bid, it must schedule and hold a hearing within 10 calendar days of the suspension date and make its determination within three calendar days of the completed hearing, but no later than 14 calendar days after the suspension date. The Ohio Division of Securities may maintain its suspension if, based upon the hearing, it determines that all of the information required to be provided by the control bid law has not been provided by the offeror, that the control bid materials provided to offerees do not provide full disclosure of all material information concerning the control bid, or that the control bid is in material violation of any provision of the Ohio securities laws. If, after the hearing, the Ohio Division of Securities maintains the suspension, the offeror has the right to correct the disclosure and other deficiencies identified and to reinstitute the control bid by filing new or amended information pursuant to the control bid law.

The Control Bid Statute does not apply to certain public utilities or public utility holding companies, banks or bank holding companies, or savings and loan companies.

Control Share Acquisition Statute

Unless a corporation's articles of incorporation or regulations otherwise provide, the Control Share Acquisition Statute requires prior shareholder approval for any "control share acquisition" of an Ohio-incorporated corporation that constitutes an issuing public corporation. This statute applies not only to traditional tender offers, but also to open market purchases, privately negotiated transactions, and transactions in which a public corporation originally issues securities. A "control share acquisition" is the acquisition, directly or indirectly, by any shareholder whose shares, when added to all other shares of the corporation, entitle the holder to exercise or direct the exercise of one-fifth or more, one-third or more, or a majority or more of the voting power in the election of directors.

Any person who seeks to make a control share acquisition must first deliver to the issuing public corporation a statement that sets forth certain information about the person and the proposed acquisition of shares. Following the delivery of this

statement, the directors of the issuing public corporation are required to call a special shareholders meeting within a certain time period for the purpose of asking shareholders to vote on the proposed control share acquisition. For the control share acquisition to proceed, it must be authorized in advance by (i) the holders of at least a majority of the voting power of the corporation in the election of directors represented at the meeting in person or by proxy, and (ii) the holders of a majority of the portion of the voting power excluding the voting power of "interested shares" at the meeting in person or by proxy. A quorum shall be deemed to be present at the meeting if at least a majority of the voting power of the shares are represented either in person or by proxy.

For this purpose, "interested shares" means shares that may be exercised or directed in the exercise of voting power in the election of directors by an acquiring person, an officer elected or appointed by the corporation's directors, any employee of the corporation who is also a director, and certain persons that purchase shares in the period between the first public disclosure and the record date for the meeting, if the aggregate consideration paid for all shares exceeds \$250,000 or the number of shares acquired exceeds half of 1 percent of the corporation's outstanding shares entitled to vote in the election of directors.

Merger Moratorium Statute

The Merger Moratorium Statute prohibits a wide range of business combinations and other transactions (including mergers, consolidations, asset sales, loans, disproportionate distributions of property and disproportionate issuances or transfers of shares or rights to acquire shares) between an Ohio-incorporated corporation that constitutes an issuing public corporation and an "interested shareholder" (any person who through beneficial ownership or otherwise may exercise or direct the exercise of 10 percent or more of the corporation's voting power in the election of directors) for a period of three years after the person becomes an interested shareholder. After the three-year period, a business combination between the issuing public corporation and an interested shareholder is prohibited unless either certain "fair price" provisions are complied with or the business combination is approved by certain super-majority shareholder votes. However, the statute does not apply if, prior to the date on which the person became an interested shareholder, either the acquisition of the corporation's shares that would cause the person to become an interested shareholder or the business combination is approved by resolution adopted by the corporation's board of directors.

Control Bid Profit Recovery Statute

The Profit Recovery Statute allows an Ohio-incorporated corporation that has outstanding shares either listed on a national securities exchange or regularly quoted in an over-the-counter market to seek to recover profits earned on the sale of its equity securities by a person who publicly discloses an intention to acquire control of the corporation. The purpose of this statute is to guard against efforts to manipulate the price of the corporation's equity securities. Certain profits cannot be recovered, including profits that do not exceed \$250,000, profits earned more than 18 months prior to the date on which the public disclosure was made, and profits earned by a person who establishes in court that his or her motive was not to manipulate the price of the security.

Classified Director Statutes

Ohio law permits an Ohio-incorporated corporation to divide its board into two or three classes of directors with each class serving a different term. Ohio recently amended its Classified Director Statute to make it more difficult to eliminate or change the classification of directors and to remove classified directors of an Ohio-incorporated corporation that constitutes an issuing public corporation. As a result, the classified board can be a deterrent to takeovers.

In addition to the vote of shareholders otherwise required under Ohio law and the corporation's code of regulations or articles of incorporation, any amendment to an issuing public corporation's articles of incorporation or code of regulations that would change or eliminate the classification of directors may only be made by shareholders at a meeting held for that purpose and only if approved by the affirmative vote of the holders of at least a majority of the disinterested shares voted on the proposal. For this purpose, disinterested shares means

shares other than those owned by an interested shareholder, within the meaning of the Merger Moratorium Statutes, and affiliates or associates of the interested shareholder. Disinterested shares are shares held by persons who do not have the authority to exercise or direct the exercise of 10 percent or more of the corporation's voting power in the election of directors.

Further, unless the code of regulations or articles of incorporation otherwise provides, the shareholders of an Ohio-incorporated corporation that constitutes an issuing public corporation may only remove a classified director for "cause." "Cause" is not defined by the statutes.

Options to Purchase Statute

Ohio law expressly permits the board of directors of an Ohio-incorporated corporation to issue options, warrants, or other rights to purchase shares of the corporation having any terms not repugnant to law for the protection of the holders of such rights, including special terms in the event of a change or threatened change in control of the corporation. Typically, those terms apply equally to all holders of those rights regardless of their holdings of the corporation's shares. Ohio law expressly permits such options or other rights to contain provisions precluding a holder or holders of at least a specified number or percentage of the corporation's outstanding common shares from exercising or redeeming their options or rights. Accordingly, an Ohio-incorporated corporation has express statutory authority permitting "dead-hand" or "dead-hand-from-the-grave" pills that cannot be redeemed or otherwise extinguished before the expiration of their term by the corporation if (i) the corporation has issued outstanding shares listed on a national securities exchange or regularly quoted in an over-the-counter market, or (ii) the provisions are adopted pursuant to a close corporation agreement.

Counsel for BOARDS AND EXECUTIVES

A Bricker & Eckler Initiative

John P. Beavers, Chair
(614) 227-2361
jbeavers@bricker.com

Thomas R. Brownlee, Jr.
(614) 227-2301
bbrownlee@bricker.com

Jerry O. Allen
(614) 227-8834
jallen@bricker.com

John W. Cook, III
(614) 227-2383
jcook@bricker.com

Michael K. Gire
(614) 227-2318
mgire@bricker.com

Gordon F. Litt
(614) 227-2305
glitt@bricker.com

Richard D. Rogovin
(614) 227-2352
rrogovin@bricker.com

Betsy A. Swift
(614) 227-8850
bswift@bricker.com

Laurie A. Briggs
(614) 227-2355
lbriggs@bricker.com

Michael E. Flowers
(614) 227-2340
mflowers@bricker.com

Steven R. Kerber
(614) 227-2356
skerber@bricker.com

Mark C. Pomeroy
(614) 227-2326
mpomeroy@bricker.com

James A. Rutledge
(614) 227-8830
jrutledge@bricker.com

Kurtis A. Tunnell
(614) 227-8837
ktunnell@bricker.com

David C. Spialter
(614) 227-2342
dspialter@bricker.com

Faith M. Williams
(614) 227-2374
fwilliams@bricker.com

Alex M. Brown
(614) 227-2344
abrown@bricker.com

James F. Flynn
(614) 227-8855
jflynn@bricker.com

Quintin F. Lindsmith
(614) 227-8802
qlindsmith@bricker.com

Christine M. Poth
(614) 227-2395
cpoth@bricker.com

Michael F. Sullivan
(614) 227-2337
msullivan@bricker.com

Randolph C. Wiseman
(614) 227-2310
rwiseman@bricker.com