

Managing a business enterprise presents challenges in the best of times. At a time of fundamental business disruption occasioned by a pandemic, the job of corporate directors and management becomes much more difficult.

Borrowing concepts from the Revised Model Business Corporation Act, Ohio's corporation laws address the practical problem of effective corporate governance during the continuation of an "emergency." An emergency is defined as existing:

"when the [Ohio] governor, or any other person lawfully exercising the power and discharging the duties of the office of governor, proclaims that . . . [a] disaster has caused an emergency for corporations, and such an emergency shall continue until terminated by proclamation of the governor or any other person lawfully exercising the powers and discharging the duties of the office of governor." Ohio Revised Code Section 1701.01(U).

We are clarifying the effect under Ohio's corporation laws of Ohio Governor DeWine's March 22, 2020 order.

The shareholders of an Ohio corporation may either adopt emergency regulations themselves or authorize the corporation's Board of Directors to do so, either before or during an emergency. Emergency regulations can include any provisions that are permitted to be included in an Ohio corporation's regulations (sometimes referred to, in accordance with prior Ohio statutory language, as codes of regulation).

In addition, emergency regulations may, unless prohibited by an Ohio corporation's articles of incorporation or regulations, make provisions that "may be practical or necessary" with respect to the following:

- (1) The place, if any, and time for holding, the manner of and authority for calling, giving notice of, and conducting, and the requirements of a quorum for, meetings of the directors;
- (2) The creation and appointment of an executive and other committees of the directors and the delegation of authority to the committees by the board;

- (3) The creation, existence, and filling of vacancies, including temporary vacancies, in the office of director;

- (4) The selection, by appointment, election, or otherwise, of officers and other persons to serve as directors for a meeting of the board in the absence from the meeting of one or more of the directors;

- (5) The creation, existence, and filling of vacancies, including temporary vacancies, in any office;

- (6) The order of rank and the succession to the duties and authority of officers." Ohio Revised Code Section 1701.11(C).

An EDGAR search revealed mixed responses to the question of whether Ohio public corporations have included provisions in their regulations authorizing their boards of directors to adopt emergency regulations. Many prominent Ohio public corporations have not, while others have. Of the Ohio public corporations that have authorized their boards of directors to adopt emergency regulations, the following provision, from a large publicly traded Ohio corporation, serves as a good example:

"Emergency Regulations. The Directors may adopt emergency regulations, either before or during an emergency, as that term is defined in the Ohio Revised Code, or in any other relevant law in effect at the time of the adoption of the emergency regulations. Such regulations shall be operative only during an emergency, notwithstanding any different provisions elsewhere in these Regulations. The emergency regulations may include such provisions as are authorized by law. Unless otherwise provided by such emergency regulations, the special rules contained in the Ohio Revised Code shall be applicable during such an emergency, notwithstanding any different provisions elsewhere in these regulations."

If an Ohio corporation has not, in its regulations or articles, authorized its board of directors to adopt emergency regulations, has not adopted emergency regulations in its code of regulations and is not a corporation (such as an Ohio domestic insurance company: *see* Ohio Revised Code Section 3901.27), subject to statutes that empower boards of directors to adopt emergency regulations, all is not lost. If the corporation is a closely held non-public Ohio corporation or is a "controlled corporation" under federal securities laws, it may be possible for its shareholders to amend the regulations to authorize the directors to adopt emergency regulations by written consent, amendment of the regulations being one of the few actions that may be taken under Ohio law by less than unanimous written shareholder consent (Ohio Revised Code Section 1701.11(C)).

If the regulations are so amended, the emergency regulations the board of directors adopts should refer to hybrid or virtual-only shareholders' meetings (if not previously authorized).

If amendment of the existing regulations to add board authority to adopt emergency regulations is not feasible, the Ohio Revised Code provides "special rules" for corporate governance applicable during an emergency:

"(1) Meetings of the directors may be called by any officer or director.

(2) Notice of the time and place of each meeting of the directors shall be given to such of the directors as it may be feasible to reach at the time and by the means of communication, written or oral, personal or mass, as may be practicable at the time.

(3) The director or directors present at any meeting of the directors that has been duly called and notice of which has been duly given shall constitute a quorum for the meeting, and, in the absence of one or more of the directors, the director or directors present may appoint one or more of the officers of the corporation directors for the meeting.

(4) If none of the directors attends a meeting of the directors that has been duly called and notice of which has been duly given, the officers of the corporation who are present, not exceeding three, in order of rank, shall be directors for the meeting, shall constitute a quorum for the meeting, and may appoint one or more of the other officers of the corporation directors for the meeting.

(5) If the chief executive officer dies, is missing, or for any other reason is temporarily or permanently incapable of discharging the duties of the office, the next ranking officer who is available shall assume the duties and authority of the office of the deceased, missing, or incapacitated chief executive officer until such time as the directors otherwise order.

(6) The offices of secretary and treasurer shall be deemed to be of equal rank, and, within the same office and as between the offices of secretary and treasurer, rank shall be determined by priority in time of the first election to the office or, if two or more persons have been first elected to the office at the same time, by seniority in age." Ohio Revised Code Section 1701.11(F).

While prior authorization for the adoption by the board of directors of emergency regulations would be preferable, these "special rules" provide Ohio corporations with the tools needed to conduct corporate governance activities during an emergency.

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