

# Report of the Corporation Law Committee

1 *To the Council of Delegates:*

2 The Corporation Law Committee respectfully requests your favorable consideration of  
3 the following proposed amendments. The committee is recommending three clarifications  
4 to Ohio corporate law. First, the proposed amendments to Section 1701.13(E)(6) make  
5 clear that once an act or omission has occurred for which an individual may seek  
6 indemnification or advancement of expenses, the rights to indemnity or advancement  
7 cannot be impaired. Second, the amendments also clarify that Section 1701.13(E)(6),  
8 which provides that Section 1701.13 is non-exclusive, extends to advancement of  
9 expenses (payments before the case is resolved) as well as indemnification payments  
10 (payments made after the matter is resolved). The third clarification is to make it explicit  
11 that the duties set out in Section 1701.59(B) are the only fiduciary duties that a director  
12 owes to the corporation. The Committee recommends that the same revisions be made for  
13 corporations under Chapter 1701 and for nonprofit corporations under Chapter 1702.

14  
15 The proposed amendments are attached as Exhibit A.

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Respectfully submitted,

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**William J. Kelly**, *Columbus*  
Chair

## 20 **1701.13 Authority of corporation.**

21 (A) A corporation may sue and be sued.

22 (B) A corporation may adopt and alter a corporate seal and use the same or a  
23 facsimile of the corporate seal, but failure to affix the corporate seal shall not affect the  
24 validity of any instrument.

25 (C) At the request or direction of the United States government or any agency of  
26 the United States government, a corporation may transact any lawful business in aid of  
27 national defense or in the prosecution of any war in which the nation is engaged.

28 (D) Unless otherwise provided in the articles, a corporation may take property of  
29 any description, or any interest in property, by gift, devise, or bequest, and may make  
30 donations for the public welfare or for charitable, scientific, or educational purposes.

31 (E)(1) A corporation may indemnify or agree to indemnify any person who was or  
32 is a party, or is threatened to be made a party, to any threatened, pending, or completed  
33 action, suit, or proceeding, whether civil, criminal, administrative, or investigative, other  
34 than an action by or in the right of the corporation, by reason of the fact that he is or was  
35 a director, officer, employee, or agent of the corporation, or is or was serving at the

36 request of the corporation as a director, trustee, officer, employee, member, manager, or  
37 agent of another corporation, domestic or foreign, nonprofit or for profit, a limited  
38 liability company, or a partnership, joint venture, trust, or other enterprise, against  
39 expenses, including attorney's fees, judgments, fines, and amounts paid in settlement  
40 actually and reasonably incurred by him in connection with such action, suit, or  
41 proceeding, if he acted in good faith and in a manner he reasonably believed to be in or  
42 not opposed to the best interests of the corporation, and, with respect to any criminal  
43 action or proceeding, if he had no reasonable cause to believe his conduct was unlawful.  
44 The termination of any action, suit, or proceeding by judgment, order, settlement, or  
45 conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a  
46 presumption that the person did not act in good faith and in a manner he reasonably  
47 believed to be in or not opposed to the best interests of the corporation, and, with respect  
48 to any criminal action or proceeding, he had reasonable cause to believe that his conduct  
49 was unlawful.

50 (2) A corporation may indemnify or agree to indemnify any person who was or is  
51 a party, or is threatened to be made a party, to any threatened, pending, or completed  
52 action or suit by or in the right of the corporation to procure a judgment in its favor, by  
53 reason of the fact that he is or was a director, officer, employee, or agent of the  
54 corporation, or is or was serving at the request of the corporation as a director, trustee,  
55 officer, employee, member, manager, or agent of another corporation, domestic or  
56 foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture,  
57 trust, or other enterprise, against expenses, including attorney's fees, actually and  
58 reasonably incurred by him in connection with the defense or settlement of such action or  
59 suit, if he acted in good faith and in a manner he reasonably believed to be in or not  
60 opposed to the best interests of the corporation, except that no indemnification shall be  
61 made in respect of any of the following:

62 (a) Any claim, issue, or matter as to which such person is adjudged to be liable for  
63 negligence or misconduct in the performance of his duty to the corporation unless, and  
64 only to the extent that, the court of common pleas or the court in which such action or  
65 suit was brought determines, upon application, that, despite the adjudication of liability,  
66 but in view of all the circumstances of the case, such person is fairly and reasonably  
67 entitled to indemnity for such expenses as the court of common pleas or such other court  
68 shall deem proper;

69 (b) Any action or suit in which the only liability asserted against a director is  
70 pursuant to section 1701.95 of the Revised Code.

71 (3) To the extent that a director, trustee, officer, employee, member, manager, or  
72 agent has been successful on the merits or otherwise in defense of any action, suit, or  
73 proceeding referred to in division (E)(1) or (2) of this section, or in defense of any claim,  
74 issue, or matter therein, he shall be indemnified against expenses, including attorney's  
75 fees, actually and reasonably incurred by him in connection with the action, suit, or  
76 proceeding.

77 (4) Any indemnification under division (E)(1) or (2) of this section, unless  
78 ordered by a court, shall be made by the corporation only as authorized in the specific  
79 case, upon a determination that indemnification of the director, trustee, officer, employee,  
80 member, manager, or agent is proper in the circumstances because he has met the  
81 applicable standard of conduct set forth in division (E)(1) or (2) of this section. Such  
82 determination shall be made as follows:

83 (a) By a majority vote of a quorum consisting of directors of the indemnifying  
84 corporation who were not and are not parties to or threatened with the action, suit, or  
85 proceeding referred to in division (E)(1) or (2) of this section;

86 (b) If the quorum described in division (E)(4)(a) of this section is not obtainable  
87 or if a majority vote of a quorum of disinterested directors so directs, in a written opinion  
88 by independent legal counsel other than an attorney, or a firm having associated with it an  
89 attorney, who has been retained by or who has performed services for the corporation or  
90 any person to be indemnified within the past five years;

91 (c) By the shareholders;

92 (d) By the court of common pleas or the court in which the action, suit, or  
93 proceeding referred to in division (E)(1) or (2) of this section was brought.

94 Any determination made by the disinterested directors under division (E)(4)(a) or  
95 by independent legal counsel under division (E)(4)(b) of this section shall be promptly  
96 communicated to the person who threatened or brought the action or suit by or in the  
97 right of the corporation under division (E)(2) of this section, and, within ten days after  
98 receipt of such notification, such person shall have the right to petition the court of  
99 common pleas or the court in which such action or suit was brought to review the  
100 reasonableness of such determination.

101 (5)(a) Unless at the time of a director's act or omission that is the subject of an  
102 action, suit, or proceeding referred to in division (E)(1) or (2) of this section, the articles  
103 or the regulations of a corporation state, by specific reference to this division, that the  
104 provisions of this division do not apply to the corporation and unless the only liability  
105 asserted against a director in an action, suit, or proceeding referred to in division (E)(1) or  
106 (2) of this section is pursuant to section 1701.95 of the Revised Code, expenses,  
107 including attorney's fees, incurred by a director in defending the action, suit, or  
108 proceeding shall be paid by the corporation as they are incurred, in advance of the final  
109 disposition of the action, suit, or proceeding, upon receipt of an undertaking by or on  
110 behalf of the director in which he agrees to do both of the following:

111 (i) Repay such amount if it is proved by clear and convincing evidence in a court  
112 of competent jurisdiction that his action or failure to act involved an act or omission  
113 undertaken with deliberate intent to cause injury to the corporation or undertaken with  
114 reckless disregard for the best interests of the corporation;

115 (ii) Reasonably cooperate with the corporation concerning the action, suit, or  
116 proceeding.

117 (b) Expenses, including attorney’s fees, incurred by a director, trustee, officer,  
118 employee, member, manager, or agent in defending any action, suit, or proceeding  
119 referred to in division (E)(1) or (2) of this section, may be paid by the corporation as they  
120 are incurred, in advance of the final disposition of the action, suit, or proceeding, as  
121 authorized by the directors in the specific case, upon receipt of an undertaking by or on  
122 behalf of the director, trustee, officer, employee, member, manager, or agent to repay  
123 such amount, if it ultimately is determined that he is not entitled to be indemnified by the  
124 corporation.

125 (6) The indemnification or advancement of expenses authorized by this section  
126 shall not be exclusive of, and shall be in addition to, any other rights granted to those  
127 seeking indemnification or advancement of expenses under the articles, the regulations,  
128 any agreement, a vote of shareholders or disinterested directors, or otherwise, both as to  
129 action in their official capacities and as to action in another capacity while holding their  
130 offices or positions, and shall continue as to a person who has ceased to be a director,  
131 trustee, officer, employee, member, manager, or agent and shall inure to the benefit of the  
132 heirs, executors, and administrators of such a person. A right to indemnification or to  
133 advancement of expenses arising under a provision of the articles or the regulations shall  
134 not be eliminated or impaired by an amendment to such provision after the occurrence of  
135 the act or omission that becomes the subject of the civil, criminal, administrative or  
136 investigative action, suit or proceeding for which indemnification or advancement of  
137 expenses is sought, unless the provision in effect at the time of such act or omission  
138 explicitly authorizes such elimination or impairment after such action or omission has  
139 occurred.

140 (7) A corporation may purchase and maintain insurance or furnish similar  
141 protection, including, but not limited to, trust funds, letters of credit, or self-insurance, on  
142 behalf of or for any person who is or was a director, officer, employee, or agent of the  
143 corporation, or is or was serving at the request of the corporation as a director, trustee,  
144 officer, employee, member, manager, or agent of another corporation, domestic or  
145 foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture,  
146 trust, or other enterprise, against any liability asserted against him and incurred by him in  
147 any such capacity, or arising out of his status as such, whether or not the corporation  
148 would have the power to indemnify him against such liability under this section.  
149 Insurance may be purchased from or maintained with a person in which the corporation  
150 has a financial interest.

151 (8) The authority of a corporation to indemnify persons pursuant to division  
152 (E)(1) or (2) of this section does not limit the payment of expenses as they are incurred,  
153 indemnification, insurance, or other protection that may be provided pursuant to divisions  
154 (E)(5), (6), and (7) of this section. Divisions (E)(1) and (2) of this section do not create  
155 any obligation to repay or return payments made by the corporation pursuant to division  
156 (E)(5), (6), or (7).

157 (9) As used in division (E) of this section, “corporation” includes all constituent  
158 entities in a consolidation or merger and the new or surviving corporation, so that any  
159 person who is or was a director, officer, employee, trustee, member, manager, or agent of

160 such a constituent entity, or is or was serving at the request of such constituent entity as a  
161 director, trustee, officer, employee, member, manager, or agent of another corporation,  
162 domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership,  
163 joint venture, trust, or other enterprise, shall stand in the same position under this section  
164 with respect to the new or surviving corporation as he would if he had served the new or  
165 surviving corporation in the same capacity.

166 (F) In carrying out the purposes stated in its articles and subject to limitations  
167 prescribed by law or in its articles, a corporation may:

168 (1) Purchase or otherwise acquire, lease as lessee, invest in, hold, use, lease as  
169 lessor, encumber, sell, exchange, transfer, and dispose of property of any description or  
170 any interest in such property;

171 (2) Make contracts;

172 (3) Form or acquire the control of other corporations, domestic or foreign,  
173 whether nonprofit or for profit;

174 (4) Be a partner, member, associate, or participant in other enterprises or ventures,  
175 whether profit or nonprofit;

176 (5) Conduct its affairs in this state and elsewhere;

177 (6) Borrow money, and issue, sell, and pledge its notes, bonds, and other  
178 evidences of indebtedness, and secure any of its obligations by mortgage, pledge, or deed  
179 of trust of all or any of its property, and guarantee or secure obligations of any person;

180 (7) Resist a change or potential change in control of the corporation if the  
181 directors by a majority vote of a quorum determine that the change or potential change is  
182 opposed to or not in the best interests of the corporation:

183 (a) Upon consideration of the interests of the corporation's shareholders and any  
184 of the matters set forth in division (~~EF~~) of section 1701.59 of the Revised Code; or

185 (b) Because the amount or nature of the indebtedness and other obligations to  
186 which the corporation or any successor or the property of either may become subject in  
187 connection with the change or potential change in control provides reasonable grounds to  
188 believe that, within a reasonable period of time, any of the following would apply:

189 (i) The assets of the corporation or any successor would be or become less than its  
190 liabilities plus its stated capital, if any;

191 (ii) The corporation or any successor would be or become insolvent;

192 (iii) Any voluntary or involuntary proceeding under the federal bankruptcy laws  
193 concerning the corporation or any successor would be commenced by any person.

194 (8) Do all things permitted by law and exercise all authority within the purposes  
195 stated in its articles or incidental to its articles.

196 (G) Irrespective of the purposes stated in its articles, but subject to limitations  
197 stated in its articles, a corporation, in addition to the authority conferred by division (F)  
198 of this section, may invest its funds not currently needed in its business in any shares or  
199 other securities, to such extent that as a result of the investment the corporation shall not  
200 acquire control of another corporation, business, or undertaking the activities and  
201 operations of which are not incidental to the purposes stated in its articles.

202 (H) No lack of, or limitation upon, the authority of a corporation shall be asserted  
203 in any action except (1) by the state in an action by it against the corporation, (2) by or on  
204 behalf of the corporation against a director, an officer, or any shareholder as such, (3) by  
205 a shareholder as such or by or on behalf of the holders of shares of any class against the  
206 corporation, a director, an officer, or any shareholder as such, or (4) in an action  
207 involving an alleged overissue of shares. This division shall apply to any action brought  
208 in this state upon any contract made in this state by a foreign corporation.

209 **1701.59 Authority of directors - bylaws.**

210 (A) Except where the law, the articles, or the regulations require action to be  
211 authorized or taken by shareholders, all of the authority of a corporation shall be  
212 exercised by or under the direction of its directors. For their own government, the  
213 directors may adopt bylaws that are not inconsistent with the articles or the regulations.  
214 The selection of a time frame for the achievement of corporate goals shall be the  
215 responsibility of the directors.

216 (B) ~~A director shall perform the director's duties as~~The only fiduciary duties a  
217 director, including owes to the corporation are the duties as a member of any committee  
218 of the directors upon which the director may serve, to act in good faith, in a manner the  
219 director reasonably believes to be in or not opposed to the best interests of the  
220 corporation, and with the care that an ordinarily prudent person in a like position would  
221 use under similar circumstances. A director serving on a committee of directors is acting  
222 as a director.

223 (C) In performing a director's duties, a director is entitled to rely on information,  
224 opinions, reports, or statements, including financial statements and other financial data,  
225 that are prepared or presented by any of the following:

226 (1) One or more directors, officers, or employees of the corporation who the  
227 director reasonably believes are reliable and competent in the matters prepared or  
228 presented;

229 (2) Counsel, public accountants, or other persons as to matters that the director  
230 reasonably believes are within the person's professional or expert competence;

231 (3) A committee of the directors upon which the director does not serve, duly  
232 established in accordance with a provision of the articles or the regulations, as to matters

233 within its designated authority, which committee the director reasonably believes to merit  
234 confidence.

235 (~~C~~D) For purposes of division (B) of this section, the following apply:

236 (1) A director shall not be found to have violated the director's duties under  
237 division (B) of this section unless it is proved by clear and convincing evidence that the  
238 director has not acted in good faith, in a manner the director reasonably believes to be in  
239 or not opposed to the best interests of the corporation, or with the care that an ordinarily  
240 prudent person in a like position would use under similar circumstances, in any action  
241 brought against a director, including actions involving or affecting any of the following:

242 (a) A change or potential change in control of the corporation, including a  
243 determination to resist a change or potential change in control made pursuant to division  
244 (F)(7) of section 1701.13 of the Revised Code;

245 (b) A termination or potential termination of the director's service to the  
246 corporation as a director;

247 (c) The director's service in any other position or relationship with the  
248 corporation.

249 (2) A director shall not be considered to be acting in good faith if the director has  
250 knowledge concerning the matter in question that would cause reliance on information,  
251 opinions, reports, or statements that are prepared or presented by the persons described in  
252 divisions (B)(1) to (3) of this section to be unwarranted.

253 (3) Nothing contained in this division limits relief available under section 1701.60  
254 of the Revised Code.

255 (~~D~~E) A director shall be liable in damages for any action that the director takes or  
256 fails to take as a director only if it is proved by clear and convincing evidence in a court  
257 of competent jurisdiction that the director's action or failure to act involved an act or  
258 omission undertaken with deliberate intent to cause injury to the corporation or  
259 undertaken with reckless disregard for the best interests of the corporation. Nothing  
260 contained in this division affects the liability of directors under section 1701.95 of the  
261 Revised Code or limits relief available under section 1701.60 of the Revised Code. This  
262 division does not apply if, and only to the extent that, at the time of a director's act or  
263 omission that is the subject of complaint, the articles or the regulations of the corporation  
264 state by specific reference to this division that the provisions of this division do not apply  
265 to the corporation.

266 (~~E~~F) For purposes of this section, a director, in determining what the director  
267 reasonably believes to be in the best interests of the corporation, shall consider the  
268 interests of the corporation's shareholders and, in the director's discretion, may consider  
269 any of the following:

270 (1) The interests of the corporation's employees, suppliers, creditors, and  
271 customers;

272 (2) The economy of the state and nation;

273 (3) Community and societal considerations;

274 (4) The long-term as well as short-term interests of the corporation and its  
275 shareholders, including the possibility that these interests may be best served by the  
276 continued independence of the corporation.

277 (~~FG~~) Nothing contained in division (~~CD~~) or (~~DE~~) of this section affects the duties  
278 of either of the following:

279 (1) A director who acts in any capacity other than the director's capacity as a  
280 director;

281 (2) A director of a corporation that does not have issued and outstanding shares  
282 that are listed on a national securities exchange or are regularly quoted in an over-the-  
283 counter market by one or more members of a national or affiliated securities association,  
284 who votes for or assents to any action taken by the directors of the corporation that, in  
285 connection with a change in control of the corporation, directly results in the holder or  
286 holders of a majority of the outstanding shares of the corporation receiving a greater  
287 consideration for their shares than other shareholders.

288 **1702.12 Authority of nonprofit corporation.**

289 (A) A corporation may sue and be sued.

290 (B) A corporation may adopt and alter a corporate seal and use it or a facsimile of  
291 it, but failure to affix the corporate seal shall not affect the validity of any instrument.

292 (C) Unless otherwise provided in the articles, a corporation may take property of  
293 any description, or any interest in property, by gift, devise, or bequest.

294 (D) Subject to limitations prescribed by law or in its articles, a corporation may  
295 make donations for the public welfare, for religious, charitable, scientific, literary, or  
296 educational purposes, or in furtherance of any of its purposes.

297 (E)(1) A corporation may indemnify or agree to indemnify any person who was or  
298 is a party, or is threatened to be made a party, to any threatened, pending, or completed  
299 civil, criminal, administrative, or investigative action, suit, or proceeding, other than an  
300 action by or in the right of the corporation, by reason of the fact that the person is or was  
301 a director, officer, employee, or agent of or a volunteer of the corporation, or is or was  
302 serving at the request of the corporation as a director, officer, employee, member,  
303 manager, or agent of or a volunteer of another domestic or foreign nonprofit corporation  
304 or business corporation, a limited liability company, or a partnership, joint venture, trust,  
305 or other enterprise, against expenses, including attorney's fees, judgments, fines, and

306 amounts paid in settlement actually and reasonably incurred by the person in connection  
307 with such action, suit, or proceeding, if the person acted in good faith and in a manner the  
308 person reasonably believed to be in or not opposed to the best interests of the corporation,  
309 and, with respect to any criminal action or proceeding, if the person had no reasonable  
310 cause to believe the person's conduct was unlawful. The termination of any action, suit,  
311 or proceeding by judgment, order, settlement, or conviction, or upon a plea of nolo  
312 contendere or its equivalent, shall not create, of itself, a presumption that the person did  
313 not act in good faith and in a manner the person reasonably believed to be in or not  
314 opposed to the best interests of the corporation, and, with respect to any criminal action  
315 or proceeding, a presumption that the person had reasonable cause to believe that the  
316 person's conduct was unlawful.

317 (2) A corporation may indemnify or agree to indemnify any person who was or is  
318 a party, or is threatened to be made a party, to any threatened, pending, or completed  
319 action or suit by or in the right of the corporation to procure a judgment in its favor, by  
320 reason of the fact that the person is or was a director, officer, employee, or agent of or a  
321 volunteer of the corporation, or is or was serving at the request of the corporation as a  
322 director, officer, employee, member, manager, or agent of or a volunteer of another  
323 domestic or foreign nonprofit corporation or business corporation, a limited liability  
324 company, or a partnership, joint venture, trust, or other enterprise against expenses,  
325 including attorney's fees, actually and reasonably incurred by the person in connection  
326 with the defense or settlement of such action or suit, if the person acted in good faith and  
327 in a manner the person reasonably believed to be in or not opposed to the best interests of  
328 the corporation, except that no indemnification shall be made in respect of any of the  
329 following:

330 (a) Any claim, issue, or matter as to which the person is adjudged to be liable for  
331 negligence or misconduct in the performance of the person's duty to the corporation  
332 unless, and only to the extent that, the court of common pleas or the court in which the  
333 action or suit was brought determines, upon application, that, despite the adjudication of  
334 liability but in view of all the circumstances of the case, the person is fairly and  
335 reasonably entitled to indemnity for such expenses as the court of common pleas or such  
336 other court considers proper;

337 (b) Any action or suit in which liability is asserted against a director and that  
338 liability is asserted only pursuant to section 1702.55 of the Revised Code.

339 (3) To the extent that a director, officer, employee, member, manager, agent, or  
340 volunteer has been successful on the merits or otherwise in defense of any action, suit, or  
341 proceeding referred to in division (E)(1) or (2) of this section, or in defense of any claim,  
342 issue, or matter in such an action, suit, or proceeding, the person shall be indemnified  
343 against expenses, including attorney's fees, actually and reasonably incurred by the  
344 person in connection with that action, suit, or proceeding.

345 (4) Unless ordered by a court and subject to division (E)(3) of this section, any  
346 indemnification under division (E)(1) or (2) of this section shall be made by the  
347 corporation only as authorized in the specific case, upon a determination that

348 indemnification of the director, officer, employee, member, manager, agent, or volunteer  
349 is proper in the circumstances because the person has met the applicable standard of  
350 conduct set forth in division (E)(1) or (2) of this section. Such determination shall be  
351 made in any of the following manners:

352 (a) By a majority vote of a quorum consisting of directors of the indemnifying  
353 corporation who were not and are not parties to or threatened with the action, suit, or  
354 proceeding referred to in division (E)(1) or (2) of this section;

355 (b) Whether or not a quorum as described in division (E)(4)(a) of this section is  
356 obtainable, and if a majority of a quorum of disinterested directors so directs, in a written  
357 opinion by independent legal counsel other than an attorney, or a firm having associated  
358 with it an attorney, who has been retained by or who has performed services for the  
359 corporation or any person to be indemnified within the past five years;

360 (c) By the members;

361 (d) By the court of common pleas or the court in which the action, suit, or  
362 proceeding referred to in division (E)(1) or (2) of this section was brought.

363 If an action or suit by or in the right of the corporation is involved, any  
364 determination made by the disinterested directors under division (E)(4)(a) of this section  
365 or by independent legal counsel under division (E)(4)(b) of this section shall be  
366 communicated promptly to the person who threatened or brought the action or suit under  
367 division (E)(2) of this section, and, within ten days after receipt of such notification, such  
368 person shall have the right to petition the court of common pleas or the court in which  
369 such action or suit was brought to review the reasonableness of such determination.

370 (5)(a)(i) Unless, at the time of a director's or volunteer's act or omission that is  
371 the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this  
372 section, the articles or regulations of the corporation state, by specific reference to this  
373 division, that its provisions do not apply to the corporation, or unless the only liability  
374 asserted against a director in an action, suit, or proceeding referred to in division (E)(1) or  
375 (2) of this section is pursuant to section 1702.55 of the Revised Code, or unless division  
376 (E)(5)(a)(ii) of this section applies, the expenses incurred by the director or volunteer in  
377 defending the action, suit, or proceeding, including attorney's fees, shall be paid by the  
378 corporation. Upon the request of the director or volunteer and in accordance with division  
379 (E)(5)(b) of this section, those expenses shall be paid as they are incurred, in advance of  
380 the final disposition of the action, suit, or proceeding.

381 (ii) Notwithstanding division (E)(5)(a)(i) of this section, the expenses incurred by  
382 a director or volunteer in defending an action, suit, or proceeding referred to in division  
383 (E)(1) or (2) of this section, including attorney's fees, shall not be paid by the corporation  
384 upon the final disposition of the action, suit, or proceeding, or, if paid in advance of the  
385 final disposition of the action, suit, or proceeding, shall be repaid to the corporation by  
386 the director or volunteer, if it is proved, by clear and convincing evidence, in a court with  
387 jurisdiction that the act or omission of the director or volunteer was one undertaken with

388 a deliberate intent to cause injury to the corporation or was one undertaken with a  
389 reckless disregard for the best interests of the corporation.

390 (b) Expenses, including attorney's fees, incurred by a director, officer, employee,  
391 member, manager, agent, or volunteer in defending any action, suit, or proceeding  
392 referred to in division (E)(1) or (2) of this section may be paid by the corporation as they  
393 are incurred, in advance of the final disposition of the action, suit, or proceeding, as  
394 authorized by the directors in the specific case, upon receipt of an undertaking by or on  
395 behalf of the director, officer, employee, member, manager, agent, or volunteer to repay  
396 the amount if it ultimately is determined that the person is not entitled to be indemnified  
397 by the corporation.

398 (6) The indemnification or advancement of expenses authorized by this section is  
399 not exclusive of, and shall be in addition to, any other rights granted to those seeking  
400 indemnification or advancement of expenses, pursuant to the articles, the regulations, any  
401 agreement, a vote of members or disinterested directors, or otherwise, both as to action in  
402 their official capacities and as to action in another capacity while holding their offices or  
403 positions, and shall continue as to a person who has ceased to be a director, officer,  
404 employee, member, manager, agent, or volunteer and shall inure to the benefit of the  
405 heirs, executors, and administrators of such a person. A right to indemnification or to  
406 advancement of expenses arising under a provision of the articles or the regulations shall  
407 not be eliminated or impaired by an amendment to such provision after the occurrence of  
408 the act or omission that becomes the subject of the civil, criminal, administrative or  
409 investigative action, suit or proceeding for which indemnification or advancement of  
410 expenses is sought, unless the provision in effect at the time of such act or omission  
411 explicitly authorizes such elimination or impairment after such action or omission has  
412 occurred.

413 (7) A corporation may purchase and maintain insurance, or furnish similar  
414 protection, including, but not limited to, trust funds, letters of credit, or self-insurance, for  
415 or on behalf of any person who is or was a director, officer, employee, agent, or volunteer  
416 of the corporation, or is or was serving at the request of the corporation as a director,  
417 officer, employee, member, manager, agent, or volunteer of another domestic or foreign  
418 nonprofit corporation or business corporation, a limited liability company, or a  
419 partnership, joint venture, trust, or other enterprise, against any liability asserted against  
420 the person and incurred by the person in any such capacity, or arising out of the person's  
421 status as such, whether or not the corporation would have the power to indemnify the  
422 person against that liability under this section. Insurance may be so purchased from or so  
423 maintained with a person in which the corporation has a financial interest.

424 (8) The authority of a corporation to indemnify persons pursuant to division  
425 (E)(1) or (2) of this section does not limit the payment of expenses as they are incurred,  
426 in advance of the final disposition of an action, suit, or proceeding, pursuant to division  
427 (E)(5) of this section or the payment of indemnification, insurance, or other protection  
428 that may be provided pursuant to division (E)(6) or (7) of this section. Divisions (E)(1)  
429 and (2) of this section do not create any obligation to repay or return payments made by a  
430 corporation pursuant to division (E)(5), (6), or (7) of this section.

431 (9) As used in division (E) of this section, “corporation” includes all constituent  
432 corporations in a consolidation or merger, and the new or surviving corporation, so that  
433 any person who is or was a director, officer, employee, agent, or volunteer of a  
434 constituent corporation or is or was serving at the request of a constituent corporation as a  
435 director, officer, employee, member, manager, agent, or volunteer of another domestic or  
436 foreign nonprofit corporation or business corporation, a limited liability company, or a  
437 partnership, joint venture, trust, or other enterprise, shall stand in the same position under  
438 this section with respect to the new or surviving corporation as the person would if the  
439 person had served the new or surviving corporation in the same capacity.

440 (F) In carrying out the purposes stated in its articles and subject to limitations  
441 prescribed by law or in its articles, a corporation may do the following:

442 (1) Purchase or otherwise acquire, lease as lessee, invest in, hold, use, lease as  
443 lessor, encumber, sell, exchange, transfer, and dispose of property of any description or  
444 any interest in property of any description;

445 (2) Make contracts;

446 (3) Form or acquire the control of other domestic or foreign nonprofit  
447 corporations or business corporations;

448 (4) Be a partner, member, associate, or participant in other enterprises or ventures,  
449 whether profit or nonprofit;

450 (5) Borrow money, and issue, sell, and pledge its notes, bonds, and other  
451 evidences of indebtedness, and secure any of its obligations by mortgage, pledge, or deed  
452 of trust, of all or any of its property, and guarantee or secure obligations of any person;

453 (6) Become a member of another corporation;

454 (7) Conduct its affairs in this state and elsewhere;

455 (8) Resist a change or potential change in control of the corporation, if the  
456 directors, by a majority vote of a quorum, determine that the change or potential change  
457 is opposed to or not in the best interests of the corporation, upon consideration of any of  
458 the matters set forth in division (~~EE~~) of section 1702.30 of the Revised Code;

459 (9) Do all things permitted by law and exercise all authority within the purposes  
460 stated in its articles or incidental to those purposes.

461 (G) Irrespective of the purposes stated in its articles, but subject to limitations or  
462 prohibitions stated in its articles, a corporation, in addition to the authority conferred by  
463 division (F) of this section, may invest its funds not currently needed in carrying out its  
464 purposes in any shares or other securities of another nonprofit corporation or business  
465 corporation, or another business or undertaking.

466 (H)(1) Notwithstanding any other provision of this section to the contrary, no  
467 corporation that is a “private foundation,” as defined in section 509 of the Internal  
468 Revenue Code, shall do the following:

469 (a) Engage in any act of “self-dealing,” as defined in section 4941(d) of the  
470 Internal Revenue Code, that would give rise to any liability for any tax imposed by  
471 section 4941 of the Internal Revenue Code;

472 (b) Retain any “excess business holdings,” as defined in section 4943(c) of the  
473 Internal Revenue Code, that would give rise to any liability for any tax imposed by  
474 section 4943 of the Internal Revenue Code;

475 (c) Make any investment that would jeopardize the carrying out of any of its  
476 exempt purposes, within the meaning of section 4944 of the Internal Revenue Code, so as  
477 to give rise to any liability for any tax imposed by that section;

478 (d) Make any “taxable expenditures,” as defined in section 4945(d) of the Internal  
479 Revenue Code, that would give rise to any liability for any tax imposed by section 4945  
480 of the Internal Revenue Code.

481 (2) Each corporation that is a “private foundation,” as defined in section 509 of  
482 the Internal Revenue Code, shall, for the purposes specified in its articles, distribute at  
483 such time and in such manner, for each taxable year, amounts at least sufficient to avoid  
484 liability for any tax imposed by section 4942 of the Internal Revenue Code.

485 (3) Divisions (H)(1) and (2) of this section apply to all corporations described in  
486 them, whether or not contrary to the provisions of the articles or regulations of such a  
487 corporation, except that divisions (H)(1) and (2) of this section do not apply to a  
488 corporation in existence on September 17, 1971, to the extent that such corporation  
489 provides to the contrary by amendment to its articles adopted after that date.

490 (4) Violation of a provision of division (H)(1) or (2) of this section by a  
491 corporation to which the provisions of those divisions are applicable is not cause for  
492 cancellation of its articles. No director or officer of a corporation to which the provisions  
493 of division (H)(1) or (2) of this section are applicable is personally liable for a violation  
494 of a prohibition or requirement of those provisions, unless the director or officer  
495 participated in such violation knowing that it was a violation, and no director or officer is  
496 personally liable if such violation was not willful and was due to reasonable cause, except  
497 that this division does not exonerate a director or officer from any responsibility or  
498 liability to which the director or officer is subject under any other rule of law, whether or  
499 not duplicated in division (H)(1) or (2) of this section.

500 (5) Except as provided in division (H)(4) of this section, nothing in division (H)  
501 of this section impairs the rights and powers of the courts or the attorney general of this  
502 state with respect to any corporation.

503 (6) As used in division (H) of this section, “Internal Revenue Code” means the  
504 “Internal Revenue Code of 1986,” 100 Stat. 2085, 26 U.S.C. 1, as amended.

505 (I)(1) No lack of, or limitation upon, the authority of a corporation shall be  
506 asserted in any action except as follows:

507 (a) By the state in an action by it against the corporation;

508 (b) By or on behalf of the corporation against a director, an officer, or a member  
509 as such;

510 (c) By a member as such or by or on behalf of the members against the  
511 corporation, a director, an officer, or a member as such.

512 (2) Division (I)(1) of this section shall apply to any action brought in this state  
513 upon any contract made in this state by a foreign corporation.

514 **1702.30 Authority of directors.**

515 (A) Except where the law, the articles, or the regulations require that action be  
516 otherwise authorized or taken, all of the authority of a corporation shall be exercised by  
517 or under the direction of its directors. For their own government, the directors may adopt  
518 bylaws that are not inconsistent with the articles or the regulations.

519 (B) ~~A director shall perform the duties of~~The only fiduciary duties a director,  
520 ~~including owes to the corporation are the duties as a member of any committee of the~~  
521 ~~directors upon which the director may serve,~~to act in good faith, in a manner the director  
522 reasonably believes to be in or not opposed to the best interests of the corporation, and  
523 with the care that an ordinarily prudent person in a like position would use under similar  
524 circumstances. A director serving on a committee of directors is acting as a director.

525 (C) In performing the duties of a director, a director is entitled to rely on  
526 information, opinions, reports, or statements, including financial statements and other  
527 financial data, that are prepared or presented by the following:

528 (1) One or more directors, officers, or employees of the corporation who the  
529 director reasonably believes are reliable and competent in the matters prepared or  
530 presented;

531 (2) Counsel, public accountants, or other persons as to matters that the director  
532 reasonably believes are within the person's professional or expert competence;

533 (3) A committee of the directors upon which the director does not serve, duly  
534 established in accordance with a provision of the articles or the regulations, as to matters  
535 within its designated authority, which committee the director reasonably believes to merit  
536 confidence.

537 (D) For purposes of division (B) of this section:

538 (1) A director shall not be found to have failed to perform the director's duties in  
539 accordance with that division, unless it is proved, by clear and convincing evidence, in an

540 action brought against the director that the director has not acted in good faith, in a  
541 manner the director reasonably believes to be in or not opposed to the best interests of the  
542 corporation, or with the care that an ordinarily prudent person in a like position would use  
543 under similar circumstances. Such an action includes, but is not limited to, an action that  
544 involves or affects any of the following:

545 (a) A change or potential change in control of the corporation;

546 (b) A termination or potential termination of the director's service to the  
547 corporation as a director;

548 (c) The director's service in any other position or relationship with the  
549 corporation.

550 (2) A director shall not be considered to be acting in good faith if the director has  
551 knowledge concerning the matter in question that would cause reliance on information,  
552 opinions, reports, or statements that are prepared or presented by the persons described in  
553 divisions (B)(1) to (3) of this section, to be unwarranted.

554 (3) The provisions of this division do not limit relief available under section  
555 1702.301 of the Revised Code.

556 ~~(D)~~(1) Subject to divisions ~~(D)~~(2) and (3) of this section, a director is liable in  
557 damages for any act that the director takes or fails to take as director only if it is proved,  
558 by clear and convincing evidence, in a court with jurisdiction that the act or omission of  
559 the director was one undertaken with a deliberate intent to cause injury to the corporation  
560 or was one undertaken with a reckless disregard for the best interests of the corporation.

561 (2) Division ~~(D)~~(1) of this section does not affect the liability of a director under  
562 section 1702.55 of the Revised Code.

563 (3) Subject to division ~~(D)~~(2) of this section, division ~~(D)~~(1) of this section  
564 does not apply if, and only to the extent that, at the time of an act or omission of a  
565 director that is the subject of complaint, the articles or the regulations of the corporation  
566 state, by specific reference to that division, that its provisions do not apply to the  
567 corporation.

568 ~~(E)~~ For purposes of this section, in determining what a director reasonably  
569 believes to be in or not opposed to the best interests of the corporation, a director shall  
570 consider the purposes of the corporation and may consider any of the following:

571 (1) The interests of the employees, suppliers, creditors, and customers of the  
572 corporation;

573 (2) The economy of this state and of the nation;

574 (3) Community and societal considerations;

575 (4) The long-term and short-term best interests of the corporation, including, but  
576 not limited to, the possibility that those interests may be best served by the continued  
577 independence of the corporation.

578 (~~FG~~) Divisions (~~CD~~) and (~~DE~~) of this section do not affect the duties of a director  
579 who acts in any capacity other than in the capacity as a director.

## 580 **Rationale for Proposal**

581 The proposed amendments to Section 1701.13(E)(6) make clear that once an act or  
582 omission has occurred for which an individual may seek indemnification or advancement  
583 of expenses, the rights to indemnity or advancement cannot be impaired. The rule is  
584 different if the provision in effect at the time of the act or omission explicitly stated that  
585 the indemnification or advancement could be eliminated or impaired. Ohio law already  
586 explicitly provides this protection for directors for advances made under Section  
587 1701.13(E)(5), but is not explicit with respect to other sources of indemnification or  
588 advancement. If the individual has a right to indemnity or advancement of expenses, that  
589 right should not be taken away with respect to actions that took place before the change.  
590 If, however, the terms of the right granted were express that those rights could be  
591 changed retroactively, then the express terms govern.

592  
593 An Ohio court might reach this result without any change to the statute. However, in  
594 *Schoon v. Troy Corp.*, 948 A.2d 1157, 1165-66 (Del. Ch. 2008), the Delaware Chancery  
595 Court allowed a retroactive change to remove protection for prior acts. The Delaware  
596 legislature was forced to amend the Delaware statute to protect the reliance expectations  
597 of corporate actors. The Committee considers it prudent to clarify Ohio law on this point.

598  
599 The proposed amendments also clarify that Section 1701.13(E)(6), which provides that  
600 Section 1701.13 is non-exclusive, extends to advancement of expenses (payments before  
601 the case is resolved) as well as indemnification payments (payments made after the  
602 matter is resolved).

603  
604 The third clarification is to make it explicit that the duties set out in Section 1701.59(B)  
605 are the only fiduciary duties that a director owes to the corporation. With the adoption of  
606 the new partnership law in Chapter 1776 in 2008, Ohio partnership law is explicit that the  
607 only fiduciary duties owed by a partner to the partnership and the other partners are those  
608 set out in Section 1776.44. The proposed revisions make corporate law similarly explicit  
609 that the duties set out in Section 1701.59(B) are the only fiduciary duties owed by a  
610 director to the corporation. The revision does not alter the duties under Section  
611 1701.59(B), and it makes no change to a director's other duties that may be imposed by  
612 state statute (for example, liability for improper dividends under Section 1701.95), or by  
613 federal law (such as duties under the Securities Act of 1933 or the Securities Exchange  
614 Act of 1934). The revision also does not change the director's potential liability for  
615 claims that can be brought directly against the director for his or her personal actions,  
616 such as participation in a fraud, or for failure of an officer/director to comply with his or  
617 her duties as an officer, such as for remittance of sales or other tax payments under  
618 chapter LVII of the Ohio Revised Code.

619

620 The Committee proposes parallel changes to Chapter 1702. Individuals acting on behalf  
621 of nonprofit corporations should also be able to rely on rights to indemnification or  
622 advancement of expenses that have been granted to them without fear of retroactive  
623 changes. Also, the duties owed by a director to the corporation under Chapter 1702  
624 parallel the duties of directors under Chapter 1701, and the explicit provisions of Chapter  
625 1776 relating to partnerships could create the same confusion under Chapter 1702 that we  
626 propose to fix in Chapter 1701