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Corporate Filings in Ohio: A Procedural Guide

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ARTICLES

CORPORATE FILINGS IN OHIO: A PROCEDURAL GUIDE

ANTHONY J. CELEBREZZE, JR.* AND JOHN J. BIANCAMANO**

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I. INTRODUCTION

THE OFFICE OF THE SECRETARY OF STATE is the official repository for records relating to profit and non-profit Ohio corporations, foreign corporations licensed to transact business in this state and a number of other business related filings. Procedures for most filings with the Secretary of State are spelled out in various chapters of the Ohio Revised Code and forms for many of the transactions are readily available. Nevertheless, more than ten percent of the documents submitted for filing in 1980 were rejected for failure to comply with Code requirements. The rejection of a document causes obvious problems for the filing party and also places a burden on the office of the Secretary of State. This article is an attempt to alleviate these problems by clarifying Ohio law and the procedure relating to the filing of articles of incorporation, corporate amendments, mergers and consolidations, statutory agents, service of summons, trade names, fictitious names, trade marks, service marks, real estate investment trusts and municipal incorporations and annexations.

Prior to 1852, corporations were created by acts of the Ohio legislature. After the passage of the Corporation Act of 1852,¹ articles of incorporation for profit corporations were required to be filed with the Secretary of State. Under the filing system used by the Secretary of State from 1852 to 1957, all original documents were retained² and a

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¹ 50 LAWS OF OHIO 274 (1852).

² Documents filed before 1957 are now stored at the Ohio Records Center, 364 South Front Street, Columbus, Ohio.

transcription was made of each document filed.³ By 1957 the original filing system had become too cumbersome to handle the increased volume of filings and as a result a microfilm system of recordkeeping was introduced.

Under the current system, documents submitted for filing are reviewed for compliance with legal requirements. If the documents are acceptable, a computer record is made of the transaction and the documents are microfilmed and then returned to the filing party. The microfilm is stored in an index card. At present there are an estimated 250,000 cards in the active file and approximately 400,000 records in the inactive file.

The files of the Corporations Department of the office of the Secretary of State are open for public inspection and most information is obtainable upon written or oral request. Certificates setting forth information in the files or certified copies of documents on file are also available. The certification fee is five dollars and there is a copying charge of one dollar per page.⁴ Forms for many transactions have been prescribed by the Secretary of State and are available upon request.

II. ARTICLES OF INCORPORATION

A. *Corporations For Profit*

The legal existence of a corporation begins when its articles of incorporation are filed with the Secretary of State.⁵ The articles of a corporation for profit must set forth:

- (1) The name of the corporation, which shall end with or include "Company," "Co.," "Corporation," "Corp.," "Incorporated," or "Inc.";
- (2) The place [city, village, or township and county] in this state where the principal office of the corporation is to be located;
- (3) The purpose or purposes for which the corporation is formed . . .;
- (4) The authorized number and the par value per share of

³ The transcription volumes and indexes are available at the Ohio Historical Center, 1982 Velma Avenue, Columbus, Ohio.

⁴ OHIO REV. CODE ANN. § 111.16(I) (Page Supp. 1979).

⁵ OHIO REV. CODE ANN. § 1701.04(D) (Page 1978). Incorporators should be aware that a separate filing must also be made with the Department of Commerce, Division of Securities pursuant to chapter 1707 of the Ohio Revised Code. In addition, corporations are subject to a franchise tax payable to the Ohio Department of Taxation. Other Ohio agencies which a new corporation may be required to contact include the Bureau of Employment Services (concerning unemployment compensation contributions) and the Bureau of Workers' Compensation. Finally, any profit or non-profit corporation involved in the solicitation of funds of charitable purposes may be required to register with the Charitable Foundations Section of the Office of the Attorney General.

shares with par value, and the authorized number of shares without par value . . . ; the express terms, if any, of the shares; and, if the shares are classified, the designation of each class, the authorized number and par value per share, if any, of the shares of each class, and the express terms of the shares of each class;

(5) The amount of stated capital with which the corporation will begin business, which shall not be less than five hundred dollars. . . .⁶

The articles must be signed by at least one incorporator⁷ whose name should be typed or printed beneath the signature. The articles must also be accompanied by a written appointment of statutory agent.⁸

The filing fee for a profit corporation is based on the number of shares of capital stock which the corporation is authorized to issue and is determined according to the schedule set forth in section 111.16(A) of the Ohio Revised Code.⁹ The minimum fee that must be paid is seventy-five dollars. Based on the schedule in section 111.16(A), the seventy-five dollar minimum allows the corporation to authorize 750 shares.¹⁰ It is advisable to authorize 750 shares when the original articles are filed even if a lesser number will initially be issued. This will minimize the filing fee for subsequent amendments to increase the number of shares since that fee is based on the number of new shares authorized.¹¹

A corporation for profit may be formed for any lawful purpose other than for carrying on the practice of a profession.¹² In drafting the purpose clause, care should be taken to avoid language which suggests the rendering of professional services. For example, a purpose clause which refers to the design of buildings might suggest that the corporation will practice the profession of engineering.¹³ In such cases, the articles will be returned to the sender to obtain a clarification. The Code authorizes the use of a general purpose clause in the articles of profit corporations.¹⁴

⁶ *Id.* § 1701.04(A). The included definition of the word "place" in § 1701.04(A)(2) is based on [1960] Op. Ohio Att'y Gen. 473 (1960) (Opinion No. 1507).

⁷ OHIO REV. CODE ANN. § 1701.04(A) (Page 1978).

⁸ *Id.* § 1701.04(C). For a more detailed discussion of the requirements pertaining to statutory agents, see notes 202-216 *infra* and accompanying text.

⁹ OHIO REV. CODE ANN. § 111.16(A) (Page Supp. 1979).

¹⁰ *Id.*

¹¹ *Id.* § 111.16(B)(2).

¹² OHIO REV. CODE ANN. § 1701.03 (Page 1978). In order to render professional services, corporations must comply with the requirements of OHIO REV. CODE ANN. § 1785.01-08 (Page 1978). For a more detailed discussion of these requirements see notes 26-36 *infra* and accompanying text.

¹³ OHIO REV. CODE ANN. § 4733.01(B) (Page 1977).

¹⁴ OHIO REV. CODE ANN. § 1701.04(A)(3) (Page 1978).

B. *Non-Profit Corporations*

The Ohio Revised Code defines a non-profit corporation as "a corporation which is not formed for the pecuniary gain or profit of, and whose net earnings or any part thereof is not distributable to, its members, trustees, officers, or other private persons. . . ."¹⁵ The articles of a non-profit corporation must set forth:

- (1) The name of the corporation;
- (2) The place in this state where the principal office of the corporation is to be located;
- (3) The purpose or purposes for which the corporation is formed;
- (4) The names and addresses of not less than three natural persons who are to be initial trustees.¹⁶

Since the Ohio Revised Code does not authorize the use of a general purpose clause in the articles of a non-profit corporation, a specific non-profit purpose must be set forth.¹⁷

As in the case of corporations for profit, the articles must be signed by at least one incorporator whose name should be typed or printed beneath the signature.¹⁸ The articles must be accompanied by a written appointment of a statutory agent.¹⁹ A twenty-five dollar filing fee must also be included.²⁰

If the non-profit corporation intends to apply for a federal tax exemption under section 501(c)(3) of the Internal Revenue Code,²¹ the articles of incorporation must contain provisions dealing with, among other things, distribution of net earnings, political activity and dissolution. An example of the appropriate language may be obtained from any local Internal Revenue Service office.

Non-profit corporations are required to file a statement of continued existence within each five years after the date of incorporation or of the last corporate filing.²² For example, if a corporation is formed in 1980, the statement of continued existence is due in 1985. However, if the corporation files an amendment in 1983, the statement becomes due in 1988. A statement of continued existence must set forth the name of the corporation, the location of its principal office, the date of incorporation, the fact that the corporation is still actively engaged in exercising its

¹⁵ *Id.* § 1702.01(C).

¹⁶ *Id.* § 1702.04(A).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* § 1702.04(C). For a more detailed discussion of the requirements pertaining to statutory agents, see notes 202-216 *infra* and accompanying text.

²⁰ OHIO REV. CODE ANN. § 111.16(A)(1) (Page Supp. 1979).

²¹ I.R.C. § 501(C)(3).

²² OHIO REV. CODE ANN. § 1702.59 (Page Supp. 1979).

corporate privileges and the name and address of the corporation's statutory agent.²³ It must be signed by a trustee, corporate officer or three members in good standing and must be accompanied by a five dollar filing fee.²⁴

When a statement of continued existence is due, the Secretary of State sends notice of this fact to the non-profit corporation at its last known address. If no response is received, the Secretary of State will cancel the articles of the delinquent corporation and will send it a notice of this cancellation. The name of any corporation so cancelled is reserved for one year. The corporation may then be reinstated by filing an application for reinstatement with a ten dollar fee.²⁵

C. Professional Corporations

In order to render professional services, a corporation must be formed in compliance with the requirements of chapter 1785 of the Ohio Revised Code. The Code defines professional service as "[A]ny type of professional service which may be performed only pursuant to a license, certificate, or other legal authorization . . . to certified public accountants, licensed public accountants, architects, attorneys, chiropractors, dentists, pharmacists, optometrists, physicians and surgeons, and practitioners of limited branches of medicine or surgery as defined in section 4731.15 of the Revised Code, psychologists, professional engineers, and veterinarians."²⁶

Opinions of the Ohio Attorney General have further developed the meaning of "professional service." For example, podiatrists render professional services within the meaning of this chapter,²⁷ while physical therapists do not.²⁸

Corporations formed under chapter 1785 must have as their sole purpose the practice of a single profession except that engineers and architects may combine their practices into one corporation.²⁹ Professional corporations may render professional services only through officers, employees and agents who are licensed or otherwise legally authorized to practice the profession within Ohio.³⁰ In addition, ownership of shares in a professional corporation is restricted to these licensed professionals.³¹ In all other respects, professional corporations must comply

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ OHIO REV. CODE ANN. § 1785.01 (Page 1978).

²⁷ [1979] Op. Ohio Att'y Gen. 2-22 (1979) (Opinion No. 009).

²⁸ [1980] Op. Ohio Att'y Gen. 2-28 (1980) (Opinion No. 004).

²⁹ OHIO REV. CODE ANN. § 1785.01(B) (Page 1978).

³⁰ *Id.* § 1785.03.

³¹ *Id.* § 1785.05.

with the same requirements and procedures of incorporation as corporations organized under chapter 1701, except that chapter 1785 takes precedence in the event of a conflict.³²

To ensure compliance with the limitation on share ownership, professional corporations must file an annual report listing the names and addresses of all shareholders and certifying that all shareholders are duly licensed or otherwise legally authorized to render a professional service in Ohio.³³ A copy of the report form is mailed to all professional corporations by the Secretary of State during the last week of June. It must be completed and filed with the Secretary of State along with a ten dollar fee, between June 30 and July 31. If a corporation fails to file the report by July 31, the Secretary of State will send notice of the failure by certified mail to the last known address of the corporation or to its statutory agent. If the report is not filed after an additional grace period of thirty days, the articles of incorporation are cancelled and notice is given to the corporation by certified mail.³⁴ A corporation whose articles have been cancelled may return to good standing by filing an application for reinstatement with a ten dollar fee and all required annual reports.³⁵ If the cancellation has been in effect for more than one year, the corporation must also submit a D-3 certificate which may be obtained from the Ohio Department of Taxation.³⁶

D. *Other Types of Corporations*

The approval of state agencies other than the Secretary of State must be obtained prior to the formation of several special types of corporations. In addition to those discussed below, approval from other agencies is necessary for agricultural societies,³⁷ humane societies,³⁸ religious printing and publishing houses,³⁹ cathedrals and religious societies,⁴⁰ and YMCA's.⁴¹

1. Community Improvement Corporations

Community improvement corporations, as defined in Ohio Revised Code chapter 1724, may be organized as non-profit corporations in the

³² *Id.* § 1785.08. See notes 5-14 *supra* and accompanying text.

³³ OHIO REV. CODE ANN. § 1785.06 (Page Supp. 1979).

³⁴ *Id.*

³⁵ *Id.*

³⁶ The Franchise Tax Division of the Ohio Department of Taxation is located at 1030 Freeway Drive North, Columbus, Ohio, 43229.

³⁷ OHIO REV. CODE ANN. § 1711.01-.02 (Page 1978).

³⁸ *Id.* § 1717.03.

³⁹ *Id.* § 1715.15.

⁴⁰ *Id.* § 1715.18.

⁴¹ *Id.* § 1715.23.

manner provided in section 1702.04.⁴² The articles of a community improvement corporation and all subsequent filings must be submitted to the Ohio Attorney General for approval. If the filing complies with chapter 1724, the Attorney General endorses his approval on the documents and sends them to the Secretary of State for filing.⁴³

2. Insurance Companies and Insurance Agencies

Insurance companies must obtain approval of the Ohio Attorney General prior to filing articles of incorporation, amendments or mergers.⁴⁴ Prior approval of the Attorney General is not a prerequisite to the filing of articles for corporations which will operate insurance agencies. However, these corporations must obtain a license from the Superintendent of Insurance before they may solicit or sell insurance in the state of Ohio.⁴⁵ Under regulations promulgated by the Department of Insurance, the name of a corporation operating an insurance agency must contain the word "agency" unless a waiver is obtained.⁴⁶ The Department of Insurance has also drafted a suggested purpose clause for corporations conducting an insurance agency business.⁴⁷

3. Corporations Regulated by the Department of Public Welfare

Corporations whose purposes include the care of dependent, neglected, abused or delinquent children or placement of such children in private homes must obtain approval from the Ohio Department of Public Welfare prior to filing articles of incorporation, amendments, mergers or consolidations.⁴⁸ Upon receipt of a certification from that agency, the documents may be filed with the Secretary of State.

4. Banks, Building and Loan Associations, Credit Unions

Banks and Building and Loan Associations are governed by title 11 of the Ohio Revised Code and must comply with the requirements of chapter 1701 to the extent that it is consistent with title 11.⁴⁹ Articles of

⁴² *Id.* § 1724.01. A community improvement corporation is defined as "a corporation not for profit . . . organized . . . for the sole purpose of advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area." *Id.*

⁴³ *Id.* § 1724.04.

⁴⁴ OHIO REV. CODE ANN. § 3907.03 (Page 1971).

⁴⁵ *Id.* § 3905.01.

⁴⁶ OHIO ADMINISTRATIVE CODE, Dept. of Insurance Rule 3901-1-10(C)(8) (1978).

⁴⁷ This suggested purpose clause is available from the Ohio Department of Insurance, 2100 Stella Court, Columbus, Ohio, 43215.

⁴⁸ OHIO REV. CODE ANN. § 5103.04 (Page Supp. 1979).

⁴⁹ But note that § 1701.07 which sets forth the requirement of a statutory agent by the very terms of its subsection (O) provides that this section is inapplicable to banks. *Id.* § 1701.07.

incorporation for banks⁵⁰ and all subsequent bank amendments, mergers and dissolutions⁵¹ must initially be presented to the Superintendent of Banks. Corporate filings by building and loan associations must first be submitted to the Superintendent of Building and Loan Associations.⁵² A certificate of approval from the appropriate agency must accompany the documents of these institutions when they are presented to the Secretary of State for recording.⁵³

Filing fees for documents submitted to the Secretary of State by banks are the same as the fees for profit corporations formed under chapter 1701.⁵⁴ The filing fee for articles of incorporation of a building and loan association is one hundred dollars.⁵⁵ The fee for amendments to the articles of building and loan associations is thirty-five dollars if the number of authorized shares is increased and twenty-five dollars if there is no increase in shares.⁵⁶

Credit unions may be organized as corporations under chapter 1733 of the Ohio Revised Code. Credit union articles of incorporation,⁵⁷ amendments,⁵⁸ mergers,⁵⁹ and dissolutions⁶⁰ must first be submitted to the Superintendent of Credit Unions. The Superintendent has thirty days to approve or disapprove the articles and regulations.⁶¹ Upon approval, they are forwarded to the Secretary of State for filing.⁶² The fee for filing original articles of incorporation is thirty-five dollars; there is a twenty-five dollar fee for any amendments.⁶³

E. *Corporate Names*

The problems most frequently encountered in forming a corporation involve the choice of a corporate name. The Ohio Revised Code prohibits the filing of articles of incorporation or a trade name if the proposed name is likely to mislead the public or if the name is not distinguishable from the name of an existing corporation or a registered trade name.⁶⁴ A

⁵⁰ OHIO REV. CODE ANN. § 1103.06 (Page 1968).

⁵¹ *Id.* § 1103.14.

⁵² *Id.* § 1151.02-.03.

⁵³ *Id.* §§ 1103.07(E), 1151.03.

⁵⁴ See note 9 *supra* and accompanying text.

⁵⁵ OHIO REV. CODE ANN. § 111.16(C) (Page Supp. 1979).

⁵⁶ *Id.*

⁵⁷ *Id.* § 1733.07(C).

⁵⁸ OHIO REV. CODE ANN. § 1733.33(E) (Page 1978).

⁵⁹ OHIO REV. CODE ANN. § 1733.34(B) (Page Supp. 1979).

⁶⁰ *Id.* § 1733.35.

⁶¹ *Id.* § 1733.07(D).

⁶² *Id.* § 1733.07(E).

⁶³ *Id.* § 111.16(E).

⁶⁴ OHIO REV. CODE ANN. §§ 1701.05(A) (for profit corporations), 1702.05(A) (for

name is misleading if it conveys a false impression of the nature of a corporation.⁶⁵ A name is not distinguishable from an existing name if the difference between the two names consists of (1) alternate spelling, or hyphenation of words; (2) variations in spacing or symbols; (3) inverted order of substantially the same words; (4) the addition or deletion of a geographical designation; (5) the addition of insubstantial descriptive terms such as "sales" or "service"; or (6) the addition of a term which implies a relationship with an existing corporation.⁶⁶

A name which is not available because of a conflict may be used if consent is obtained from the existing corporation or from the owner of the previously registered trade name. If the prior user is a corporation, the consent must be evidenced by a resolution of the directors or trustees of the corporation and certified by its secretary or assistant secretary.⁶⁷

Prior to filing articles of incorporation, the availability of a proposed name may be checked by contacting the Corporations Department of the Office of the Secretary of State by mail or by telephone. It should be noted that clearance over the telephone is only a preliminary check of the name. In view of the complexities of the manual filing system presently in use and the subjective nature of the decision involved, it is required that all names be double checked. Time and staff limitations make a double search impossible for a telephone request. Therefore applicants should not undertake a serious financial commitment to a name until it is reserved⁶⁸ or until the articles are actually approved by the Secretary of State.

The approval of a corporate name by the Secretary of State does not establish ownership of the name under common law.⁶⁹ Courts have enjoined the use of a corporate name despite approval by the Secretary of State.⁷⁰ The risk of a trade name infringement may be minimized by

non-profit corporations) (Page 1978); OHIO REV. CODE ANN. § 1329.02 (Page Supp. 1979).

⁶⁵ For example, a name which implies a relationship with a governmental agency, *i.e.*, "Ohio State Revenue Service Co.," is considered misleading.

⁶⁶ These are guidelines established by the office of the Secretary of State and used by the office in reviewing corporate names.

⁶⁷ OHIO REV. CODE ANN. §§ 1701.05(A) (profit), 1702.05(A) (non-profit) (Page 1978).

⁶⁸ If articles of incorporation will not be filed immediately, a proposed name may be reserved by sending to the Secretary of State a written request for a reservation accompanied by a filing fee of five dollars. A reservation is effective for a period of sixty days and may be renewed for additional sixty day periods. *Id.* §§ 1701.05(C) (profit), 1702.05(C) (non-profit).

⁶⁹ *See, e.g.*, *Cincinnati Realty Co. v. St. Nicholas Plaza, Inc.*, 28 Ohio N.P. (n.s.) 354 (C.P. Hamilton County 1931).

⁷⁰ *See, e.g.*, *Henry Furnace Co. v. Kappelman*, 91 Ohio App. 451 108 N.E.2d 839 (8th Dist. 1952); *Backus Oil Co. v. Backus Oil and Car Grease Co.*, 8 Ohio Dec. Reprint 93 (C.P. Cuyahoga County 1880).

checking local telephone and business directories for similar names prior to incorporation and by urging clients to select a unique name. Since the Corporations Department's active file contains over 250,000 corporate and trade names, the obvious descriptive terms for most types of businesses have already been used.

The Ohio Revised Code contains a number of miscellaneous provisions which relate to corporate names. For example, the words "bank," "banking" or "trust" may not be included in a corporate name unless the corporation is in fact a bank.⁷¹ The word "engineering" may not be used in a corporate name unless the corporation is a professional association formed under chapter 1785 of the Ohio Revised Code.⁷² Professional corporations formed to practice dentistry must include the name of each dentist who will render dental services through the corporation.⁷³ The name of a professional corporation formed to practice law may end with the legend "Co., L.P.A." or may include the words "A Legal Professional Association."⁷⁴ Other provisions applicable to corporate names can be discovered by researching the relevant portions of the Ohio Revised Code dealing with particular corporate activities and by consulting the rules of state agencies regulating such activities.

III. AMENDMENTS

A. Profit Corporations

Articles of incorporation may be amended at any time, but the amended form may only contain provisions which would have properly appeared in the original articles.⁷⁵ An amendment may either modify a specific portion of the articles⁷⁶ or restate the full text in amended form.⁷⁷ Generally, shareholders must approve amendments⁷⁸ although under some limited circumstances approval by incorporators or directors is sufficient.⁷⁹

An amendment may be adopted at a meeting of the shareholders by a vote of the shareholders entitled to exercise two-thirds of the voting power of the corporation unless the articles otherwise provide.⁸⁰ In either event, the articles may not provide for approval by less than a

⁷¹ OHIO REV. CODE ANN. § 1101.02(A) (Page 1968).

⁷² OHIO REV. CODE ANN. § 4733.16 (Page Supp. 1979).

⁷³ OHIO REV. CODE ANN. § 4715.18 (Page 1977).

⁷⁴ Rules for the Government of the Bar of Ohio, OHIO SUP. CT. R. III, § 2(A) (1980).

⁷⁵ OHIO REV. CODE ANN. § 1701.69(A) (Page 1978).

⁷⁶ *Id.*

⁷⁷ *Id.* § 1701.72(A).

⁷⁸ *Id.* § 1701.71.

⁷⁹ *Id.* § 1701.70.

⁸⁰ *Id.* § 1701.71(A).

majority of the voting shares.⁸¹ An amendment may also be adopted by shareholders without a meeting in a writing signed by all the shareholders who would be entitled to notice of a meeting.⁸²

When an amendment is approved, a certificate containing a copy of the resolution adopting the amendment and a statement of the manner of adoption must be filed with the Secretary of State.⁸³ If the amendment is adopted by incorporators or directors, the certificate must explicitly set forth the conditions which allow these parties to act on the amendment. A certificate of amendment adopted by incorporators must be signed by each incorporator.⁸⁴ If the amendment is adopted by directors or shareholders, the certificate must be signed by the chairman of the board, the president or a vice-president and by the secretary or an assistant secretary.⁸⁵ The Ohio Revised Code explicitly requires the signatures of two individuals as officers of the corporation; one individual may not sign the certificate in two capacities.⁸⁶ The certificate of amendment must be accompanied by the required thirty-five dollar filing fee. If the amendment increases the number of authorized shares, an additional fee is computed according to the statutory scale.⁸⁷

A corporation for profit may be converted to a non-profit corporation by filing an amendment to existing articles⁸⁸ or by filing new amended articles.⁸⁹ The amendment must contain a valid non-profit purpose clause and must state that after the effective date of the amendment, the corporation shall be subject to the provisions of chapter 1702. If the corporation was formed on or after June 9, 1927, the amendment must provide terms for the cancellation of all outstanding shares.⁹⁰ If the corporation was formed prior to June 9, 1927, the amendment may provide for the cancellation of outstanding shares. If it does not, it must contain a provision prohibiting the payment of dividends on any shares after the effective date of the amendment.⁹¹

B. *Non-Profit Corporations*

Non-profit articles of incorporation may be amended at any time, pro-

⁸¹ *Id.*

⁸² *Id.* § 1701.54.

⁸³ *Id.* § 1701.73(A).

⁸⁴ *Id.* § 1701.73(B).

⁸⁵ *Id.* § 1701.73(C).

⁸⁶ *Id.* § 1701.64(A).

⁸⁷ OHIO REV. CODE ANN. § 111.16(B) (Page Supp. 1979).

⁸⁸ OHIO REV. CODE ANN. § 1701.69(B)(10) (Page 1978). There is no provision in the Code for an amendment changing a non-profit corporation to a corporation for profit.

⁸⁹ *Id.* § 1701.72(D).

⁹⁰ *Id.* § 1701.71(C).

⁹¹ *Id.*

vided the amended articles contain all requirements of the original articles with the exception of the provision concerning initial trustees.⁹² The amended articles must state that they supersede the existing articles.⁹³ It should be noted that a charitable corporation may not amend its articles to change its charitable status.⁹⁴

Trustees may adopt amended articles to consolidate original articles and previously adopted amendments.⁹⁵ However, all other amendments must be adopted by the affirmative vote of a majority of voting members.⁹⁶

Upon the adoption of an amendment or amended articles, a certificate containing a copy of the resolution, a statement of the manner of adoption and, in the case of adoption by trustees, a statement of the basis for such adoption, must be filed with the Secretary of State.⁹⁷ This certificate must be signed by the chairman of the board, the president or vice-president and by the secretary or an assistant secretary.⁹⁸

IV. DISSOLUTIONS

A. *Profit Corporations*

In order to voluntarily dissolve a corporation, the incorporators,⁹⁹ the directors¹⁰⁰ or the shareholders¹⁰¹ must adopt a resolution of dissolution and file a certificate with the Secretary of State.¹⁰² A certificate of dissolution must set forth:

- (1) The name of the corporation;
- (2) A statement that a resolution of dissolution has been adopted;
- (3) A statement of the manner of adoption of such resolution, and, in the case of its adoption by incorporators or directors, a statement of the basis for such adoption;
- (4) The place in this state where its principal office is or is to be located;
- (5) The names and addresses of . . . [the corporation's] directors and officers, unless the resolution of dissolution is adopted

⁹² *Id.* § 1702.38(A).

⁹³ *Id.* § 1702.38(F).

⁹⁴ *Id.* § 1702.38(A).

⁹⁵ *Id.* § 1702.38(E).

⁹⁶ *Id.* § 1702.38(C).

⁹⁷ *Id.* § 1702.38(G).

⁹⁸ *Id.*

⁹⁹ OHIO REV. CODE ANN. § 1701.86(C) (Page Supp. 1979).

¹⁰⁰ *Id.* § 1701.86(D).

¹⁰¹ *Id.* § 1701.86(E).

¹⁰² *Id.* § 1701.86(H).

by the incorporators, in which event the names and addresses of the incorporators shall be set forth in the certificate;

(6) The name and address of . . . [the corporation's] statutory agent.¹⁰³

If the resolution has been adopted by the incorporators, the certificate must be signed by at least a majority of the incorporators.¹⁰⁴ If the resolution has been adopted by the directors or shareholders, the certificate must be signed by the chairman of the board, the president or vice-president and by the secretary or an assistant secretary.¹⁰⁵

The certificate of dissolution may be signed by any three shareholders if the officers fail to execute and file the certificate 1) within thirty days after the adoption of the resolution, or 2) upon any date specified in the resolution as the date which such certificate is to be filed, or 3) upon the expiration of any period specified in the resolution as the period within which such certificate is to be filed, whichever is latest.¹⁰⁶ In this event, the certificate must state that the signatories are shareholders who are filing the certificate because of the officers' failure to do so.¹⁰⁷

The certificate of dissolution must be accompanied by:

(1) An affidavit of one or more of the persons executing the certificate of dissolution or of an officer of the corporation containing a statement of the counties, if any, in this state in which the corporation has personal property or a statement that the corporation is of a type required to pay personal property taxes to state authorities only;

(2) A receipt, certificate, or other evidence showing the payment of all franchise, sales, use, and highway use taxes accruing up to the date of such filing, or that such payment has been adequately guaranteed;

(3) A receipt, certificate, or other evidence showing the payment of all personal property taxes accruing up to the date of such filing;

(4) A receipt, certificate, or other evidence from the bureau of employment services showing that all contributions due from the corporation as an employer have been paid, or that such payment has been adequately guaranteed, or that the corporation is not subject to such contributions;

(5) A receipt, certificate, or other evidence from the industrial

¹⁰³ *Id.* § 1701.86(F).

¹⁰⁴ *Id.* § 1701.86(G).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

commission showing that all premiums due from the corporation as an employer have been paid, or that such payment has been adequately guaranteed, or that the corporation is not subject to such premium payments.¹⁰⁸

In lieu of the receipts or certificates relating to payment of franchise, sales, use and highway use taxes, personal property taxes, Bureau of Employment Services contributions and Workers' Compensation payments, the corporation may submit an affidavit stating the date on which each governmental authority was notified in writing of the scheduled filing date of the certificate of dissolution.¹⁰⁹ The affidavit must include an acknowledgement of the applicability of Ohio Revised Code section 1701.95 and must be signed by one or more persons executing the certificate of dissolution or by an officer of the corporation.¹¹⁰

The filing fee for a certificate of dissolution is thirty-five dollars.¹¹¹ The dissolution becomes effective when the certificate and accompanying documents are properly filed,¹¹² however the corporation may continue its existence for the purpose of winding up its affairs.¹¹³

B. *Non-Profit Corporations*

The provisions governing the dissolution of non-profit corporations directly parallel the provisions for profit corporations. The certificate of dissolution of a non-profit corporation must set forth:

- (1) The name of the corporation;
- (2) A statement that a resolution of dissolution has been adopted;

¹⁰⁸ *Id.* § 1701.86(H) (1)-(5).

¹⁰⁹ *Id.* § 1701.86(H)(6).

¹¹⁰ *Id.* § 1701.86(H)(6) and 1701.95. Section 1701.95 provides in part:

(A) In addition to any other liabilities imposed by law upon directors of a corporation, directors who vote for or assent to: . . .

(2) A dissolution of assets to shareholders during the winding up of affairs of the corporation, on dissolution or otherwise, without the payment of all known obligations of the corporation, or without making adequate provision therefor;

(3) . . . shall be jointly and severally liable to the corporation . . . to the extent that such obligations (not otherwise barred by statute) are not paid, or for payment of which adequate provision has not been made.
. . .

(C) A shareholder who knowingly receives any . . . distribution . . . made contrary to the law or the articles shall be liable to the corporation.

OHIO REV. ANN. § 1701.95(A) and (C) (Page 1978).

¹¹¹ *Id.* § 111.16(B).

¹¹² *Id.* § 1701.86(I).

¹¹³ OHIO REV. CODE ANN. § 1701.88(A) (Page 1978).

(3) A statement of the manner of adoption of such resolution, and, in the case of its adoption by the trustees, a statement of the basis for such adoption;

(4) The place in this state where its principal office is or is to be located;

(5) The names and addresses of its trustees and officers;

(6) The name and address of its statutory agent.¹¹⁴

As with corporations for profit, the certificate of dissolution must be signed by the chairman of the board, the president or the vice-president and by the secretary or an assistant secretary.¹¹⁵ In the event the officers fail to execute and file the certificate within the statutorily prescribed periods, three voting members may sign the certificate. In this event, the certificate must state that the signatories are voting members who are filing the certificate because the officers failed to do so.¹¹⁶

A certificate of dissolution of a non-profit corporation filed with the Secretary of State must be accompanied by many of the same documents required for the dissolution of corporations for profit:

(1) An affidavit of one or more of the persons executing the certificate of dissolution or of an officer of the corporation containing a statement of the counties, if any, in . . . [Ohio] in which the corporation has personal property subject to personal property taxes or a statement that the corporation is of a type required to pay personal property taxes to state authorities only;

(2) A receipt, certificate, or other evidence showing the payment of all personal property taxes accruing up to the date of filing, unless the affidavit provided for in . . . [item one above] states that the corporation has in this state no personal property subject to personal property taxes;

(3) A receipt, certificate, or other evidence from the bureau of employment services showing that all contributions due from the corporation as an employer have been paid, or that such payment has been adequately guaranteed, or that the corporation is not subject to such contributions;

(4) A receipt, certificate, or other evidence showing the payment of all sales, use, and highway use taxes accruing up to the date of such filing, or that such payment has been adequately guaranteed.¹¹⁷

As in the case of a profit corporation, an affidavit may be filed in lieu of the receipts or certificates relating to payment of personal property

¹¹⁴ OHIO REV. CODE ANN. § 1702.47(E) (Page Supp. 1979).

¹¹⁵ *Id.* § 1702.47(F).

¹¹⁶ *Id.*

¹¹⁷ *Id.* § 1702.47(G). Compare note 108 *supra* and accompanying text.

taxes, Bureau of Employment Services contributions, sales, use and highway use taxes.¹¹⁸ This affidavit must be signed by one or more of the persons executing the certificate of dissolution or by an officer of the corporation. The filing fee for the dissolution of a non-profit corporation is twenty-five dollars.¹¹⁹

V. FOREIGN CORPORATIONS

A. *Applicability of Chapter 1703*

Under chapter 1703 of the Ohio Revised Code, foreign corporations which "transact business" in Ohio are required to obtain a license from the Secretary of State.¹²⁰ This license requirement does not apply to foreign corporations in Ohio engaged solely in interstate commerce,¹²¹ banks, trusts companies, building and loan associations, title guarantee and trust companies, bond investment companies, insurance companies or public utility companies engaged in Ohio in interstate commerce.¹²²

To determine whether a foreign corporation is transacting business in Ohio within the meaning of chapter 1703, the quantitative nature of the contacts within the state must first be examined. A foreign corporation must be engaged in a continuing course of business in Ohio before it is subject to the requirements of chapter 1703.¹²³ If it is determined that the foreign corporation has sufficient contacts in Ohio, the applicability of the interstate commerce exception must be considered. The nature of these corporate activities should be examined in light of case law and opinions of the Ohio Attorney General which have dealt with this issue. Business activities which have been the subject of Ohio cases and opinions include: ownership of real or personal property located in Ohio,¹²⁴ the leasing of personal property to Ohio residents,¹²⁵ agreements to

¹¹⁸ OHIO REV. CODE ANN. § 1702.47(G)(5) (Page Supp. 1979).

¹¹⁹ *Id.* § 111.16(B).

¹²⁰ OHIO REV. CODE ANN. § 1703.03 (Page 1978).

¹²¹ Interstate commerce as defined by § 1703.02 includes "the installation, demonstration or repair of machinery or equipment sold by [the corporation] in interstate commerce, . . ." *Id.* § 1703.02.

¹²² *Id.*

¹²³ *Empire Fuel Co. v. Lyons*, 257 F. 840 (6th Cir. 1919); *Perkins v. Banquet Consol. Mining Co.*, 88 Ohio App. 118, 95 N.E.2d 6 (1st Dist. 1950), *aff'd*, 155 Ohio St. 116, *vacated on other grounds*, 342 U.S. 437 (1950).

¹²⁴ *Toledo Traction, Light & Power Co. v. Smith*, 205 F. 643 (N.D. Ohio 1913); *Monnington v. Hockey Valley Ry. Co.*, 183 F. 133 (S.D. Ohio 1910); [1953] Op. Ohio Att'y Gen. 235 (1953) (Opinion No. 2719); [1949] Op. Ohio Att'y Gen. 282 (1949) (Opinion No. 578).

¹²⁵ *Didactics Corp. v. Welch Scientific Co.*, 291 F. Supp. 890 (N.D. Ohio 1968); *Short Films Syndicate Co. v. Standard Film Serv. Co.*, 39 Ohio App. 79, 176 N.E. 893 (8th Dist. 1931).

assemble, install or service articles sold in Ohio¹²⁶ and sales by agents or solicitors.¹²⁷

B. *License Procedure for Foreign Corporations for Profit*

To obtain a license, a foreign corporation for profit must file an application with the Secretary of State setting forth:

- (1) The name of the corporation, and, if its corporate name is not available, the trade name under which it will do business in this state;
- (2) The name of the state under the laws of which it was incorporated;
- (3) The location and complete address of its principal office;
- (4) The name of the county and the municipal corporation or township in which its principal office within this state is to be located;
- (5) The appointment of a designated agent and the complete address of such agent;
- (6) The irrevocable consent of such corporation to service of process on such agent so long as the authority of such agent continues and to service of process upon the secretary of state in the event . . . [that the agent cannot be located or if the corporation's license is cancelled or expires];
- (7) A brief summary of the corporate purposes to be exercised within this state.¹²⁸

The application must be accompanied by a certificate from the state in which the corporation was formed setting forth the exact corporate title, the date of incorporation and the fact that the corporation is in good standing or is a subsisting corporation.¹²⁹ The certificate of good standing must be dated not earlier than sixty days prior to the filing date.¹³⁰ The filing fee for a permanent license is seventy-five dollars.¹³¹

A foreign corporation may transact business in Ohio under a temporary license for a period of six months, but no more than two temporary licenses will be issued within any three year period.¹³² The ap-

¹²⁶ *Cont v. New Britain Mach. Co.*, 20 F.2d 593 (6th Cir.), *cert. denied*, 275 U.S. 552 (1927); *Beach v. Kerr Turbine Co.*, 243 F. 706 (N.D. Ohio 1917); *National Sign Co. v. Maccar Cleveland Sales Co.*, 33 Ohio App. 89, 168 N.E. 758 (8th Dist. 1929).

¹²⁷ *Blueball Importing Corp. v. Myers*, 13 Ohio Op. 124, 31 N.E.2d 227 (10th Dist. 1938); *McClurran v. Longdin-Brugger Co.*, 24 Ohio App. 434, 157 N.E. 828 (9th Dist. 1926); *Leonard Custom Tailors Co. v. Aetna Casualty & Surety Co.*, 19 Ohio Op. 224 (C.P. Hamilton County 1940).

¹²⁸ OHIO REV. CODE ANN. § 1703.04(B) (Page Supp. 1979).

¹²⁹ *Id.* § 1703.04(A).

¹³⁰ *Id.*

¹³¹ *Id.* § 1703.04(C).

¹³² *Id.* § 1703.13.

plication requirements for permanent and temporary licenses are the same with the exception that the filing fee for a temporary license is one hundred twenty-five dollars.¹³³

An application for a foreign license will not be accepted for filing if the name of the applicant corporation is prohibited by Ohio law or is not readily distinguishable from the name of every other corporation, domestic or foreign, authorized to transact business in Ohio.¹³⁴ The standard of review described above in connection with profit and non-profit corporate names is also applied to the names of foreign corporations.¹³⁵ In the event of a conflict, a name may be used if consent is obtained from the prior registrant.¹³⁶ The consent must be evidenced by a resolution of the board of directors of the existing corporation and certified by its secretary or assistant secretary.¹³⁷

If the foreign corporation is unwilling or unable to obtain consent, it may obtain a license to transact business in Ohio under an assumed name.¹³⁸ In this event, the license application must be accompanied by a resolution from the foreign corporation's board of directors, certified by its secretary or assistant secretary, and stating that the corporation will transact business in Ohio only under the assumed name.¹³⁹ After the license application is approved, the master record for the corporation is indexed under the assumed name with a cross-reference card filed under the official corporate name.

Foreign corporations are required to file an annual statement of proportion of capital stock with the Secretary of State before April first of each year.¹⁴⁰ Statement forms are sent to foreign corporations along with franchise tax reports provided by the Ohio Department of Taxation. It must be emphasized that filing an annual statement of proportion of capital stock with the Secretary of State does not satisfy a foreign corporation's obligation to submit franchise tax reports to the Ohio Department of Taxation. These are two separate filings with different state agencies.

In the annual statement, the foreign corporation must set forth as of the beginning of the current annual accounting period: 1) the book value, excluding good will, of Ohio assets and the amount of business transacted in Ohio during the preceding year, 2) the book value, excluding good will, of all assets and total business transacted during the

¹³³ *Id.*

¹³⁴ *Id.* § 1703.04(D).

¹³⁵ See notes 64-74 *supra* and accompanying text.

¹³⁶ OHIO REV. CODE ANN. § 1703.04(D) (Page Supp. 1979).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* §§ 1703.07, 5733.02.

preceding year and 3) the number of shares authorized and issued by the corporation.¹⁴¹

On the basis of this information, the Secretary of State computes the percentage of the corporation's total business which is derived from its Ohio activities.¹⁴² This percentage is then applied to the total number of issued shares. A fee is computed on the resulting number of shares in accordance with the statutory schedule.¹⁴³ In subsequent years credit is given for fees previously paid. A licensed corporation will not pay a fee in later years unless there is an increase in the percentage of Ohio business or in the number of issued shares.¹⁴⁴ It should be noted that the annual statement is intended to elicit total volume of business, and not profit or loss. Therefore, negative figures may not be used in the report.

If a foreign corporation fails to file the annual report or to pay any installment of the license fee, the Secretary of State will notify the corporation by certified mail.¹⁴⁵ If the deficiency is not remedied within thirty days, the license will expire by operation of law.¹⁴⁶ The license may be reinstated by filing an application for reinstatement with a ten dollar fee.¹⁴⁷ All delinquent annual reports must be filed and fees must be paid before the reinstatement can be effected.¹⁴⁸ If the application for reinstatement is submitted in a tax year or calendar year other than that in which the cancellation occurred, the corporation must also submit a D-4 certificate which may be obtained from the Franchise Tax Division of the Department of Taxation.¹⁴⁹

If a licensed foreign corporation amends its articles to change its corporate title, the change may be entered on the records of the Secretary of State by filing a certificate evidencing the change issued by the State in which the corporation was formed.¹⁵⁰ The same procedure may be used to record a merger or consolidation involving a foreign corporation

¹⁴¹ *Id.* § 1703.07(C), (D) and (E).

¹⁴² OHIO REV. CODE ANN. § 1703.08 (Page 1978).

¹⁴³ OHIO REV. CODE ANN. § 111.16 (Page Supp. 1979). Consider for example, a foreign corporation with total assets and business valued at \$200,000, \$40,000 (or 20%) of which is derived from its Ohio activities. The corporation has issued 500 shares. Twenty percent of 500 (number of issued shares) is 100 shares. According to the § 111.16 schedule, the fee on 100 shares, at ten cents per share is ten dollars. Note that in no situation will the initial fee be less than five dollars.

¹⁴⁴ OHIO REV. CODE ANN. § 1703.09 (Page 1978); OHIO REV. CODE ANN. § 1703.11 (Page Supp. 1979).

¹⁴⁵ OHIO REV. CODE ANN. § 1703.14 (Page Supp. 1979).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* § 1703.07.

licensed in Ohio and other foreign corporations.¹⁵¹ The filing fee for this transaction is ten dollars.¹⁵²

A foreign corporation transacting business in Ohio without the requisite license is subject to a forfeiture of not less than two hundred fifty dollars and not more than ten thousand dollars.¹⁵³ To obtain a license, such a corporation must submit the usual application materials,¹⁵⁴ an annual statement of proportion of capital stock for each year the corporation transacted business in Ohio without a license and a D-4 certificate from the Ohio Department of Taxation. An application which indicates that the corporation transacted business without a license is filed by the Secretary of State and then sent to the Attorney General for collection of the forfeiture.

The failure of a foreign corporation to obtain a license, when required to do so under chapter 1703, does not affect the validity of any contract entered into by the corporation,¹⁵⁵ but an unlicensed foreign corporation transacting business in Ohio may not maintain an action in any Ohio court until it has obtained a license.¹⁵⁶ A foreign corporation obtaining a license solely to maintain an action in an Ohio court is subject to a forfeiture of two hundred fifty dollars.¹⁵⁷

C. *Foreign Non-Profit Corporations*

Foreign non-profit corporations which exercise their corporate privileges in Ohio in a continual course of transactions are required to obtain a license from the Secretary of State.¹⁵⁸ An application for a license submitted by a foreign non-profit corporation must set forth:

- (A) The name of the corporation;
- (B) The state under the laws of which it is incorporated;
- (C) The location of its principal office;
- (D) The corporate privileges it proposes to exercise in this state;
- (E) The location of its principal office in this state;
- (F) The appointment of a designated agent and the complete address of such agent;
- (G) Its irrevocable consent to service of process on such agent so long as the authority of such agent continues and to service of

¹⁵¹ See notes 181-85 *infra* and accompanying text.

¹⁵² OHIO REV. CODE ANN. § 1703.07 (Page Supp. 1979).

¹⁵³ OHIO REV. CODE ANN. § 1703.28 (Page 1978).

¹⁵⁴ See notes 126-27 *supra* and accompanying text.

¹⁵⁵ OHIO REV. CODE ANN. § 1703.29(A) (Page 1978).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ OHIO REV. CODE ANN. § 1703.27 (Page Supp. 1979).

process upon the secretary of state in the events provided for in section 1703.19 of the (Ohio) Revised Code.¹⁵⁹

This application must be verified by the oath of one of the corporate officers and must be accompanied by an original certificate of good standing from the state in which the corporation was formed.¹⁶⁰ The filing fee is thirty-five dollars.¹⁶¹

Foreign non-profit corporations are not required to file an annual statement of proportion of capital stock. However, they must file a statement of continued existence.¹⁶²

D. *Foreign Professional Corporations*

In addition to obtaining a license to transact business in Ohio under chapter 1703, foreign corporations rendering professional services must comply with the requirements of chapter 1785.¹⁶³ The application for license must be accompanied by an affidavit signed by a corporate officer stating that each shareholder is licensed to render a professional service in the State of Ohio and that the corporation complies in all other respects with the requirements of chapter 1785.¹⁶⁴

E. *Surrender of License*

A foreign corporation may surrender its license to transact business in Ohio by filing with the Secretary of State a certificate setting forth the name of the corporation, the state in which it is incorporated, an intent to surrender the license and the address to which the Secretary of State may mail any process against the corporation or any other notices, certificates or statements.¹⁶⁵ This certificate must be signed by the corporation's president, vice-president, secretary or treasurer, or by the receiver, trustee in bankruptcy or other liquidator of the corporation.¹⁶⁶

In place of the certificate of surrender, a corporation may file a certificate by the Secretary of State or other proper official of the state in which the corporation was formed, certifying that it has been dissolved or its corporate existence otherwise terminated.¹⁶⁷ A certified copy of a court order terminating the existence of the corporation is also acceptable.¹⁶⁸ If such a certificate or certified copy is submitted, the Ohio

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See notes 22-25 *supra* and accompanying text.

¹⁶³ [1977] Op. Ohio Att'y Gen. 257 (1977) (Opinion No. 018).

¹⁶⁴ See notes 26-36 *supra* and accompanying text.

¹⁶⁵ OHIO REV. CODE ANN. § 1703.17(B) (Page Supp. 1979).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* § 1703.17(E).

¹⁶⁸ *Id.*

Secretary of State must be advised of an address to which any process, notices, certificates or statements may be mailed.¹⁶⁹

A certificate of surrender, certificate of dissolution or court order filed with the Secretary of State, must be accompanied by essentially the same documents required for the dissolution of a domestic corporation:

(1) A receipt, certificate, or other evidence showing the payment of all franchise, sales, use and highway use taxes accruing up to the date of such filing, or that such payment has been adequately guaranteed;

(2) A receipt, certificate, or other evidence showing the payment of all personal property taxes accruing up to the date of such filing;

(3) A receipt, certificate, or other evidence from the bureau of employment services showing that all contributions due from the corporation as an employer have been paid, or that such payment has been adequately guaranteed, or that the corporation is not subject to such contributions;

(4) An affidavit of the officer, or other person permitted by law, executing the certificate of surrender, containing a statement of the counties, if any, in this state in which the corporation has personal property or a statement that the corporation is of a type required to pay personal property taxes to state authorities only.¹⁷⁰

In lieu of the receipts of certificates relating to franchise, sales, use and highway taxes, property taxes, and contributions to the Bureau of Employment Services, an affidavit of the person executing the certificate of surrender or of an officer of the corporation may be submitted. This affidavit must contain a statement of the date each governmental authority was advised in writing of the scheduled filing of the certificate of surrender and an acknowledgement by the corporation that the surrender of its license does not relieve it from any liability for payments or taxes due to the Ohio Department of Taxation, the counties to which personal property taxes may be due or the Ohio Bureau of Employment Services.¹⁷¹

VI. MERGERS AND CONSOLIDATIONS

A. *Profit Corporations*

A merger consists of the absorption of one or more corporations into an existing surviving corporation.¹⁷² A consolidation is the union of one

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 1703.17(C). Compare note 108 *supra* and accompanying text.

¹⁷¹ OHIO REV. CODE ANN. § 1703.17(D) (Page Supp. 1979).

¹⁷² *Id.* § 1701.79(A). A surviving corporation is defined as "the corporation into

or more existing corporations to form a new corporation.¹⁷³ In order to effect a merger or consolidation involving profit corporations, a certificate must be filed with the Secretary of State.¹⁷⁴ This certificate must set forth, with respect to each constituent corporation,¹⁷⁵ the manner in which the agreement of merger or consolidation was approved by the directors, and, if required, by the shareholders.¹⁷⁶ The certificate must be signed by the chairman of the board, the president or vice-president and by the secretary or an assistant secretary of each constituent corporation. It also must be accompanied by a signed agreement of merger or consolidation or a copy thereof.¹⁷⁷

If any constituent corporation in the merger or consolidation is a foreign corporation, a copy of the agreement and other necessary documents must be filed with the proper office in the state in which the foreign corporation was formed.¹⁷⁸ It is therefore essential that the merger or consolidation be permitted by the laws of each state in which any foreign constituent corporation was formed.¹⁷⁹

The merger or consolidation will take effect upon the filing with the Secretary of State, unless a later date is specified in the agreement.¹⁸⁰ The Ohio Revised Code does not provide for an effective date prior to filing with the Secretary of State.

1. Merger or Consolidation into a Domestic Corporation

Section 1701.78 of the Ohio Revised Code deals with the merger of one or more domestic and foreign corporations into a surviving domestic corporation and the consolidation of several domestic or foreign corporations into a new domestic corporation.¹⁸¹ An agreement of merger or consolidation under this provision must set forth:

- (1) The state under the laws of which each constituent corporation exists;

which one or more other constituent corporations are to be or have been merged." OHIO REV. CODE ANN. § 1701.01(W) (Page 1978).

¹⁷³ OHIO REV. CODE ANN. § 1701.79(A) (Page Supp. 1979).

¹⁷⁴ *Id.* § 1701.81(A).

¹⁷⁵ A constituent corporation is defined as "an existing corporation that is participating with one or more other corporations in a merger, or is being consolidated with one or more other corporations into a new corporation, whether any such provisions are domestic or foreign. OHIO REV. CODE ANN. § 1701.01(V) (Page 1978).

¹⁷⁶ OHIO REV. CODE ANN. § 1701.81(A) (Page Supp. 1979).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* § 1701.81(B).

¹⁷⁹ See OHIO REV. CODE ANN. § 1701.78(A) (Page 1978); OHIO REV. CODE ANN. § 1701.79(F) (Page Supp. 1979).

¹⁸⁰ OHIO REV. CODE ANN. § 1701.81(C) (Page Supp. 1979).

¹⁸¹ OHIO REV. CODE ANN. § 1701.78 (Page 1978).

(2) In the case of a merger, that one or more specified constituent corporations shall be merged into a specified surviving domestic corporation, and, in the case of a consolidation, that the constituent corporations shall be consolidated into a new domestic corporation. . . .;

(3) All other provisions with respect to the surviving or new corporation which would be required in original articles of a domestic corporation filed at the time of adoption of the agreement, other than the statement with respect to initial stated capital. . . .;

(4) All statements and matters required to be set forth by the laws of each state under the laws of which any constituent foreign corporation exists;

(5) In the case of a merger, a statement that the directors of the surviving corporation shall continue as such or, if there are to be any changes on or before the effective date of the merger, the names of the directors. In the case of a consolidation, the names of the first directors of the new corporation;

(6) The regulations of the surviving or new corporation, or a provision that the regulations of a specified constituent corporation shall be the regulations of the surviving or new corporation, with such amendments as may be set forth in the agreement;

(7) The name and address of the statutory agent upon whom any process, notice, or demand against any constituent corporation or the surviving or new corporation may be served;

(8) The terms of the merger or consolidation, the mode of carrying them into effect, and the manner and basis of making distributions to shareholders of the constituent corporations in extinguishment of or in substitution for their shares. . . .¹⁸²

The agreement may include other provisions dealing with the effective date of the merger or consolidation, abandonment prior to filing with the Secretary of State, the terms and classifications of directors, the method of determining the fair value of assets to be owned by the surviving or new corporation or any additional provision permitted in the articles of a newly formed domestic corporation.¹⁸³

2. Merger or Consolidation into a Foreign Corporation

A merger or consolidation involving a domestic corporation that results in the formation or continuance of a foreign corporation is governed by Ohio Revised Code section 1701.79.¹⁸⁴ The merger or consolidation agreement under this provision must set forth:

¹⁸² *Id.* § 1701.78(B).

¹⁸³ *Id.* § 1701.78(C).

¹⁸⁴ OHIO REV. CODE ANN. § 1701.79 (Page Supp. 1979).

(1) The states under the laws of which each constituent corporation exists, and, in the case of a consolidation, the state under the laws of which the new corporation is to exist;

(2) In the case of a merger, that one or more specified constituent corporations shall be merged into a specified surviving foreign corporation, and, in the case of a consolidation, that the constituent corporations shall be consolidated into a new foreign corporation. . . .;

(3) All additional statements and matters with regard to the surviving or the new corporation, other than the name and address of the statutory agent, which would be required by section 1701.78 of the Revised Code if the surviving or new corporation were a domestic corporation;

(4) The location of the principal office of the surviving or new corporation in the state under the laws of which the surviving corporation exists or the new corporation is to exist;

(5) All additional statements and matters required to be set forth in such an agreement of merger or consolidation by the laws of each state under the laws of which any constituent foreign corporation exists and, in the case of a consolidation, the new corporation is to exist;

(6) The consent of the surviving or the new corporation to be sued and served with process in this state, and the irrevocable appointment of the secretary of state as its agent to accept service of process in any proceeding in . . . [Ohio] to enforce against the surviving or the new corporation any obligation of any constituent domestic corporation, or to enforce the rights of a dissenting shareholder of any constituent domestic corporation;

(7) If it is desired that the surviving or the new corporation transact business in . . . [Ohio] as a foreign corporation, a statement to that effect, together with a statement on the appointment of a statutory agent. . . .¹⁸⁵

If the surviving or new corporation does not desire to transact business in Ohio, specific evidence showing that the merging or consolidating corporations have satisfied prior responsibilities within the state must be submitted by entities which were formerly domestic corporations¹⁸⁶ or were formerly licensed foreign corporations.¹⁸⁷

3. Merger into Parent Corporation

Mergers of subsidiaries into parent corporations must comply with

¹⁸⁵ *Id.* § 1701.79(B).

¹⁸⁶ *Id.* § 1701.79(G).

¹⁸⁷ *Id.* §§ 1703.17(C), (D).

Ohio Revised Code section 1701.80.¹⁸⁸ A short form merger agreement may be used if the surviving parent owns ninety percent or more of each class of the outstanding shares of each subsidiary involved and at least one constituent corporation was incorporated in Ohio.¹⁸⁹ When the parent-survivor is an Ohio corporation, the section 1701.80 procedure is not available if any of the following conditions exist:

(1) The articles or regulations of the surviving corporation then in effect require that the agreement be adopted by the shareholders or by the holders of a particular class of shares of that corporation;

(2) The agreement conflicts with the articles or regulations of the surviving corporation then in effect, or changes the articles or regulations, or authorizes any action which, if it were being made or authorized apart from the merger, would otherwise require adoption by the shareholders or by the holders of a particular class of shares of that corporation;

(3) The merger involves the issuance or transfer by the surviving corporation to the shareholders of the other constituent corporation or corporations of such number of shares of the surviving corporation as will entitle the holders thereof immediately after the consummation of the merger to exercise one-sixth or more of the voting power of that corporation in the election of directors;

(4) The agreement of merger makes such change in the directors of the surviving corporation as would otherwise require action by the shareholders or by the holders of a particular class of shares of that corporation.¹⁹⁰

A parent/subsidiary merger agreement must set forth:

(1) The states under the laws of which each constituent corporation exists;

(2) That one or more specified constituent corporations shall be merged into a specified surviving corporation;

(3) The designation and the number of the outstanding shares of each class of each constituent subsidiary corporation, and the number of shares of each such class owned by the surviving corporation;

(4) The terms of the merger, the mode of carrying them into effect, and the manner and basis of making distributions to shareholders of each constituent subsidiary corporation in extinguishment of or in substitution for their shares. . . .;

¹⁸⁸ OHIO REV. CODE ANN. § 1701.80 (Page 1978).

¹⁸⁹ *Id.* § 1701.80(A).

¹⁹⁰ *Id.* § 1701.78(D) (read in conjunction with § 1701.80(A)).

(5) If any constituent corporation is a foreign corporation, all statements and matters required to be set forth . . . by laws of the state under the laws which such corporation exists;

(6) If desired, the effective date of the merger, which may be on or after the date of filing the certificate.¹⁹¹

If the parent is an unlicensed foreign corporation which intends to transact business in Ohio, it may do so by including in the merger agreement a statement of intent and appointment of a statutory agent.¹⁹² If the surviving foreign parent does not intend to transact business in Ohio, the disappearing Ohio corporations and other licensed foreign constituent corporations must also file the affidavits, receipts, certificates or other documents required by section 1701.86 and section 1703.17(c) or (d) of the Ohio Revised Code.¹⁹³

4. Filing Fees

The minimum filing fee for a merger or consolidation is fifty dollars. The fee may be higher if the merger or consolidation results in an increase in the number of shares authorized by the new corporation or the surviving corporation.¹⁹⁴ The additional fee is computed according to the statutory schedule in the same manner as the fee for an amendment to increase the authorized shares of a domestic corporation.¹⁹⁵ A credit is given for shares previously authorized by constituent Ohio corporation and for license fees paid by licensed foreign corporations.¹⁹⁶ The filing fee for a merger or consolidation resulting in a new or surviving foreign corporation which obtains a license to transact business in Ohio is seventy-five dollars.¹⁹⁷

B. *Non-Profit Corporation Mergers and Consolidations*

The merger and consolidation procedure for non-profit corporations is essentially the same as that for profit corporations. However, charitable corporations may only merge into or consolidate with other charitable corporations, and the surviving or new corporation must be a charitable corporation.¹⁹⁸

The certificate of merger to be filed with the Secretary of State must

¹⁹¹ *Id.* § 1701.80(B).

¹⁹² OHIO REV. CODE ANN. § 1701.79(B)(7) (Page Supp. 1979).

¹⁹³ *Id.* §§ 1701.79(G), .86, 1703.17. See notes 108 and 165-71 *supra* and accompanying text.

¹⁹⁴ OHIO REV. CODE ANN. § 111.16(D) (Page Supp. 1979).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* § 1701.79(B)(7).

¹⁹⁸ OHIO REV. CODE ANN. § 1702.41(A) (Page 1978).

be signed by the chairman of the board, the president or a vice-president and the secretary or an assistant secretary of each constituent corporation.¹⁹⁹ It must contain a statement of the manner in which the merger or consolidation was adopted by each corporation and either a signed agreement of merger or consolidation or a copy thereof.²⁰⁰

An agreement of merger or consolidation involving non-profit corporations must set forth:

- (1) That the named constituent corporations have agreed to merge into a specified constituent corporation . . . or that . . . [they] have agreed to consolidate into a new corporation . . . ;
- (2) The name of the surviving or new corporation . . . ;
- (3) The place in . . . [Ohio] where the principal office of the surviving or new corporation is to be located;
- (4) The purpose or purposes of the surviving or new corporation which, in case the constituent corporations are charitable corporations, must be such that the surviving or new corporation will also be a charitable corporation;
- (5) The names and addresses of the first trustees and officers of the surviving or new corporation . . . ;
- (6) The name and address of the statutory agent . . . ;
- (7) The terms of the merger or consolidation and the mode of carrying . . . [them] into effect;
- (8) The regulations of the surviving or new corporation or a provision to the effect that the regulations of one of the constituent corporations shall be the regulations of the surviving or new corporation or to the effect that the voting members or the trustees of the surviving or new corporation may adopt regulations. . . .²⁰¹

The agreement may also set forth provisions relating to the effective date of the merger or consolidation,²⁰² abandonment of the merger or consolidation or any provision permitted in the articles of a newly formed corporation.²⁰³

VII. STATUTORY AGENTS

Profit and non-profit corporations formed in Ohio and foreign corporations licensed to transact business in this state are required to appoint a statutory agent upon whom process against the corporation may be

¹⁹⁹ *Id.* § 1702.43(A).

²⁰⁰ *Id.*

²⁰¹ *Id.* § 1702.41(B).

²⁰² *Id.* § 1702.41(C)(1). The merger may be effective on the date of filing or a date subsequent thereto.

²⁰³ *Id.* § 1702.41(C).

served.²⁰⁴ The statutory agent may be "a natural person who is a resident of . . . [Ohio], or may be a domestic corporation or a foreign corporation holding a license as such . . . that is authorized by its articles of incorporation to act as such agent and that has a business address in this state."²⁰⁵

Articles of incorporation must be accompanied by an appointment of a statutory agent²⁰⁶ which must be submitted on a separate form.²⁰⁷ The appointment must include the agent's name and complete street address; a post office box number is not sufficient.²⁰⁸ The Secretary of State must subsequently be notified of a statutory agent's change of address,²⁰⁹ and notification must be accompanied by a three dollar filing fee.²¹⁰

An agent may resign by submitting to the Secretary of State a signed statement of resignation which includes the last known address of the corporation. The resignation becomes effective in sixty days.²¹¹ On receipt of a resignation, the Secretary of State will mail a copy to the corporation so that it knows it has the obligation to appoint a new agent. A corporation may revoke the appointment of an agent by filing with the Secretary of State a written revocation of the prior appointment, an appointment of another agent,²¹² and a three dollar filing fee.²¹³ This change of agent must be signed by the chairman of the board, the president, a vice-president and the secretary or an assistant secretary of the corporation.²¹⁴

On learning of a corporation's failure to maintain a statutory agent or to file a statement of change of address, the Secretary of State will send

²⁰⁴ OHIO REV. CODE ANN. §§ 1701.07(A) (profit corporations), 1702.06(A) (non-profit corporations), 1703.04(A) (foreign corporations) (Page Supp. 1979).

²⁰⁵ *Id.*

²⁰⁶ OHIO REV. CODE ANN. §§ 1701.04(C) (profit), 1702.04(C) (non-profit) (Page 1978). This general requirement is subject to the exceptions set out in § 1701.07(O) which provides that no statutory agent need be appointed for banks, trust companies, insurance companies or for any corporation defined as a public utility for taxation purposes. OHIO REV. CODE ANN. § 1701.07(O) (Page Supp. 1979).

²⁰⁷ [1929] Op. Ohio Att'y Gen. 1002 (1929) (Opinion No. 666).

²⁰⁸ OHIO REV. CODE ANN. §§ 1701.07(C) (profit), 1702.06(C) (non-profit), 1703.041(B) (foreign) (Page Supp. 1979).

²⁰⁹ *Id.* §§ 1701.07(E) (profit), 1702.06(E) (non-profit), 1703.041(E) (foreign). For the individual who must sign this change of address, see *Id.* §§ 1701.07(L) (profit), 1702.06(K) (non-profit), 1703.041(K) (foreign).

²¹⁰ *Id.* §§ 1701.07(M) (profit), 1702.06(L) (non-profit), 1703.041(L) (foreign).

²¹¹ *Id.* §§ 1701.07(F) (profit), 1702.06(F) (non-profit), 1703.041(F) (foreign).

²¹² *Id.* §§ 1701.07(G) (profit), 1702.06(G) (non-profit), 1703.041(G) (foreign).

²¹³ *Id.* §§ 1701.07(M) (profit), 1702.06(L) (non-profit), 1703.041(L) (foreign).

²¹⁴ *Id.* §§ 1701.07(L) (profit), 1702.06(K) (non-profit), 1703.041(K) (foreign).

the corporation a notice of delinquency by certified mail.²¹⁵ If a change of address or appointment of an agent is not filed within thirty days, the corporate charter or foreign license will be cancelled by the Secretary of State. Notice of this cancellation will be sent to the last known address of the corporation.²¹⁶ A corporation so cancelled may return to good standing by filing an application for reinstatement with the required appointment of an agent or a change of address and by paying a fee of ten dollars.²¹⁷ If a for profit corporation or a foreign corporation licensed in Ohio remains cancelled for more than one year, the reinstatement application must be accompanied by a D-3 certificate which may be obtained from the Ohio Department of Taxation.²¹⁸

VIII. SERVICE OF SUMMONS

Service of process upon both domestic and foreign corporations is made "by serving the [corporation's statutory] agent . . . ; or by serving the corporation by certified mail at any of its usual places of business; or by serving an officer or a managing or general agent of the corporation[.]"²¹⁹ When the statutory agent of a domestic corporation cannot be found or is no longer located at the address recorded with the Secretary of State, or when the corporation has failed to maintain an agent, service may be obtained upon the Secretary of State as the agent of the corporation.²²⁰ To effect service, the plaintiff must file with the Secretary of State four copies of the summons and complaint and an affidavit stating the reason for failure to serve the corporation through its agent.²²¹ The affidavit must also state the most recent address of the corporation which the plaintiff has ascertained after a diligent search.²²²

These documents must be accompanied by a five dollar filing fee.²²³ The Secretary of State will then forward copies of the process to the corporation at any address which can be ascertained from the records of the Secretary of State, the Department of Taxation or from the affidavit submitted by the plaintiff. Service upon the corporation is then deemed to be effected.²²⁴

The Secretary of State is the agent for service of process for any foreign corporation licensed in Ohio if the designated agent cannot be

²¹⁵ *Id.* §§ 1701.07(N) (profit), 1702.06(M) (non-profit), 1703.15 (foreign).

²¹⁶ *Id.*

²¹⁷ *Id.* §§ 1701.07(N) (profit), 1702.06(M) (non-profit), 1703.14 (foreign).

²¹⁸ *See* note 36 *supra*.

²¹⁹ OHIO R. CIV. P. 4.2(6). *See* OHIO REV. CODE ANN. §§ 1701.07(H) (profit), 1702.06(H) (non-profit), 1703.041(H) (foreign) (Page Supp. 1979).

²²⁰ *Id.* §§ 1701.07(H) (profit), 1702.06(H) (non-profit).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

found, if the corporation has failed to appoint another agent when required to do so or if the license of the corporation has expired or has been cancelled.²²⁵ If any of these conditions exist, service may be made upon the Secretary of State by submitting three copies of the summons and complaint and a five dollar fee.²²⁶ Upon receipt of the process, the Secretary of State will send notice by certified mail to the corporation's principal office within Ohio and to the principal location outside this state. Pursuant to such service, suit may be brought in the county where the principal Ohio office of the corporation is or was located, or in any county in which the cause of action arose.²²⁷

Any foreign corporation required to be licensed, but which transacts business in Ohio without obtaining a license is conclusively presumed to have designated the Secretary of State as its agent for service of process in any action arising out of its acts or omissions within Ohio.²²⁸ Service may be effected by delivering to the Secretary of State two copies of the summons and complaint and an affidavit setting forth the last known address of the corporation. The filing fee is five dollars.²²⁹ The Secretary of State will give notice to the corporation at the address set forth in the affidavit. Pursuant to such service, suit may be brought in Franklin County or in any county in which the foreign corporation did any act or transacted any business.²³⁰

IX. TRADE NAMES

A trade name is "a name used in business or trade to designate the business of the user and to which the user asserts a right to exclusive use."²³¹ Although a trade name may be registered with the Secretary of State,²³² this does not convey ownership rights to the registrant.²³³ Ownership of a trade name is determined under common law by length of actual use.²³⁴

The registration of a trade name requires a filing fee of twenty dollars.²³⁵ The application must set forth:

- (1) The name and business address of the applicant for such registration; and if the applicant is a general partnership, the

²²⁵ *Id.* § 1703.19.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* § 1703.191.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ OHIO REV. CODE ANN. § 1329.01(A)(1) (Page 1979).

²³² *Id.* § 1329.01(B).

²³³ *Yunker v. Nationwide Mut. Ins. Co.*, 175 Ohio St. 1, 191 N.E.2d 149 (1963).

²³⁴ *Id.*

²³⁵ Ohio Rev. Code Ann. § 1329.01(B)(4) (Page 1979).

names and residence addresses of all of the partners, . . . and, if the applicant is a corporation, the state of its incorporation;

(2) The trade name to be registered;

(3) The general nature of the business conducted by the applicant;

(4) The length of time during which the trade name has been used by the applicant in the business operation in this state.

The application shall be signed by the applicant or [if the applicant is not an individual] by a member or officer of the applicant.²³⁶

The Secretary of State may not accept the registration of any trade name that tends to mislead the public, or that is not readily distinguishable from other trade names, corporate names, trademarks or service marks previously registered and not abandoned, unless written consent of the former registrant is filed with the application.²³⁷

A registration of a trade name is effective for five years and may be renewed at the end of each term²³⁸ for a fee of ten dollars.²³⁹ If the registrant is a partnership, the registration must be renewed whenever there is a change in the listing of general partners.²⁴⁰ Any trade name registration that is not renewed will be cancelled.²⁴¹

The registrant of any trade name must report all changes of his business address to the Secretary of State by filing a written statement setting forth the trade name, the date of registration, the new address²⁴² and accompanied by a three dollar filing fee.²⁴³ The assignment of a trade name may be recorded with the Secretary of State by submitting the executed instrument of assignment with a ten dollar filing fee.²⁴⁴ However, the filing of an assignment does not operate as a renewal of the registration.²⁴⁵

X. FICTITIOUS NAMES

A fictitious name is a name used in business or trade that does not identify the user and that is not registered as a trade name or a cor-

²³⁶ *Id.* § 1329.01(B).

²³⁷ *Id.* § 1329.02.

²³⁸ *Id.* § 1329.04.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* § 1329.08(B).

²⁴² *Id.* § 1329.07.

²⁴³ *Id.*

²⁴⁴ *Id.* § 1329.06.

²⁴⁵ *Id.*

porate name.²⁴⁶ Any person who does business under a fictitious name must report its use to the Secretary of State.

The report of a fictitious name must set forth the name and address of the user, the nature of the business and the exact form of the fictitious name.²⁴⁷ If the user of the fictitious name is a partnership, the names and residence addresses of all general partners must also be reported.²⁴⁸ The filing fee is ten dollars.²⁴⁹

A person who reports a fictitious name must record all changes of his business address by filing with the Secretary of State a written statement setting forth the name, the date of the report and the new address.²⁵⁰ A filing fee of three dollars must accompany the statement.²⁵¹

The report of a fictitious name is effective for a term of five years, and may be renewed at the end of each period,²⁵² except that a partnership must renew its report whenever there is a change in the listing of general partners.²⁵³ The renewal fee is ten dollars.²⁵⁴ A fictitious name and its report may be assigned by a duly executed, written instrument which may be recorded with the Secretary of State upon payment of a ten dollar filing fee.²⁵⁵

XI. TRADE MARKS, SERVICE MARKS AND MARKS OF OWNERSHIP

A trademark is "any word, name, symbol or device, or any combination thereof adopted and used by a person to identify goods made or sold by him, and to distinguish them from goods made or sold by others."²⁵⁶ A service mark is "a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others. . . ."²⁵⁷

A trademark or service mark used in Ohio may be registered with the Secretary of State²⁵⁸ by submitting a twenty dollar filing fee²⁵⁹ and an application setting forth the following information:

²⁴⁶ *Id.* § 1329.01(A)(2).

²⁴⁷ *Id.* § 1329.01(C).

²⁴⁸ *Id.*

²⁴⁹ OHIO REV. CODE ANN. § 111.16(G) (Page Supp. 1979).

²⁵⁰ OHIO REV. CODE ANN. § 1329.07 (Page 1979).

²⁵¹ *Id.*

²⁵² *Id.* § 1329.04.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* § 1329.06.

²⁵⁶ *Id.* § 1329.54(A).

²⁵⁷ *Id.* § 1329.54(F). Service marks include "marks, names, symbols, titles, designations, slogans, character names, and distinctive features of radio or other advertising used in commerce." *Id.*

²⁵⁸ *Id.* § 1329.56.

²⁵⁹ *Id.* § 1329.56(E).

(A) The name and business address of the . . . [applicant]; and, if a corporation, the state of incorporation;

(B) The goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with the goods or services and the class in which the goods or services fall;

(C) The date when the trademark or service mark was first used anywhere and the date when it was first used in . . . [Ohio] by the applicant or his predecessor in business;

(D) A statement that the applicant is the owner of the trademark or service mark and that no other person has the right to use the trademark or service mark in . . . [Ohio] either in the identical form thereof, or in such near resemblance thereto, as might be calculated to deceive or be mistaken therefor;

(E) A statement that no other person has registration of the same or a confusingly similar trademark or service mark in the United States patent office for the same or similar goods or services or a statement that applicant is the owner of a concurrent registration in the United States patent office of his trademark or service mark covering an area including . . . [Ohio].

The application shall be signed and verified by the applicant. . . .

The application shall be accompanied by a specimen or facsimile of the trademark or service mark as actually used and shall contain a brief description of the trademark or service mark as it appears on the specimen or facsimile.²⁶⁰

²⁶⁰ *Id.* § 1329.56(A)-(E). In some cases the Secretary of State may refuse to register a trademark or service mark. A trademark or service mark will not be accepted if it is:

(A) Immoral, deceptive or scandalous matter;

(B) Matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or dispute;

(C) The flag or coat of arms or other insignia of the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof;

(D) The name, signature, or portrait of any living individual, except with his written consent;

(E) A mark which:

(1) When applied to the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them;

(2) . . . is primarily geographically descriptive or deceptively misdescriptive of them;

(3) Is primarily merely a surname; . . .

(F) A trade-mark or service mark which so resembles a trade-mark or service mark registered in . . . [Ohio] or a trade-mark, service mark, corporate name, or trade name previously used in . . . [Ohio] by another and

Trademark or service mark registrations are effective for a term of ten years and, upon application within six months prior to the expiration date, they may be renewed for additional ten year periods upon payment of a ten dollar renewal fee.²⁶¹

A trademark or service mark and its registration are assignable along with the good will of the business in which the mark is used. The assignment may be recorded with the Secretary of State by filing the executed assignment agreement with a fee of ten dollars.²⁶² The registrant must record all changes of his business address by filing a written statement with the Secretary of State. The filing fee for this transaction is three dollars.²⁶³

A mark of ownership is a "word, name, symbol, picture, design or device, or any combination thereof, produced upon and used by a person to indicate ownership of articles and supplies. . . ."²⁶⁴ A mark of ownership may be registered with the Secretary of State by filing an application setting forth: "(A) The name and business address of the . . . [applicant]; and if a corporation, the state of incorporation; (B) The nature of the business of the applicant; and (C) The type of articles or supplies in connection with which the name, mark, or device is used."²⁶⁵ This application must be accompanied by a copy, specimen, facsimile or counterpart of the mark or ownership and a filing fee of twenty dollars.²⁶⁶ The registration is effective for ten years and may be renewed for additional ten year periods. The renewal fee is ten dollars.²⁶⁷

As in the case of trademarks and service marks, a mark of ownership may be assigned by filing a copy of the agreement with the Secretary of State along with a fee of ten dollars.²⁶⁸ The registrant must record all changes of business address with the Secretary of State; the filing fee for this notice is three dollars.²⁶⁹

not abandoned, as likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive;

(G) A trade-mark or service mark which so resembles a trade-mark or service mark registered in the United States patent office by another and not abandoned, as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive. . . .

Id. § 1329.55.

²⁶¹ *Id.* § 1329.58.

²⁶² *Id.* § 1329.60.

²⁶³ *Id.* § 1329.601.

²⁶⁴ *Id.* § 1329.41(A).

²⁶⁵ *Id.* § 1329.42.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* § 1329.45.

²⁶⁹ *Id.* § 1329.421.

XII. REAL ESTATE INVESTMENT TRUSTS

Before transacting business in Ohio, a real estate investment trust must comply with the requirements of chapter 1747 of the Ohio Revised Code.²⁷⁰ A real estate investment trust is defined as "a trust created by an instrument under which any estate or interest in real property is held, managed, administered, controlled, invested, reinvested or operated by a trustee or trustees for the benefit and profit of persons who are or many become the holders of transferable certificates of beneficial interest. . . ."²⁷¹

In order to transact business in Ohio, a real estate investment trust must submit a report and a fifty dollar filing fee to the Secretary of State.²⁷² This report must include:

- (1) An executed copy of the trust instrument or a true and correct copy of it, certified to be such by a trustee before an official authorized to administer oaths or by a public official in another state in whose office an executed copy is on file;
- (2) A list of the names and addresses of its trustees;
- (3) The address of its principal office;
- (4) In the case of a foreign real estate investment trust, the address of its principal office within this state, if any;
- (5) The business name of the trust;
- (6) The name and address within this state of a designated agent upon whom process against the trust may be served;
- (7) The irrevocable consent of the trust to service of process on its designated agent and to service of process upon the secretary of state if, without the registration of another agent with the Secretary of State, its designated agent has died, resigned, lost authority, dissolved, become disqualified, or has removed from this state, or if its designated agent cannot, with due diligence, be found; . . .²⁷³

The Secretary of State must be notified within ninety days of any information in the report which becomes inaccurate.²⁷⁴ The fee for such a modification of the report is ten dollars.²⁷⁵

No amendment to the trust instrument adopted subsequent to the filing of the initial report is legally effective in Ohio until an executed or certified copy of the amendment has been filed with the secretary of state along with a twenty-five dollar fee.²⁷⁶

²⁷⁰ *Id.* §§ 1747.01-.13.

²⁷¹ *Id.* § 1747.01(A).

²⁷² *Id.* § 1747.03(B).

²⁷³ *Id.* § 1747.03(A).

²⁷⁴ *Id.* § 1747.03(A)(8).

²⁷⁵ *Id.* § 1747.03(B).

²⁷⁶ *Id.* § 1747.04.

XIII. MUNICIPAL INCORPORATION AND ANNEXATIONS

The incorporation of a city or village requires that a petition for incorporation, a transcript of the proceedings before the County Commissioners and a map be filed with the Secretary of State.²⁷⁷ The incorporation becomes effective on the filing date. The filing fee for this transaction is five dollars.²⁷⁸

In the case of an approved municipal annexation, the Auditor or Clerk of the municipality must file with the Secretary of State a copy of the annexation petition, the annexation map, a transcript of the proceedings of the County Commissioners and all relevant resolutions and ordinances.²⁷⁹ These documents must be accompanied by a certificate of correctness, signed by the Auditor or Clerk in his official capacity and authenticated by the seal of the municipal corporation.²⁸⁰ The filing fee for this transaction is five dollars.²⁸¹

XIV. CONCLUSION

The incorporation process in Ohio is largely administered by the Secretary of State. It involves compliance with a series of formal requirements which standardize records and create a centralized repository of documents within the state. The process also creates a comprehensive body of records that aids research and investigation, enabling the Secretary of State to serve as a clearinghouse of information on parties transacting business within Ohio.

²⁷⁷ OHIO REV. CODE ANN. § 707.09 (Page 1976).

²⁷⁸ OHIO REV. CODE ANN. § 111.16(F) (Page Supp. 1979).

²⁷⁹ OHIO REV. CODE ANN. § 709.06 (Page 1976).

²⁸⁰ *Id.*

²⁸¹ OHIO REV. CODE ANN. § 111.16(F) (Page Supp. 1979).