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# OHIO LEGISLATIVE SERVICE COMMISSION

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H.J.R. 2  
133<sup>rd</sup> General Assembly

## Resolution Analysis

**Version:** As Introduced

**Primary Sponsors:** Reps. D. Manning and Callender

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### SUMMARY

- Proposes to amend the Ohio Constitution to do the following:
  - Prohibit a corporation or other business entity that is determined by the Secretary of State to be an “alien entity” from having ownership interest in critical infrastructure.
  - Require an alien entity to divest its ownership interest in critical infrastructure not later than one year after receiving notice from the Secretary of State to do so, unless a mistake of fact hearing determines the alien entity determination is erroneous.
  - Define “alien entity” as a corporation or other business entity for which nonresident aliens or alien investors have at least 51% ownership interest or have access to certain nonpublic technical information, rights on its board of directors, or involvement in decision-making regarding critical infrastructure.
  - Define “critical infrastructure” to include any Ohio facility that affects the “life, safety, health, welfare, and economic well-being” of Ohio citizens and that includes water treatment facilities, intrastate oil transmission pipelines, and certain electric generating facilities, intrastate transmission lines, and intrastate pipelines.
  - Require a corporation or entity with an ownership interest in critical infrastructure to report to the Secretary of State, along with a \$5 filing fee, certain information including, for example, the corporation’s or entity’s name and the country and business address of its nonresident alien and alien investor shareholders.
- Specifies that the proposed constitutional amendment is to appear on the ballot on November 3, 2020.
- Provides that, if adopted by a majority of electors voting on it, the constitutional amendment takes effect immediately.

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## DETAILED ANALYSIS

### Critical infrastructure ownership prohibition and divestment

The joint resolution proposes to amend the Ohio Constitution to expressly prohibit an alien entity from having ownership interest in critical infrastructure.<sup>1</sup> The amendment also requires the Secretary of State to determine whether a corporation or entity that owns critical infrastructure is an alien entity, and if so, to require divestment of all ownership interest in that infrastructure. The determination (described below) is based on nonresident aliens or alien investors holding or acquiring a certain percentage of shares of stock or other interests in the corporation or entity or their access rights on the board of directors or access to critical infrastructure nonpublic technical information or decision-making.<sup>2</sup>

#### Definitions

Under the joint resolution, an “alien entity” is a corporation or other business entity that is created or organized under the laws of Ohio, any other state, or any foreign nation or has its principal place of business in a foreign nation. In addition, to be an alien entity, one of the following must apply:

- Nonresident aliens and alien investors, in aggregate, hold or acquire at least 51% of the shares of stock or other interests in the corporation or entity.
- A nonresident alien or alien investor holds or acquires any shares of stock or other interests in the corporation or entity, the holding or acquisition of which grants the nonresident alien or alien investor access to any of the following:
  - Nonpublic technical information about critical infrastructure;
  - Membership or observer rights on the corporation’s or entity’s board of directors;
  - Any other involvement in substantive decision-making regarding critical infrastructure or critical infrastructure technology.<sup>3</sup>

An “alien investor” is a corporation, business trust, estate, trust, partnership, or any other entity or association, created or organized under the laws of a foreign nation or with its principal place of business in a foreign nation that holds or acquires shares of stock or other interest in another corporation or entity.<sup>4</sup> A “nonresident alien” is any individual who is not a citizen of, and is not domiciled in, the United States.<sup>5</sup>

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<sup>1</sup> Article XV, Section 12(B).

<sup>2</sup> Article XV, Section 12(A), (D), and (F).

<sup>3</sup> Article XV, Section 12(A)(1).

<sup>4</sup> Article XV, Section 12(A)(2).

<sup>5</sup> Article XV, Section 12(A)(5).

“Critical infrastructure,” means any facility located in Ohio that affects the “life, safety, health, welfare, and economic well-being” of Ohio citizens and that is any of the following:

- An electric generating facility that:
  - Has a generating capacity of 50 megawatts or more; and
  - Is a hydroelectric facility or its primary source of fuel is coal, natural gas, or nuclear power.
- An intrastate electric transmission line and any associated facility that is of a design capacity of 100 kilovolts or more, but is not a step-down transmission substation for a single industrial customer located at a single location;
- A water treatment facility;
- An intrastate pipeline that is a major utility facility as defined in the Power Siting Board law. (Under that law, a major utility facility includes a gas pipeline that is greater than 500 feet in length and its associated facilities, is more than nine inches in outside diameter and is designed for transporting gas at a maximum allowable operating pressure in excess of 125 pounds per square inch. It does not include a gas transmission line under exclusive jurisdiction of a federal agency; nor does it include certain types of gas gathering and other gas-transporting pipelines.)
- An intrastate oil transmission pipeline.<sup>6</sup>

“Divest” means to release, dispose of, or convey all ownership interests in critical infrastructure that is either held directly or through any type of subsidiary or associated entity or organization.<sup>7</sup>

## **Challenge to alien entity determination/divestment exception**

The amendment permits a corporation or entity to challenge an alien entity determination made by the Secretary of State. The corporation or entity may request a mistake of fact hearing if it believes the Secretary of State’s determination is erroneous. Procedures for a mistake of fact hearing are to be established by rules adopted by the Secretary of State. If, at the hearing, the corporation or entity is determined not to be an alien entity, the corporation or entity is not required to divest its ownership interest in critical infrastructure.<sup>8</sup>

## **Procedures for alien entity determination and divestment**

### **1. Critical infrastructure owner submission to Secretary of State**

Under the amendment, every corporation or entity with an ownership interest in critical infrastructure must submit all of the following to the Secretary of State:

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<sup>6</sup> Article XV, Section 12(A)(3); R.C. 4906.01, not in the resolution.

<sup>7</sup> Article XV, Section 12(A)(4).

<sup>8</sup> Article XV, Section 12(E)(5), (F), and (G).

- The name of the corporation or entity, address of its principal place of business, and address of its principal Ohio office;
- The name, address, telephone number, and country of citizenship of each nonresident alien, if any, and the name and address, including country, of the principal place of business of each alien investor, if any:
  - Owning, in aggregate, at least 51% of the shares of stock or other interests in the corporation or entity;
  - Owning stock or interest in the corporation or entity that grants the nonresident alien or alien investor access to any nonpublic technical information, membership or observer rights on the corporation's or entity's board of directors, or any other involvement in substantive decision-making regarding critical infrastructure or critical infrastructure technology;
- The chairman of the governing board, chief executive, and partners of the corporation or entity, as applicable;
- The corporation's or entity's agent in Ohio;
- The place of incorporation, if a corporation;
- The critical infrastructure in which the corporation or entity has an ownership interest.<sup>9</sup>

## **2. Mandatory filing fee**

Under the amendment, a corporation's or entity's submission of information to the Secretary of State must be accompanied by a \$5 filing fee.<sup>10</sup> The amendment does not specify the purpose of the filing fee, but presumably it could be used for administration of the procedures that the amendment requires.

## **3. Alien entity determination**

After the Secretary of State receives information from a corporation or entity regarding its ownership in critical infrastructure, he or she must determine if the corporation or entity is an alien entity based on the information the corporation or entity submitted.<sup>11</sup>

## **4. Divestment notice to corporation or entity**

If the Secretary of State determines that the corporation or entity is an alien entity, he or she must direct the corporation or entity to divest all ownership interest in the critical infrastructure described in the submission to the Secretary of State. The notification must be in writing and must contain the following information:

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<sup>9</sup> Article XV, Section 12(C)(1) to (7).

<sup>10</sup> Article XV, Section 12(C).

<sup>11</sup> Article XV, Section 12(D).

- The name of the corporation or entity the Secretary of State has determined is an alien entity, address of its principal place of business, and address of its principal Ohio office;
- The critical infrastructure in which the corporation or entity has an ownership interest;
- A statement that the corporation or entity must divest any ownership interest it has in the critical infrastructure;
- A statement that the corporation or entity must achieve the divestment not later than one year after the notice is sent;
- A statement that the corporation or entity may request a mistake of fact hearing under rules adopted by the Secretary of State if the corporation or entity believes the alien entity determination is erroneous.<sup>12</sup>

## **5. Divestment deadline**

Each corporation or entity that receives a notice from the Secretary of State requiring it to divest its ownership interest in the critical infrastructure described in the notice must complete divestment not later than one year after the notice is sent.<sup>13</sup>

## **6. Divestment achievement notice to Secretary of State**

A corporation or entity determined to be an alien entity must notify the Secretary of State once it achieves divestment and the date the divestment is effective. The notice must be in writing.<sup>14</sup>

## **Secretary of State rules**

The amendment requires the Secretary of State to adopt rules under the Administrative Procedure Act (Chapter 119 of the Revised Code) to implement the amendment. The rules must include provisions that establish a mistake of fact hearing procedure through which a corporation or entity may object to the determination that it is an alien entity.<sup>15</sup>

## **Date of election and effective date**

The resolution specifies that the amendment is to appear on the ballot on November 3, 2020. If adopted by a majority of electors voting on it, the amendment takes effect immediately.

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<sup>12</sup> Article XV, Section 12(D) and (E).

<sup>13</sup> Article XV, Section 12(F).

<sup>14</sup> Article XV, Section 12(F).

<sup>15</sup> Article XV, Section 12(H).

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## NOTE

The United States Supreme Court has construed the Foreign Commerce Clause of the U.S. Constitution<sup>16</sup> to mean that only the federal government, as a single entity, can regulate foreign commerce. The provisions of the joint resolution that prohibit an alien entity from having an ownership interest in critical infrastructure in Ohio and require divestment<sup>17</sup> might impact foreign commerce. Under the resolution, an “alien entity” includes a corporation or business entity that is created or organized under the laws of any foreign nation or that has its principal place of business in a foreign nation.<sup>18</sup>

In addition, under the Interstate Commerce Clause, unless the regulation is narrowly tailored to achieve a legitimate state interest states cannot interfere with interstate commerce.<sup>19</sup> The joint resolution’s prohibition against an alien entity’s investment in critical infrastructure in Ohio and requirement for divestment might impact interstate commerce, because an alien entity may include a “corporation or other business entity that is created or organized under the laws of any state, including Ohio.”

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## HISTORY

Action	Date
Introduced	10-25-19

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<sup>16</sup> U.S. Constitution, Article I, Section 8, Clause 3; *Bd. of Trustees v. U.S.*, 289 U.S. 48, 56-59 (1933); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 452-457 (1979).

<sup>17</sup> Article XV, Section 12(B) and (F).

<sup>18</sup> Article XV, Section 12(A)(1).

<sup>19</sup> U.S. Constitution, Article I, Section 8, Clause 3; *Lewis v. Bt Inv. Managers*, 447 U.S. 27 (2009).