

NORTH CAROLINA GENERAL ASSEMBLY
1977 SESSION

CHAPTER 781
SENATE BILL 204

AN ACT TO CREATE A NEW CHAPTER 78B CONCERNING TENDER OFFERS.

The General Assembly of North Carolina enacts:

Section 1. A new Chapter of the General Statutes to be known as Chapter 78B is hereby created and shall read as follows:

"§ 78B-1. Title. — This Chapter shall be known and may be cited as the 'Tender Offer Disclosure Act'.

"§ 78B-2. Definitions. — As used in this Chapter, unless the context otherwise requires, the term:

- (a) 'Administrator' means the Secretary of State.
- (b) 'Affiliate' of a person means any person that, directly or indirectly, controls, is controlled by or is under common control with that person.
- (c) 'Associate' of a person means
 - (i) any corporation or other organization of which such person is an officer, director or partner, or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities;
 - (ii) any person who is an officer, director, partner or managing agent of such person, or who is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities of such person;
 - (iii) any trust, guardianship, estate or similar entity in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity; or
 - (iv) any relative or spouse of such person or any relative of such spouse, if in each case such relative or spouse has the same home as such person.
- (d) 'Business day' means any day other than a Saturday, Sunday, or legal holiday in North Carolina.
- (e) 'Equity security' means any stock, bond or other obligation, the holder of which presently has the right to vote for the election of directors or other persons who serve in a similar capacity for the issuer; and it includes any security convertible into an equity security and any right, option or warrant to purchase an equity security.
- (f) 'Executive officer' means a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any other person performing similar functions.
- (g) 'Exempt offer' means, with respect to any class of equity securities of the subject company,
 - (i) an offer made by the subject company or any issuer of equity securities to purchase its own equity securities or equity securities of its subsidiary;

- (ii) offers to purchase equity securities from not more than 25 offerees within a twelve-month period;
- (iii) an offer, if the acquisition of any equity security pursuant to the offer, together with all other acquisitions by the offeror and his associates of securities of the same class during the preceding 12 months, would not exceed two percent (2%) of the outstanding securities of such class;
- (iv) an offer to purchase equity securities of a class not registered pursuant to Section 12 of the Securities Exchange Act of 1934;
- (v) an offer that is subject to approval by the shareholders of the subject company at a meeting for which proxies have been solicited pursuant to Section 14 of the Securities Exchange Act of 1934; or
- (vi) bids made by a registered broker-dealer in the ordinary course of his business and not with the purpose of changing the control of an issuer of equity securities,

(h) 'Offeree' means any person to whom a tender offer is made,

(i) 'Offeror' means a person who makes a tender offer, and includes two or more persons,

- (i) whose tender offers are made jointly or in concert; or
- (ii) who intend to exercise jointly or in concert any voting rights attaching to the equity securities for which a tender offer is made.

An 'offeror' does not include any bank, insurance company, broker-dealer or other person loaning funds to an offeror in the ordinary course of its business or any broker-dealer, attorney, accountant, consultant, employee or other person furnishing information or advice to or performing administrative or ministerial duties for an offeror in the ordinary course of his business.

(j) 'Person' means an individual, a partnership, a corporation, an unincorporated association, a trust, an estate or similar entity.

(k) 'Securities Act of 1933' and 'Securities Exchange Act of 1934' mean the federal statutes of those names as now or hereafter amended.

(l) 'Subject company' means a corporation or other issuer of securities whose equity securities are the subject of a tender offer and which

- (i) is organized under the laws of and doing business in this State; or
- (ii) has its principal place of business and substantial assets in this State.

(m) 'Subsidiary' of a person means a person more than fifty percent (50%) of whose outstanding securities representing the right, other than as effected by default, to vote for the election of directors, is owned by such person directly or indirectly.

(n) 'Tender offer' means an offer to purchase or invitation to tender, other than an exempt offer, made by an offeror, directly or indirectly, for such amount of any class of equity securities of a subject company that, together with equity securities of such class owned beneficially or of record by the offeror and his associates at the time of the offer or invitation, will in the aggregate exceed five percent (5%) of the outstanding equity securities of such class. A tender offer is 'made' when the offer or invitation is first published or sent or given to the offerees.

"§ 78B-3. Mandatory provisions of and limitations on tender offers. — The following provisions apply to every tender offer:

- (a) Every tender offer shall provide that any equity securities of a subject company deposited or tendered pursuant to such tender offer may be withdrawn by or on behalf of any offeree at any time up to three business

days before the termination of the effectiveness of the tender offer, and that any unpurchased equity securities may be so withdrawn at any time after 60 days from the date the tender offer is made. The period of effectiveness of any tender offer shall not be less than 21 days from the date the tender offer is made.

- (b) Where a tender offer is made for less than all the equity securities of a class and a greater amount of equity securities is deposited or tendered pursuant thereto than the offeror is bound or willing to accept, the securities shall be accepted by the offeror as nearly as practicable pro rata, disregarding fractions, according to the amount of equity securities deposited or tendered by each offeree.
- (c) Where an offeror revises the terms of a tender offer before the expiration thereof by increasing the consideration offered, the offeror shall pay the increased consideration to each offeree whose equity securities are purchased even if such securities were tendered and purchased before the revision of the terms of the tender offer.

"§ 78B-4. Disclosure. — (a) No offeror shall make a tender offer unless at least 30 days prior thereto he shall file with the administrator and deliver to the principal office of the subject company personally or by registered United States mail a statement containing all the information required by subsection (b) of this section.

(b) The statement to be filed with the administrator and delivered to the subject company pursuant to subsection (a) of this section shall contain the following information:

- (i) the name of the subject company and its registered agent and registered office; the title of the equity securities for which the proposed tender offer will be made; and all of the terms and conditions of the proposed tender offer;
- (ii) with respect to the offeror filing the statement:
 - a. the name and residence or business address of the offeror;
 - b. if the offeror is an individual, his citizenship, his principal occupations or employments at the time of the filing and during the past five years, giving the starting and ending dates of each and the name, principal business and address of any corporation or other organization in which such occupation or employment is or has been conducted;
 - c. if the offeror is not an individual, its form of organization; the date of its organization; the jurisdiction in which it is organized and the name of its registered agent and registered office in that jurisdiction, if any; a description of the amount and characteristics of all of its equity securities that are authorized and that are outstanding; the amount, maturity date and interest rate of all of its outstanding long-term debt; and the name, address, citizenship and principal occupation or employment during the past five years of each director and executive officer of the offeror, and each person owning beneficially, directly or indirectly, to the knowledge of the offeror twenty percent (20%) or more of any class of outstanding equity securities of the offeror, giving the starting and ending dates of each and the name, principal business and address of any business, corporation or other organization in which each such occupation or employment was carried on; and if the tender offer is for the purchase of less than all the outstanding equity securities issued by the subject company and is made by an offeror which is not subject

to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, copies of a balance sheet of the offeror as of the end of its last fiscal year and of its income statements for the three fiscal years preceding the offer.

- d. whether or not, during the past five years, the offeror or any associate of the offeror has been convicted of, or has entered a plea of guilty or nolo contendere, in a criminal proceeding in any jurisdiction (excluding traffic violations or similar misdemeanors) and, if so, as to each proceeding the date of such conviction or plea, a description of the crime involved, the name and location of the court, and the penalty imposed or other disposition of the case; and
- e. whether or not, during the past five years, the offeror or any associate of the offeror has been a party to a civil or criminal proceeding before a court or administrative or regulatory agency as a result of which the offeror or any associate of the offeror was or is subject to a judgment, decree or order enjoining future violations of, or prohibiting activities regulated by, federal or State securities or blue sky laws or finding liability under any such laws; and if so, a description of each such proceeding and the date and a summary of the terms of any such judgment, decree or order.

- (iii) the source and amount of all the funds used or to be used in making the tender offer or purchasing equity securities pursuant thereto, and if any part of such funds is represented or is to be represented by funds borrowed for the purpose of making such offer or purchasing such securities a description of the transaction and the names of the parties thereto, except that where the source of funds is a loan or loans made in the ordinary course of business by a bank or other financial institution regularly engaged in the business of making loans, it will be sufficient to identify such bank or financial institution and so to state;
- (iv) a statement of the purpose or purposes of the tender offer and of any plans existing at the time such tender offer is made which the offeror, upon successful completion of the proposed tender offer, may have which related to or would result in:
 - a. any major change in the business or corporate structure of the subject company or any of its subsidiaries, including without limitation any merger, consolidation, liquidation or sale of all or any substantial portion of its or their assets;
 - b. any change in the board of directors or executive officers of the subject company, including without limitation any plans or proposals to change the number or terms of directors and the names, addresses, citizenship and principal occupation or employment of any proposed new members of the board of directors;
 - c. any material change in the capitalization of the subject company or any of its subsidiaries;
 - d. the payment or nonpayment of dividends by the subject company; or
 - e. the delisting of any equity securities of the subject company from any organized securities exchange, or the termination of the registration of any equity securities of the subject company with the Securities and Exchange Commission;
- (v) the aggregate number of each class of equity securities of the subject company owned beneficially or of record, or subject to a right of acquisition,

by each offeror and by each affiliate and associate of each offeror, giving the name and address of each such affiliate and associate, and any transactions in any such equity securities during the past 90 days by any such person;

(vi) information as to any contracts, arrangements or understandings, whether in writing or otherwise, between the offeror or any associate or affiliate of the offeror and any person, including without limitation any offeree or the subject company or any director or executive officer thereof, with respect to the subject company or any equity securities thereof, including without limitation the transfer or retention of such securities, joint ventures, option arrangements, puts or calls, loans, guaranties of loans, guaranties against loss or guaranties of profit, division of profits or losses, proxies, voting arrangement, or employment arrangements, naming the persons with whom such contracts, arrangements or understandings have been entered into, and giving the material details thereof; and

(vii) the identity of all persons employed, retained or to be compensated by the offeror, or by any person on his behalf, to make solicitations of or recommendations to equity security holders regarding the tender offer, and a brief description of the material terms of such employment, retainer or arrangement.

(c) There shall be delivered, as exhibits to the statement required by subsection (a) of this section, copies of the proposed tender offer and all advertisements and other written material relating thereto, including without limitation solicitations or recommendations to holders of equity securities of the subject company with respect to such tender offer.

(d) In the case of an offer that is registered under Section 6 of the Securities Act of 1933, the offeror may, in lieu of the statement and exhibits required pursuant to subsections (a), (b) and (c) of this section, file with the administrator and deliver to the principal officer of the subject company in the manner set forth in subsection (a) of this section a copy of the form of prospectus filed under the Securities Act of 1933 with respect to such offer. If such prospectus is filed with the administrator pursuant to G.S. 78A-26, no additional copies shall be required to be filed with the administrator pursuant to this subsection.

(e) If before the tender offer is made any material amendment is made to the statement furnished or exhibits delivered pursuant to subsections (b) and (c) of this section, the tender offer shall not be made earlier than 10 days after the date of such amendment.

(f) If at any time or from time to time after a tender offer is made, the offeror revises the terms of such offer, the offeror shall file with the administrator and deliver to the principal office of the subject company personally or by registered United States mail a statement containing all of the terms and conditions of the revised tender offer and explaining in what respect the revised tender offer differs from the tender offer or offers previously made. Such statement shall be filed and delivered not less than six business days prior to the time such revised tender offer is made. All of the provisions of G.S. 78B-3 shall apply to such revised tender offer as if it were an original tender offer.

(g) A notice, in the form of a news release reasonably disseminated, advertisement, or other written communication directed to holders of equity securities of the subject company, which contains the following information shall be given concurrently with the filing required by subsection (a) of this section:

(i) the fact that a tender offer is proposed to be made and that a statement pursuant to subsection (a) of this section has been filed with the administrator and delivered to the subject company;

(ii) the amount of securities to be covered by the proposed tender offer and the date on which such offer is expected to be made;

(iii) the consideration proposed to be offered;

- (iv) the identity of the offeror; and
- (v) the purpose of the offer.

Any such notice shall not be deemed to constitute a tender offer and shall contain a statement that the tender offer shall be made only by a communication complying with the provisions of this Chapter.

(h) Whenever the subject company mails or otherwise delivers any written communication to the offerees with respect to the tender offer, the offeror, or any affiliate or associate of the offeror, it shall at the same time file with the administrator and deliver to the offeror personally or by registered United States mail copies of such written communications.

(i) The administrator shall maintain in his office copies of all documents and other material filed pursuant to this section for a period of three years from the date of filing, and thereafter all such documents and other material may be destroyed as the administrator deems appropriate. All documents and other material filed pursuant to this section shall be available for public inspection and copying.

"§ 78B-5. Deceptive practices. — It shall be unlawful for an offeror or subject company or any affiliate or associate of any offeror or the subject company or any person acting on its or their behalf to engage in any deceptive or manipulative acts or practices in connection with a tender offer. Deceptive and manipulative acts or practices include, without limitation, making any untrue statement of a material fact or omitting to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, in connection with any tender offer.

"§ 78B-6. Civil liabilities. — (a) An offeror who

- (i) makes a tender offer that does not comply in all material respects with the provisions of G.S. 78B-3, or
- (ii) makes a tender offer without complying in all material respects with the provisions of G.S. 78B-4, or
- (iii) makes a tender offer by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading (the offeree not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and did not act in reckless disregard, of such untruth or omission,

shall be liable to any offeree whose equity securities are sold to the offeror pursuant to the tender offer and such offeree in a civil action shall be entitled (A) to recover such equity securities, together with all dividends, interest or other payments received thereon upon the tender of the consideration received for such securities from the offeror, or (B) if the offeror has transferred such equity securities to a third party, to recover such damages as the offeree shall have sustained as the proximate result of the conduct of the offeror which is in violation of this section.

(b) No civil action may be maintained under this section unless commenced before the expiration of two years after the act or transaction constituting the violation.

(c) The rights and remedies of this Chapter are in addition to any other rights or remedies that may exist at law or in equity.

"§ 78B-7. Injunctions. — (a) Whenever it appears to the administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter, he may in his discretion bring an action in any court of competent jurisdiction to enjoin such acts or practices and to enforce compliance with this Chapter or he may refer such evidence as is available concerning violations of this Chapter to the Attorney General, who may, with or without such a reference, bring such an action. A subject company and an offeror shall also have standing to bring an action in any court of competent jurisdiction to enjoin any person from any act or practice which constitutes a violation of this Chapter.

(b) Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order or may order rescission of any sales or purchases of equity securities determined to be unlawful under this Chapter, or award such other relief as it may deem just and proper, including directing the subject company to refuse to transfer such securities on its books and to refuse to recognize any vote with respect to such securities.

"§ 78B-8. Criminal penalties. — (a) Any person who willfully violates this Chapter may be fined not more than five thousand dollars (\$5,000) or imprisoned for not more than two years or both. Each of the acts specified herein shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this Chapter more than two years after the alleged violation.

(b) The administrator may refer such evidence as is available concerning violations of this Chapter to the Attorney General or the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime under any other statute.

"§ 78B-9. Service of process. — (a) Any person, including any nonresident of this State, who engages in conduct that is subject to the provisions of this Chapter and who has not filed a consent to service of process under subsection (b) of this section, shall be deemed to have appointed the administrator to be his attorney to receive service of any lawful process in any suit, action or proceeding against him or his successor, executor or administrator which grows out of that conduct and which is brought under this Chapter, with the same force and validity as if served on him personally. Service may be had by leaving a copy of the process in the office of the administrator, and it is not effective unless (i) the plaintiff forthwith sends notice of the service and a copy of the process by registered United States mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and (ii) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(b) Any person who engages in conduct that is subject to the provisions of this Chapter may appoint and maintain a registered agent, which agent may be either an individual resident of this State, or a domestic corporation, or a foreign corporation authorized to transact business in this State. Such appointment shall take place by filing in the office of the Secretary of State a statement setting forth the name and address of the person appointing, the registered agent and the name and address in this State of the registered agent.

The registered agent appointed by any person pursuant to this section shall be an agent for said person upon whom any process, notice, or demand in any cause of action arising under this Chapter may be served.

(c) When process is served under subsection (a) of this section, the court shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend.

"§ 78B-10. Application of Chapter. — This Chapter shall not apply if the subject company is a public utility, public utility holding company, bank, bank holding company, insurance company, insurance holding company or savings and loan association subject to regulation by a federal or State agency and the tender offer is subject to approval by that agency.

"§ 78B-11. Severability. — If any provision or clause of this Chapter or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

Sec. 2. G.S. 78A-56(a)(2) and G.S. 78A-56(c) are amended by deleting therefrom the words "and in the exercise of reasonable care could not have known" and by inserting in lieu thereof the words "and did not act in reckless disregard".

Sec. 3. This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 28th day of June, 1977.