

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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SENATE BILL 309*

Judiciary II Committee Substitute Adopted 5/3/89

Short Title: Control Share Acquisition Act Amd.

(Public)

Sponsors:

Referred to:

February 27, 1989

1 A BILL TO BE ENTITLED
2 AN ACT TO AMEND THE NORTH CAROLINA CONTROL SHARE
3 ACQUISITION ACT.

4 The General Assembly of North Carolina enacts:

5 Section 1. Article 7A of Chapter 55 of the General Statutes reads as
6 rewritten:

7 "ARTICLE 7A.

8 "CONTROL SHARE ACQUISITIONS.

9 "§ 55-90. Short title and definitions.

10 (a) The provisions of this Article shall be known and may be cited as The North
11 Carolina Control Share Acquisition Act.

12 (b) In this Article:

13 (1) 'Beneficial ownership' of shares means the sole or shared ownership of
14 any shares or the sole or shared power to vote any shares or to direct
15 the exercise of voting power of any shares, whether such ownership or
16 power is direct or indirect or through any contract, arrangement,
17 understanding, relationship or otherwise, and includes shares
18 beneficially owned by any person acting in concert with such
19 beneficial owner pursuant to any contract, arrangement, understanding,
20 relationship or otherwise. Notwithstanding the foregoing, beneficial
21 ownership does not include shares acquired in the ordinary course of
22 business for the benefit of others in good faith and not for the purpose
23 of circumventing this Article, unless the acquiror of such shares may

- 1 exercise or direct the exercise of voting of such shares without
2 instruction from others.
- 3 (2) 'Control shares' means shares of an issuing public corporation that
4 when added to all other shares of the corporation beneficially owned
5 by a person would entitle (except for this Article) that person to voting
6 power in the election of directors that is equal to or greater than any of
7 the following levels of voting power:
8 a. One-fifth of all voting power.
9 b. One-third of all voting power.
10 c. A majority of all voting power.
- 11 (3) 'Control share acquisition' means the acquisition by any person of
12 beneficial ownership of control shares, except that the acquisition of
13 beneficial ownership of any shares of an issuing public corporation
14 does not constitute a control share acquisition if the acquisition is
15 consummated in any of the following circumstances:
16 a. Before April 30, 1987.
17 b. Pursuant to a contract existing before April 30, 1987, with
18 either:
19 (i) The issuing public corporation; or
20 (ii) A seller of such shares who owned such shares before
21 April 30, 1987.
22 c. Pursuant to the laws of descent and distribution.
23 d. Pursuant to the satisfaction of a pledge or other security interest
24 created in good faith and not for the purpose of circumventing
25 this Article.
26 e. Pursuant to a ~~tender offer~~, merger or plan of consolidation
27 effected in compliance with applicable law, but only if pursuant
28 to an agreement of merger or consolidation to which the issuing
29 public corporation is a party.
30 f. Pursuant to the sale of such shares by the issuing public
31 corporation or its parent or subsidiary corporation. ~~For~~
32 ~~purposes of this definition, shares acquired within any~~
33 ~~consecutive 90 day period or shares acquired pursuant to a plan~~
34 ~~to make a control share acquisition are considered to have been~~
35 ~~acquired in the same acquisition.~~
36 g. Pursuant to a written agreement to which the issuing public
37 corporation is a party that permits the purchasers of shares from
38 the issuing public corporation or its parent or subsidiary
39 corporation also to purchase in any manner within 90 days
40 before or after the purchase from the issuing public corporation
41 or its parent or subsidiary up to the same aggregate number of
42 shares as were sold by the issuing public corporation or its
43 parent or subsidiary corporation.

- 1 h. By an employee benefit plan established by the issuing public
2 corporation.
- 3 i. Before the corporation became an issuing public corporation.
4 For purposes of this definition, shares acquired within any consecutive
5 90-day period or shares acquired pursuant to a plan to make a control
6 share acquisition are considered to have been acquired in the same
7 acquisition.
- 8 (4) 'Interested shares' means the shares of an issuing public corporation
9 beneficially owned by any of the following persons:
- 10 a. Any person who has acquired or proposes to acquire control
11 shares in a control share acquisition.
- 12 b. Any officer of the issuing public corporation.
- 13 c. Any employee of the issuing public corporation who is also a
14 director of the corporation.
- 15 (5) 'Issuing public corporation' means a corporation that:
- 16 a. ~~Is incorporated under the laws of:~~
- 17 ~~(i) North Carolina and has substantial assets within North~~
18 ~~Carolina; or~~
- 19 ~~(ii) Any other state of the United States, and:~~
- 20 ~~(A) As of the end of each of its two most recent fiscal~~
21 ~~years and most recent fiscal quarter has more than~~
22 ~~forty percent (40%) of its fixed assets that are~~
23 ~~located in the United States located within North~~
24 ~~Carolina; and~~
- 25 ~~(B) More than forty percent (40%) of the persons~~
26 ~~employed by such corporation in the United~~
27 ~~States are residents of North Carolina;~~
- 28 Is incorporated under the laws of North Carolina and has
29 substantial assets within North Carolina,
- 30 b. ~~Has 500 or more shareholders;~~ Has a class of shares registered
31 under Section 12 of the Securities Exchange Act of 1934,
- 32 c. Has its principal place of business or principal office within
33 North Carolina; and
- 34 d. Has either:
- 35 (i) More than ten percent (10%) of its shareholders resident
36 in North Carolina; or
- 37 (ii) More than ten percent (10%) of its shares owned by
38 North Carolina residents.
- 39 (6) The residence of a shareholder is presumed to be the address appearing
40 in the records of the corporation.
- 41 (7) For purposes of calculating the percentages or numbers described in
42 subsection (b) (5) of this section, any shares held in trust or by a
43 nominee shall be deemed to be held by the beneficiaries of such trust
44 or by the beneficiaries of such shares held by such nominee.

1 **"§ 55-91. Acquiring person statement.**

2 Any person who has made a control share acquisition or who has made a bona fide
3 written offer to make a control share acquisition may at the person's election deliver an
4 acquiring person statement to the issuing public corporation at the issuing public
5 corporation's principal office. The acquiring person statement must set forth all of the
6 following:

- 7 (1) The identity of the acquiring person and each other beneficial owner of
8 shares that are beneficially owned by the acquiring person.
- 9 (2) A statement that the acquiring person statement is given pursuant to
10 this Article.
- 11 (3) The number of shares of the issuing public corporation beneficially
12 owned by the acquiring person and each other beneficial owner named
13 under ~~subsection (a)~~ subdivision (1) of this section.
- 14 (4) The level of voting power above which the control share acquisition
15 falls or would, if consummated, fall.
- 16 (5) If the control share acquisition has not taken place:
 - 17 a. A description in reasonable detail of the terms of the proposed
18 control share acquisition; and
 - 19 b. Representations of the acquiring person, together with a
20 statement in reasonable detail of the facts upon which they are
21 based, that the proposed control share acquisition, if
22 consummated, will not be contrary to law, and that the
23 acquiring person has the financial capacity to make the
24 proposed control share acquisition.

25 **"§ 55-92. Meeting of shareholders.**

26 (a) If the acquiring person so requests at the time of delivery of an acquiring
27 person statement and gives an undertaking to pay the corporation's expenses of a special
28 meeting, within 10 days after delivery of such request the directors of the issuing public
29 corporation shall call a special meeting of shareholders of the issuing public corporation
30 for the purpose of considering the voting rights to be accorded the control shares
31 acquired or to be acquired in the control share acquisition.

32 (b) Unless the acquiring person agrees in writing to another date, the special
33 meeting of shareholders shall be held within 50 days after the receipt by the issuing
34 public corporation of the request.

35 (c) If no request is made, the voting rights to be accorded the control shares
36 acquired in the control share acquisition shall be considered at the next special or annual
37 meeting of shareholders.

38 (d) If the acquiring person so requests in writing at the time of delivery of the
39 acquiring person statement, the special meeting must not be held sooner than 30 days
40 after receipt by the issuing public corporation of the acquiring person statement.

41 **"§ 55-93. Notice.**

42 If a special meeting is requested pursuant to G.S. 55-92, notice of the special
43 meeting of shareholders shall be given as promptly as reasonably practicable by the
44 issuing public corporation. Notice of any special or annual meeting at which the voting

1 rights of control shares are to be considered shall be given to all shareholders who are
2 entitled to vote at the meeting and who are shareholders of record as of the record date
3 set for the meeting, and to all holders of interested shares, and such notice must include
4 or be accompanied by each of the following:

- 5 (1) A copy of the acquiring person statement delivered to the issuing
6 public corporation pursuant to this Article.
- 7 (2) A statement by the board of directors of the issuing public corporation,
8 authorized by a majority of its directors, of its position or
9 recommendation, or that it is taking no position or making no
10 recommendation, with respect to granting voting rights to the control
11 shares acquired or proposed to be acquired in the control share
12 acquisition.
- 13 (3) If the shareholders would have a right of redemption under G.S. 55-95,
14 a statement, displayed with reasonable prominence, describing such
15 right and advising the shareholders that it will ~~be~~ be available only to
16 those who give the written notice required by G.S. 55-95(b).

17 **"§ 55-94. Voting rights.**

18 (a) Control shares acquired in a control share acquisition shall have no voting
19 rights unless such rights are granted by resolution adopted by the shareholders of the
20 issuing public corporation.

21 (b) To be approved under this section, the resolution must be adopted by the
22 affirmative vote of the holders of at least a majority of all the outstanding shares of the
23 corporation (not including interested shares) entitled to vote for the election of directors;
24 provided that if applicable law or a charter or bylaw provision adopted by the
25 shareholders before the occurrence of the control share acquisition that is the subject of
26 the vote prescribes voting by separate classes of shares, the resolution must also be
27 adopted by the affirmative vote of the holders of at least a majority of each such class
28 (but excluding in any such case all interested shares); and provided further that if
29 applicable law or a charter or bylaw provision adopted by the shareholders before the
30 occurrence of the control share acquisition that is the subject to the vote prescribes
31 voting by shares that would not otherwise be entitled to vote, such shares shall be
32 treated solely for purposes of this section as shares entitled to vote for directors (but
33 excluding in any such case all interested shares).

34 **"§ 55-95. Right of redemption by shareholders.**

35 (a) Unless otherwise provided in the charter or a bylaw of the issuing public
36 corporation adopted by the shareholders before a control share acquisition has occurred
37 and subject to G.S. 55-52(e), if control shares acquired in a control share acquisition are
38 accorded voting rights and the holders of the control shares have a majority of all voting
39 power for the election of directors, all shareholders of the issuing public corporation
40 (other than holders of control shares) have rights as prescribed in this section to have
41 their shares redeemed by the corporation at the fair value of those shares as of the day
42 prior to the date on which the vote was taken under G.S. 55-94.

43 (b) If the notice of meeting at which voting rights are accorded to control shares
44 contains the statement required by G.S. 55-93(3), a shareholder will not have any right

1 of redemption under this section unless he gives to the corporation, prior to or at the
2 meeting of shareholders at which the voting rights to be accorded to control shares are
3 considered, written notice that if voting rights are accorded to such shares he may ask
4 for the redemption of his shares hereunder.

5 (c) As soon as practicable after control shares held by persons having a majority
6 of all voting power for the election of directors have been accorded voting rights, the
7 board of directors shall cause a notice to be sent to all shareholders of the corporation
8 advising them of the facts and that if they gave the notice required by subsection (b) of
9 this section they may have rights to have their shares redeemed at the fair value of those
10 shares pursuant to this section.

11 (d) Within 30 days after the date on which a shareholder receives such notice,
12 such shareholder may make written demand on the corporation for payment of the fair
13 value of his shares, and after such demand, if such shareholder has complied with the
14 notice requirement in subsection (b) of this section, the corporation shall redeem his
15 shares at their fair value within 30 days after the date on which the corporation receives
16 such shareholder's written demand for payment.

17 (e) As used in this section, 'fair value' means a value not less than the highest
18 price paid per share by the acquiring person in the control share acquisition.

19 **"§ 55-96. Inconsistent regulation.**

20 ~~If any jurisdiction under the laws of which a foreign corporation is organized adopts~~
21 ~~any law containing provisions that are expressly inconsistent with the provisions of this~~
22 ~~Article as applicable to such foreign corporation, the provisions of this Article shall be~~
23 ~~inapplicable to such foreign corporation to the extent necessary to resolve such~~
24 ~~inconsistency.~~

25 **"§ 55-97. Severability.**

26 If any provision or clause of this Article or application thereof to any person or
27 circumstance is held invalid, such invalidity shall not affect other provisions or
28 applications of this Article that can be given effect without the invalid provision or
29 application, and to this end the provisions of this Article are declared to be severable.

30 **"§ 55-98. Effect on existing law.**

31 Nothing in this Article shall be construed to modify in any manner the provisions or
32 applicability of Article 7 of this Chapter.

33 **"§ 55-98.1. Exemptions.**

34 The provisions of this Article shall not be applicable to any corporation if, on or
35 before ~~the ninetieth (90th) calendar day after August 12, 1987~~September 30, 1990, or
36 such earlier date as may be irrevocably established by resolution of the board of
37 directors, or at any time before the corporation becomes, or after it ceases to be, an
38 issuing public corporation, the board of directors adopts a bylaw stating that the
39 provisions of this Article shall not be applicable to the corporation; or, in the case of a
40 corporation formed after August 12, 1987, its initial articles of incorporation provide
41 that this Article shall not be applicable to the corporation. Neither adoption nor failure
42 to adopt such a bylaw or provision shall constitute grounds for any cause of action
43 against the corporation, or any officer or director of the corporation."

1 Sec. 2. Section 2 of Chapter 182 of the 1987 Session Laws reads as
2 rewritten:
3 "Sec. 2. This act is effective upon ratification, ~~but shall expire June 30, 1989.~~"
4 Sec. 3. This act is effective upon ratification.