

No. 1983-92

AN ACT

SB 1144

Amending the act of May 5, 1933 (P.L.364, No.106), entitled, as amended, "An act relating to corporations; defining and providing for the organization, merger, consolidation, reorganization, winding up and dissolution of certain corporations for profit; conferring certain rights, powers, duties and immunities upon them and their officers and shareholders; prescribing the conditions on which such corporations may exercise their powers; providing for the inclusion of certain existing corporations and associations within the provisions of this act; prescribing the terms and conditions upon which certain foreign corporations may be admitted, or may continue, to do business within the Commonwealth; conferring powers and imposing duties on the courts of common pleas, and certain State departments, commissions, and officers; authorizing certain State departments, boards, commissions, or officers to collect fees for services required to be rendered by this act; imposing penalties; and repealing certain acts and parts of acts relating to corporations and other entities," clarifying the right of directors and officers to consider the effects of corporate actions upon employees, suppliers, customers and communities; providing for interested shareholder transactions; and conferring certain rights on noncontrolling shareholders.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 408 of the act of May 5, 1933 (P.L.364, No.106), known as the Business Corporation Law, amended July 20, 1968 (P.L.459, No.216), is amended to read:

Section 408. Relation of Directors and Officers to Corporation.—
A. Officers and directors shall be deemed to stand in a fiduciary relation to the corporation, and shall discharge the duties of their respective positions in good faith and with that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances.

B. *In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best interests of the corporation, consider the effects of any action upon employes, suppliers and customers of the corporation, communities in which offices or other establishments of the corporation are located and all other pertinent factors.*

Section 2. The section heading of section 409.1 of the act, added July 20, 1968 (P.L.459, No.216), is amended and a subsection is added to read:

Section 409.1. Interested Directors *and Shareholders*; Quorum.—* * *

C. *(1) Any transaction authorized under subsection B of section 311 or under Article IX of this act between a business corporation or subsidiary thereof and a shareholder of such business corporation, or any transaction authorized under Article XI of this act in which a shareholder is treated differently from other shareholders of the same class (other than any dissenting shareholders under section 515 of this act), shall require the affirmative vote*

of the shareholders entitled to cast at least a majority of the votes which all shareholders other than the interested shareholder are entitled to cast with respect to the transaction, without counting the vote of the interested shareholder. For the purposes of the preceding sentence, interested shareholder shall include the shareholder who is a party to the transaction or who is treated differently from other shareholders and any person, or group of persons, that is acting jointly or in concert with the interested shareholder and any person who, directly or indirectly, controls, is controlled by or is under common control with the interested shareholder. An interested shareholder shall not include any person who, in good faith and not for the purpose of circumventing this subsection, is an agent, bank, broker, nominee or trustee for one or more other persons, to the extent that such other person or persons are not interested shareholders.

(2) Clause (1) shall not apply to a transaction (i) which has been approved by a majority vote of the board of directors without counting the vote of directors who (a) are directors or officers of, or have a material equity interest in, the interested shareholder or (b) were nominated for election as a director by the interested shareholder, and first elected as a director, within twenty-four months of the date of the vote on the proposed transaction, or (ii) in which the consideration to be received by the shareholders for shares of any class of which shares are owned by the interested shareholder is not less than the highest amount paid by the interested shareholder in acquiring shares of the same class.

(3) The approvals required by this section shall be in addition to, and not in lieu of, any other approval required by this act, the articles of the corporation, the bylaws of the corporation or otherwise.

Section 3. The article heading of Article IX of the act is amended to read:

ARTICLE IX
MERGER [AND], CONSOLIDATION AND CERTAIN
OTHER FUNDAMENTAL TRANSACTIONS

Section 4. The act is amended by adding a section to read:

Section 910. Right of Shareholders to Receive Payment for Shares Following a Control Transaction.—A. Unless (1) the bylaws, by amendment adopted within ninety days of the date of enactment of this section and not subsequently rescinded by an article amendment, or (2) the articles explicitly provide that this section shall not be applicable to the corporation, any holder of voting shares of a business corporation that becomes the subject of a control transaction described in subsection B who shall object to the transaction shall be entitled to the rights and remedies herein provided.

B. (1) A controlling person or group shall mean for the purposes of this section a person who has, or a group of persons acting in concert that has, voting power over voting shares of the corporation that would entitle the holders thereof to cast at least thirty per cent of the votes that all shareholders would be entitled to cast in an election of directors of the corporation.

(2) *Notwithstanding the above, a person or group which would otherwise be a controlling person or group within the meaning of this section shall not be deemed such a controlling person or group unless, subsequent to the enactment of this section, that person or group increases the percentage of outstanding voting shares of the corporation over which it has voting power to in excess of the percentage of outstanding voting shares of the corporation over which that person or group had voting power on the date of enactment of this section, and to at least the amount specified in clause (1), as the result of forming or enlarging a group, or acquiring, by purchase, voting power over voting shares of the corporation.*

(3) (i) *A person shall not be a controlling person under clause (1) if such person holds voting power, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee or trustee for one or more beneficial owners who do not individually or, if they are a group acting in concert, as a group have the voting power specified in clause (1) or who are not deemed a controlling person or group under clause (2).*

(ii) *For the purposes of this section, a person has voting power over a voting share if such person has or shares, directly or indirectly, through any option, contract, arrangement, understanding, conversion right or relationship, or by acting jointly or in concert or otherwise, the power to vote, or to direct the voting of, such voting share.*

(4) *A control transaction shall mean, for the purposes of this section, the acquisition by a person or group of the status of a controlling person or group.*

C. Prompt notice that a control transaction has occurred shall be given by the controlling person or group to each shareholder of record of the corporation holding voting shares. If the person or group so requests, the corporation shall, at the option of the corporation and at the expense of the person or group, either furnish a list of all such shareholders to the person or group or mail the notice to all such shareholders. There shall be included in, or enclosed with, the notice a copy of this section and subsections F through I of section 515 of this act.

D. After the occurrence of the control transaction, any holder of voting shares of the corporation may, prior to or within a reasonable time after the notice required by subsection C is given, which time period may be specified in the notice, make written demand on the controlling person or group for payment of the amount provided in subsection E with respect to the voting shares of the corporation held by the shareholder, and the controlling person or group shall agree to pay that amount to the shareholder upon surrender of the share certificate or certificates representing such shares. The demand of the shareholder shall state the number and class or series, if any, of the shares owned by him with respect to which the demand is made.

Nothing contained in this section shall preclude a controlling person or group subject to this section from offering, whether in such notice or otherwise, to purchase voting shares of the corporation at a price other than that provided in subsection E, and nothing contained in this section shall preclude any shareholder from agreeing to sell his voting shares at that or any other price to any person.

E. A shareholder making written demand under subsection D shall be entitled to receive cash for each of his shares in an amount equal to the fair value of each voting share as of the day prior to the date on which the control transaction occurs, taking into account all relevant factors, including an increment representing a proportion of any value payable for acquisition of control of the corporation. Either the controlling person or group or the shareholder may proceed under subsections F through I of section 515 for a determination of the fair value of such share as defined in this subsection. The date of notice of the occurrence of the control transaction, or if no notice is given, the date of written demand made by the shareholder, shall be deemed to be the effective date of the plan, the shareholders who make written demand shall be deemed to be the dissenting shareholders, and the controlling person or group shall be deemed to be the corporation for the purposes of those subsections.

F. A person or group that proposes to engage in a control transaction may comply with the requirements of this section in connection with the control transaction, and the effectiveness of the rights afforded herein to shareholders may be conditioned upon the consummation of the control transaction.

The person or group shall give prompt written notice of the satisfaction of any such condition to each shareholder who has made demand as herein provided.

G. Subsections A through F shall not apply to any corporation that does not have a class of voting shares registered under the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.) or to any person or group that inadvertently becomes a controlling person or group if that controlling person or group, as soon as practicable, divests itself of a sufficient amount of its voting shares so that it is no longer a controlling person or group, or to any corporation that on the effective date of this section is a subsidiary of any other corporation.

For purposes of this subsection, subsidiary shall mean any corporation as to which any other corporation has or has the right to acquire, directly or indirectly, through the exercise of all warrants, options and rights and the conversion of all convertible securities, whether issued or granted by the subsidiary or otherwise, voting power over voting shares of the subsidiary that would entitle the holders thereof to cast in excess of fifty per cent of the votes that all shareholders would be entitled to cast in the election of directors of such subsidiary: Provided, however, That a subsidiary will not be deemed to cease being a subsidiary so long as such corporation remains a controlling person or group within the meaning of subsection B.

Section 5. The adoption of an amendment to the bylaws as permitted by section 910A.(1) of the act shall not be void or voidable by reason of the participation of any director affiliated with any shareholder and no director shall be held liable for taking or omitting to take such action.

Section 6. This act shall be applicable to shares issued before or after the effective date of this act.

Section 7. This act shall take effect immediately.

APPROVED—The 23rd day of December, A. D. 1983.

DICK THORNBURGH