

No. 1988-27

AN ACT

HB 2031

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," providing for option and conversion rights; and further providing for the rights of shareholders.

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

Section 1. Section 611 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 611. *Option Rights and Conversion Rights; Preemptive Rights of Shareholders.*—A. Except as otherwise provided [in subsection B of this section or] in its articles[, a business corporation may issue shares, option rights or securities having conversion or option rights, without first offering them to shareholders of any class or classes.] *prior to the creation and issuance thereof, a business corporation may create and issue (whether or not in connection with the issuance of any of its shares or other securities) option rights or securities having conversion or option rights entitling the holders thereof to purchase or acquire shares, option rights, securities having conversion or option rights, or obligations, of any class or series, or assets, of the corporation, or to purchase or acquire from the corporation shares, option rights, securities having conversion or option rights, or obligations, of any class or series, owned by the corporation and issued by any other person. Except as otherwise provided in subsection B of this section or in its articles:*

(1) *The shares, option rights, securities having conversion or option rights, or obligations shall be evidenced in such manner as the corporation may determine and may be offered without first offering them to shareholders of any class or classes; and*

(2) *A business corporation may issue shares, option rights or securities having conversion or option rights, or obligations without first offering them to shareholders of any class or classes.*

B. Unless otherwise provided in its articles, the shareholders of an unlisted corporation shall have a preemptive right to subscribe for shares, option rights, or securities having option rights, issued for cash by the corporation, if the corporation was not incorporated hereunder and its shareholders were or are entitled to preemptive rights at the date the corporation became or becomes subject to this act, but this subsection shall apply neither to the holders of shares of a class issued after the date such corporation became or becomes subject to this act nor to the issue of securities having conversion rights.

C. Except as otherwise provided in the articles, shares (or any option rights or securities having conversion or option rights with respect to such shares) which have been offered to shareholders having a preemptive right thereto, at a price and upon terms duly fixed, and which have not been subscribed for by them within the time duly fixed by the articles or the board of directors, may be thereafter offered for subscription to any person or persons at a price and upon terms not more favorable than those at which they were offered to such shareholders.

D. The securities, contracts, warrants, or other instruments evidencing any shares, option rights, securities having conversion or option rights, or obligations of a corporation may contain such terms as are fixed by the board of directors, including, without limiting the generality of such authority: restrictions upon the authorization or issuance of additional shares, option rights, securities having conversion or option rights, or obligations; provisions for the adjustment of the conversion or option rights price; provisions concerning rights or adjustments in the event of reorganization, merger, consolidation, sale of assets or other fundamental changes; provisions for the reservation of authorized but unissued shares or other securities; restrictions upon the declaration or payment of dividends or distributions or related party transactions; and conditions relating to the exercise, conversion, transfer or receipt of such shares, option rights, securities having conversion or option rights, or obligations; and, in the case of a corporation with a class of voting shares registered under the Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. § 78a et seq.) only, conditions including, but not limited to, conditions that preclude or limit any person or persons owning or offering to acquire a specified number or percentage of the outstanding common shares, other shares, option rights, securities having conversion or option rights, or obligations of such a corporation or transferee or transferees of any such person or persons from exercising, converting, transferring or receiving such shares, option rights, securities having conversion or option rights, or obligations.

E. Nothing contained in this section shall be construed to effect a change in the fiduciary relationship between a director and a business corporation or to change the standard of care of a director provided for in 42 Pa.C.S. Ch. 83 Subch. F (relating to corporate directors' liability).

Section 2. Section 910 of the act, added December 23, 1983 (P.L.395, No.92), is amended 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.] *A. 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, unless (1) the bylaws, by amendment adopted either (i) by March 23, 1984, or (ii) within ninety days after the effective date of this amendatory act, and, in either event, not subsequently rescinded by an article amendment, explicitly provide that this section shall not be applicable to the corporation or (2) the articles explicitly provide that this section shall not be applicable to the corporation by a provision included in the original articles, by an article amendment adopted prior to the date of such control transaction and prior to or on the effective date of this amendatory act pursuant to the procedures then applicable to the corporation, or by an article amendment adopted prior to the date of such control transaction and subsequent to the effective date of this amendatory act pursuant to both (i) the procedures then applicable to the corporation and (ii) unless such proposed amendment has been approved by the board of directors of the corporation, in which event this clause (ii) shall not be applicable, the affirmative vote of the shareholders entitled to cast at least eighty per cent of the votes which all shareholders are entitled to cast thereon. The rights and remedies herein provided shall be in addition to, and not in lieu of, any other rights or remedies provided by this act, the articles of the corporation, the bylaws of the corporation, any securities, option rights or obligations of the corporation or otherwise.*

B. (1) A controlling person or group shall mean for the purpose 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]~~ *twenty* 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, (i) 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]~~ *later of the effective date of this amendatory act or the date this section becomes applicable to a corporation by bylaw or article amendment or otherwise*, 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]~~ *such later date*, 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 *and (ii) no person or group shall be deemed to be a controlling person or group at any particular time if voting power over any of the following voting shares is required to be counted at such time in order to meet the twenty per cent minimum:*

(a) shares which have been held continuously by a natural person since January 1, 1983, and which are held by such natural person at such time; or

(b) shares which are held at such time by any natural person or trust, estate, foundation or other similar entity to the extent such shares were acquired solely by gift, inheritance, bequest, devise or other testamentary distribution or series of such transactions, directly or indirectly, from a natural person who had acquired such shares prior to January 1, 1983; or

(c) shares which were acquired pursuant to a stock split, stock dividend, reclassification or similar recapitalization with respect to shares described under subclause (ii) that have been held continuously since their issuance by the corporation by the natural person or entity that acquired them from the corporation, or that were acquired, directly or indirectly, from such natural person or entity, solely pursuant to a transaction or series of transactions described in paragraph (b) of subclause (ii), and that are held at such time by a natural person or entity described in such paragraph (b).

(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 (1) each shareholder of record of the corporation holding voting shares *and (2) to the court of common pleas in the county in this Commonwealth where the registered office of the corporation is located, accompanied by a petition to such court praying that the fair value (as defined in subsection E) of the voting shares of the corporation be determined pursuant to subsection E if the court should receive pursuant to such subsection certificates from shareholders of such corporation.* If the controlling 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. *The notice must state that (i) all shareholders are entitled to demand that they be paid the fair value of their shares; (ii) the minimum*

value the shareholder can receive under this section is the highest price paid per share by the controlling person or group within the ninety-day period ending on and including the date of the control transaction, and stating that value; and (iii) if the shareholder believes the fair value of his shares is higher, that this section provides an appraisal procedure for determining the fair value of such shares, specifying the name of the court referenced above and its address and the caption of the petition referenced above, and stating that such information is provided for the possible use by such shareholder in electing to proceed with a court-appointed appraiser under subsection E. The controlling person or group may, at its option, supply with the notice referenced in subclause (i) a form for the shareholder to demand payment of the minimum value referred to in subclause (ii) directly from the controlling person or group without utilizing the court-appointed appraiser procedure of subsection E, requiring the shareholder to state the number and class or series, if any, of the shares owned by him, and stating where the payment demand must be sent and the procedures to be followed. 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] be required** to pay that amount to the shareholder *pursuant to the procedures specified in subsection E [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. (1) 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.] *For the purposes of this subsection, fair value means a value not less than the highest price paid per share by the controlling person or group at any time during the ninety-day period ending on and including the date of the control transaction plus an increment representing any value, including without limitation any proportion of any value payable for acquisition of control of the corporation, that may not be reflected in such price.*

(2) *If, (i) within forty-five days (or such other time period, if any, as required by applicable law) after the date of the notice required by subsection C, or (ii) if such notice was not provided prior to the date of the written demand by the shareholder under subsection D, then within forty-five days (or such other time period, if any, as required by applicable law) of the date of such written demand, the controlling person or group and the shareholder are unable to agree on the fair value of the shares or on a binding procedure to determine the fair value of the shares, then each shareholder who is unable to agree on both the fair value and on such a procedure with the controlling person or group and who so desires to obtain the rights and remedies herein provided shall, no later than thirty days after the expiration of the applicable forty-five (or other) day period, surrender to the court of common pleas referenced in subsection C certificates representing such shares duly endorsed for transfer to the controlling person or group, with a notice stating that such certificates are being surrendered in connection with the petition referenced in subsection C, or, if no such petition has theretofore been filed, such shareholder may file a petition within such thirty-day period in such court praying that the fair value (as defined herein) of such shares be determined. Any such shareholder who does not so surrender such certificates within such time period shall have no further right to receive, with respect to shares the certificates of which were not so surrendered under this clause, payment under this clause from the controlling person or group with respect to the control transaction giving rise to the shareholder's rights hereunder. Such court shall hold such certificates surrendered to it in escrow for, and shall promptly, following the expiration of the time period during which such certificates may be surrendered, provide a notice to the controlling person or group of the number of shares so surrendered. The controlling person or group shall then make a partial payment for the shares so surrendered to such court, within ten business days of receipt of the notice from such court, at a per-share price equal to the highest price paid per share by the controlling person or group within the ninety-day period ending on and including the date of the control transaction. Such court shall then make payment, as soon as practicable but in any event within ten business days, to the shareholders who so surrendered their shares to the court of the appropriate per-share amount received from the controlling person or group.*

Upon receipt of any share certificate surrendered pursuant to this section, such court shall, as soon as practicable but in any event within thirty days, appoint an appraiser with experience in appraising share values of companies of like nature to the corporation to determine the fair value of such shares.

The appraiser so appointed by the court shall, as soon as reasonably practicable, determine the fair value of the shares subject to its appraisal and the appropriate market rate of interest on the amount then owed by the controlling person or group to the holders of such shares. The determination of any appraiser so appointed by the court shall be final and binding on both the controlling person or group and all shareholders who so surrendered their share certificates to such court, except that the determination of the appraiser shall be subject to review to the extent and within the time provided or prescribed by law in the case of other appointed judicial officers.

(3) Any amount agreed upon between the parties or determined pursuant to the procedure agreed upon between the parties shall be payable by the controlling person or group after it is so agreed upon or so determined and upon and concurrently with the delivery of the certificate or certificates representing such shares to the controlling person or group by the shareholder.

Any amount owed, together with interest, as determined pursuant to clause (2) shall be payable by the controlling person or group after it is so determined and upon and concurrently with the delivery of the certificate or certificates representing shares surrendered to the court referenced in subsection C to the controlling person or group by such court (which shall make such delivery of the certificate or certificates surrendered to it to the controlling person or group as soon as practicable but in any event within ten business days after the final determination of the amount owed), and such court shall then make payment, as soon as practicable but in any event within ten business days after receipt of payment from the controlling person or group, to the shareholders who so surrendered their shares to such court of the appropriate per-share amount received from the controlling person or group.

Upon full payment by the controlling person or group of the amount owed to the shareholder or to the court, as appropriate, the shareholder shall cease to have any interest in such shares.

(4) Shareholders who surrender their shares to the court pursuant to clause (2) shall retain the right to vote their shares and receive dividends or other distributions thereon until the court receives payment in full for each of the shares so surrendered of the highest price paid per share by the controlling person or group within the ninety-day period ending on and including the date of the control transaction (and, thereafter, the controlling person or group shall be entitled to vote such shares and receive dividends or other distributions thereon). The fair value (as determined by the appraiser) of any dividends or other distributions so received by such shareholders shall be subtracted from any amount owing to such shareholders hereunder.

(5) The court referenced in subsection C may appoint such agents, including the transfer agent of the corporation, or any other institution, to hold the shares so surrendered, to effect any necessary change in record ownership of such shares after the payment by the controlling person or group to the court of the amount specified in clause (4), to receive and disburse dividends or other distributions, to provide notices to shareholders and to take such other actions as the court shall determine are appropriate to effect the purposes of this section.

(6) The costs and expenses of any appraiser or other agents so appointed by the court shall be assessed against the controlling person or group. The costs and expenses of any other procedure to determine fair value shall be paid as agreed to by the parties agreeing to such procedure.

(7) The jurisdiction of the court referenced under subsection C in which the proceeding is commenced is plenary and exclusive, and the controlling person or group and all shareholders who so surrendered their shares to such court shall be made a party to the proceeding as in an action against their shares.

(8) The corporation shall comply with requests for information, which may be submitted pursuant to procedures maintaining the confidentiality of such information, made by the court or the appraiser so selected by the court.

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

Section 911. Requirements Relating to Certain Business Combinations.—A. For the purposes of this section:

(1) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified person.

(2) "Announcement Date," when used in reference to any business combination, means the date of the first public announcement of the final, definitive proposal for such business combination.

(3) "Associate," when used to indicate a relationship with any person, means (i) any corporation or organization of which such person is an officer, director or partner or is, directly or indirectly, the beneficial owner of shares entitling that person to cast at least ten per cent of the votes that all shareholders would be entitled to cast in an election of directors of the corporation or organization, (ii) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (iii) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person.

(4) "Beneficial Owner," when used with respect to any shares, means a person:

(i) that, individually or with or through any of its affiliates or associates, beneficially owns such shares, directly or indirectly; or

(ii) that, individually or with or through any of its affiliates or associates, has (a) the right to acquire such shares (whether such right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise: Provided, however, That a person shall not be deemed the beneficial owner of shares tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates until such tendered shares are accepted for purchase or exchange; or (b) the right to vote such shares pursuant to any agreement, arrangement or understanding (whether or not in writing): Provided, however, That a person shall not be deemed the beneficial owner of any shares under this item if the agreement, arrangement or understanding to vote such shares (I) arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act and (II) is not then reportable on a Schedule 13D under the Exchange Act (or any comparable or successor report); or

(iii) that has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in paragraph (b) of subclause (ii) of clause (4) of this subsection or disposing of such shares with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such shares.

(5) "Business Combination," when used in reference to any business corporation and any interested shareholder of such business corporation, means:

(i) any merger or consolidation of such business corporation or any subsidiary of such business corporation with (a) such interested shareholder or (b) any other corporation (whether or not itself an interested shareholder of such business corporation) which is, or after such merger or consolidation would be, an affiliate or associate of such interested shareholder;

(ii) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with such interested shareholder or any affiliate or associate of such interested shareholder of

assets of such business corporation or any subsidiary of such business corporation (a) having an aggregate market value equal to ten per cent or more of the aggregate market value of all the assets, determined on a consolidated basis, of such business corporation, (b) having an aggregate market value equal to ten per cent or more of the aggregate market value of all the outstanding shares of such business corporation, or (c) representing ten per cent or more of the earning power or net income, determined on a consolidated basis, of such business corporation;

(iii) the issuance or transfer by such business corporation or any subsidiary of such business corporation (in one transaction or a series of transactions) of any shares of such business corporation or any subsidiary of such business corporation which has an aggregate market value equal to five per cent or more of the aggregate market value of all the outstanding shares of such business corporation to such interested shareholder or any affiliate or associate of such interested shareholder except pursuant to the exercise of option rights to purchase shares, or pursuant to the conversion of securities having conversion rights, offered, or a dividend or distribution paid or made, pro rata to all shareholders of such business corporation;

(iv) the adoption of any plan or proposal for the liquidation or dissolution of such business corporation proposed by, or pursuant to any agreement, arrangement or understanding (whether or not in writing) with, such interested shareholder or any affiliate or associate of such interested shareholder;

(v) any reclassification of securities (including, without limitation, any split of shares, dividend of shares, or other distribution of shares in respect of shares, or any reverse split of shares), or recapitalization of such business corporation, or any merger or consolidation of such business corporation with any subsidiary of such business corporation, or any other transaction (whether or not with or into or otherwise involving such interested shareholder), proposed by, or pursuant to any agreement, arrangement or understanding (whether or not in writing) with, such interested shareholder or any affiliate or associate of such interested shareholder, which has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of voting shares or securities convertible into voting shares of such business corporation or any subsidiary of such business corporation which is, directly or indirectly, owned by such interested shareholder or any affiliate or associate of such interested shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(vi) any receipt by such interested shareholder or any affiliate or associate of such interested shareholder of the benefit, directly or indirectly (except proportionately as a shareholder of such business corporation), of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through such business corporation.

(6) "Business Corporation" means a business corporation as defined in clause (6) of section 2. No business corporation which is organized under the laws of this Commonwealth shall cease to be a business corporation as defined herein by reason of events occurring or actions taken while such business corporation is subject to the provisions of this section.

(7) "Common Shares" means any shares other than preferred shares.

(8) "Consummation Date," with respect to any business combination, means the date of consummation of such business combination or, in the case of a business combination as to which a shareholder vote is taken, the later of the business day prior to the vote or twenty days prior to the date of consummation of such business combination.

(9) "Control," including the terms "Controlling," "Controlled By," and "Under Common Control With," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise. A person's beneficial ownership of shares entitling that person to cast at least ten per cent of the votes that all shareholders would be entitled to cast in an election of directors of the corporation shall create a presumption that such person has control of such corporation. Notwithstanding the foregoing, a person shall not be deemed to have control of a corporation if such person holds voting shares, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of such corporation.

(10) "Exchange Act" means the Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. § 78a et seq.), as the same has been or hereafter may be amended from time to time.

(11) "Interested Shareholder," when used in reference to any business corporation, means any person (other than such business corporation or any subsidiary of such business corporation) that:

(i) is the beneficial owner, directly or indirectly, of shares entitling that person to cast at least twenty per cent of the votes that all shareholders would be entitled to cast in an election of directors of the corporation; or

(b) is an affiliate or associate of such business corporation and at any time within the five-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of shares entitling that person to cast at least twenty per cent of the votes that all shareholders would be entitled to cast in an election of directors of the corporation;

(ii) provided that, for the purpose of determining whether a person is an interested shareholder, (a) the number of votes that would be entitled to be cast in an election of directors of such business corporation shall be calculated by including shares deemed to be beneficially owned by the person through application of clause (4) of this subsection but excluding any other unissued shares of such business corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion or option rights, or otherwise; and (b) there shall be excluded from the beneficial ownership of such interested shareholder any:

(I) shares which have been held continuously by a natural person since January 1, 1983, and which are then held by such natural person; or

(II) shares which are then held by any natural person or trust, estate, foundation or other similar entity to the extent such shares were acquired solely by gift, inheritance, bequest, devise or other testamentary distribution

or series of such transactions, directly or indirectly, from a natural person who had acquired such shares prior to January 1, 1983; or

(III) shares which were acquired pursuant to a stock split, stock dividend, reclassification or similar recapitalization with respect to shares described under paragraph (b) that have been held continuously since their issuance by the corporation by the natural person or entity that acquired them from the corporation, or that were acquired, directly or indirectly, from such natural person or entity, solely pursuant to a transaction or series of transactions described in subparagraph (II) of paragraph (b), and that are then held by a natural person or entity described in subparagraph (II) of paragraph (b).

(12) "Market Value," when used in reference to shares or property of any business corporation, means:

(i) in the case of shares, the highest closing sale price during the thirty-day period immediately preceding the date in question of such a share on the composite tape for New York Stock Exchange-listed shares, or, if such shares are not quoted on such composite tape or if such shares are not listed on such exchange, on the principal United States securities exchange registered under the Exchange Act on which such shares are listed, or, if such shares are not listed on any such exchange, the highest closing bid quotation with respect to such a share during the thirty-day period preceding the date in question on the National Association of Securities Dealers, Inc., Automated Quotations System or any system then in use, or, if no such quotations are available, the fair market value on the date in question of such a share as determined by the board of directors of such business corporation in good faith; and

(ii) in the case of property other than cash or shares, the fair market value of such property on the date in question as determined by the board of directors of such business corporation in good faith.

(13) "Preferred Shares" means any class or series of shares of a business corporation which, under the bylaws or articles of such business corporation, is entitled to receive payment of dividends prior to any payment of dividends on some other class or series of shares, or is entitled in the event of any voluntary liquidation, dissolution or winding up of the business corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of shares.

(14) "Shares" means:

(i) any shares or similar security, any certificate of interest, any participation in any profit-sharing agreement, any voting trust certificate, or any certificate of deposit for shares; and

(ii) any security convertible, with or without consideration, into shares, or any option right, conversion right or privilege of buying shares without being bound to do so, or any other security carrying any right to acquire, subscribe to or purchase shares.

(15) "Share Acquisition Date," with respect to any person and any business corporation, means the date that such person first becomes an interested shareholder of such business corporation.

(16) "Subsidiary" means any corporation as to which any other corporation is the beneficial owner, directly or indirectly, of shares of such first corporation that would entitle such other corporation 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 first corporation.

(17) "Voting Shares" means shares of a corporation entitled to vote generally in the election of directors.

B. Notwithstanding anything to the contrary contained in this act (except the provisions of subsection C of this section), no business corporation shall engage at any time in any business combination with any interested shareholder of such business corporation other than a business combination specified in any one of clauses (1), (2), (3) or (4) of this subsection:

(1) A business combination approved by the board of directors of such business corporation prior to such interested shareholder's share acquisition date, or where the purchase of shares made by such interested shareholder on such interested shareholder's share acquisition date had been approved by the board of directors of such business corporation prior to such interested shareholder's share acquisition date.

(2) A business combination approved (i) by the affirmative vote of the holders of shares entitling such holders to cast a majority of the votes that all shareholders would be entitled to cast in an election of directors of such business corporation, not including any voting shares beneficially owned by such interested shareholder or any affiliate or associate of such interested shareholder, at a meeting called for such purpose no earlier than three months after such interested shareholder became, and provided that at the time of such meeting such interested shareholder is, the beneficial owner, directly or indirectly, of shares entitling such interested shareholder to cast at least eighty per cent of the votes that all shareholders would be entitled to cast in an election of directors of the corporation, and provided that such business combination satisfies all the conditions of subclauses (i) through (v) of clause (4) of this subsection or (ii) by the affirmative vote of all of the holders of all of the outstanding common shares.

(3) A business combination approved by the affirmative vote of the holders of shares entitling such holders to cast a majority of the votes that all shareholders would be entitled to cast in an election of directors of such business corporation, not including any voting shares beneficially owned by such interested shareholder or any affiliate or associate of such interested shareholder, at a meeting called for such purpose no earlier than five years after such interested shareholder's share acquisition date.

(4) A business combination approved at a shareholders' meeting called for such purpose no earlier than five years after such interested shareholder's share acquisition date that meets all of the following conditions:

(i) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding common shares of such business corporation in such business combination is at least equal to the higher of the following:

(a) *the highest per share price paid by such interested shareholder at a time when he was the beneficial owner, directly or indirectly, of shares entitling that person to cast at least five per cent of the votes that all shareholders would be entitled to cast in an election of directors of such business corporation, for any common shares of the same class or series acquired by it (I) within the five-year period immediately prior to the announcement date with respect to such business combination, or (II) within the five-year period immediately prior to, or in, the transaction in which such interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which such highest per-share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per common share since such earliest date, up to the amount of such interest; and*

(b) *the market value per common share on the announcement date with respect to such business combination or on such interested shareholder's share acquisition date, whichever is higher; plus interest compounded annually from such date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per common share since such date, up to the amount of such interest.*

(ii) *The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common shares, of such business corporation is at least equal to the highest of the following (whether or not such interested shareholder has previously acquired any shares of such class or series of shares):*

(a) *the highest per-share price paid by such interested shareholder at a time when he was the beneficial owner, directly or indirectly, of shares entitling such person to cast at least five per cent of the votes that all shareholders would be entitled to cast in an election of directors of such business corporation, for any shares of such class or series of shares acquired by it (I) within the five-year period immediately prior to the announcement date with respect to such business combination, or (II) within the five-year period immediately prior to, or in, the transaction in which such interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which such highest per-share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of such class or series of shares since such earliest date, up to the amount of such interest;*

(b) *the highest preferential amount per share to which the holders of shares of such class or series of shares are entitled in the event of any voluntary liquidation, dissolution or winding up of such business corporation,*

plus the aggregate amount of any dividends declared or due as to which such holders are entitled prior to payment of dividends on some other class or series of shares (unless the aggregate amount of such dividends is included in such preferential amount); and

(c) the market value per share of such class or series of shares on the announcement date with respect to such business combination or on such interested shareholder's share acquisition date, whichever is higher; plus interest compounded annually from such date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per share of such class or series of shares since such date, up to the amount of such interest.

(iii) The consideration to be received by holders of a particular class or series of outstanding shares (including common shares) of such business corporation in such business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of such class or series of shares previously acquired by it, and such consideration shall be distributed promptly.

(iv) The holders of all outstanding shares of such business corporation not beneficially owned by such interested shareholder immediately prior to the consummation of such business combination are entitled to receive in such business combination cash or other consideration for such shares in compliance with subclauses (i), (ii) and (iii) of clause (4) of this subsection.

(v) After such interested shareholder's share acquisition date and prior to the consummation date with respect to such business combination, such interested shareholder has not become the beneficial owner of any additional voting shares of such business corporation except:

(a) as part of the transaction which resulted in such interested shareholder becoming an interested shareholder;

(b) by virtue of proportionate splits of shares, share dividends or other distributions of shares in respect of shares not constituting a business combination under subclause (v) of clause (5) of subsection A;

(c) through a business combination meeting all of the conditions of clause (1), (2), (3) or (4) of this subsection;

(d) through purchase by such interested shareholder at any price which, if such price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of such purchase, would have satisfied the requirements of subclauses (i), (ii) and (iii) of clause (4) of this subsection; or

(e) through purchase required by and pursuant to the provisions of, and at no less than the fair value (including interest to the date of payment) as determined by a court-appointed appraiser under clause (2) of subsection E of section 910 of this act (or if such fair value was not then so determined, then at a price that would satisfy the conditions in paragraph (d)).

C. The provisions of this section shall not apply:

(1) to any business combination of a business corporation that does not have a class of voting shares registered under the Exchange Act; or

(2) to any business combination of a business corporation whose ~~articles~~ have been amended to provide that such business corporation shall be subject to the provisions of this section, which did not have a class of voting shares registered under the Exchange Act on the effective date of such amendment, and which is a business combination with an interested shareholder whose share acquisition date is prior to the effective date of such amendment; or

(3) to any business combination of a business corporation (i) the bylaws of which, by amendment adopted within ninety days of the date of enactment of this section, and not subsequently rescinded either by an article amendment or by a bylaw amendment approved by at least eighty-five per cent of the whole board of directors, explicitly provide that this section shall not be applicable to the corporation or (ii) the articles of which explicitly provide that this section shall not be applicable to the corporation by a provision included in the original articles, or by an article amendment adopted pursuant to both (a) the procedures then applicable to the corporation and (b) the affirmative vote of the holders, other than interested shareholders and their affiliates and associates, of shares entitling such holders to cast a majority of the votes that all shareholders would be entitled to cast in an election of directors of such business corporation, excluding the voting shares of interested shareholders and their affiliates and associates, expressly electing not to be governed by this section, provided that such amendment to the articles shall not be effective until eighteen months after such vote of such business corporation's shareholders and shall not apply to any business combination of such business corporation with an interested shareholder whose share acquisition date is on or prior to the effective date of such amendment; or

(4) to any business combination of a business corporation with an interested shareholder of such business corporation which became an interested shareholder inadvertently, if such interested shareholder (i) as soon as practicable, divests itself of a sufficient amount of the voting shares of such business corporation so that it no longer is the beneficial owner, directly or indirectly, of shares entitling such person to cast at least twenty per cent of the votes that all shareholders would be entitled to cast in an election of directors of such business corporation, and (ii) would not at any time within the five-year period preceding the announcement date with respect to such business combination have been an interested shareholder but for such inadvertent acquisition; or

(5) to any business combination with an interested shareholder who was the beneficial owner, directly or indirectly, of shares entitling such person to cast at least fifteen per cent of the votes that all shareholders would be entitled to cast in an election of directors of such business corporation on the effective date of this section and remain so to such interested shareholder's share acquisition date; or

(6) to any business corporation that on the effective date of this section is a subsidiary of any other corporation; provided, however, that a corporation that is a subsidiary on the effective date of this section will not be deemed to cease being a subsidiary so long as such other corporation remains a control-

ling person or group of such subsidiary within the meaning of subsection B of section 910 of this act.

D. The rights and remedies herein provided shall be in addition to, and not in lieu of, any other rights or remedies provided by this act, the articles of the corporation, the bylaws of the corporation, any securities, option rights or obligations of the corporation or otherwise.

Section 4. This act shall take effect immediately.

APPROVED—The 23rd day of March, A. D. 1988.

ROBERT P. CASEY