

## AN ACT

## SB 1106

Providing for the protection of Pennsylvania corporations, shareholders, employees and the public, and to prevent fraud and deception by requiring certain persons purchasing equity securities of any corporation incorporated in Pennsylvania or having its principal office and substantial assets located in this Commonwealth to make a full and fair disclosure to offerees of all material information in regard to takeover offers.

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

Section 1. Short Title.—This act should be known as the “Takeover Disclosure Law.”

Section 2. Findings and Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding that legislation is necessary to provide adequate protection for Pennsylvania corporations, shareholders, and employees and the public from the use of takeover offers without full and fair disclosure of information concerning them.

Section 3. Definitions.—As used in this act:

“Affiliate” with respect to a person means any person controlling, controlled by, or under common control with such person.

“Associate” with respect to a person means any person acting jointly or in concert with such person for the purpose of acquiring, holding, or disposing of, or exercising any voting rights attached to the equity securities of an issuer.

“Commission” means the Pennsylvania Securities Commission.

“Equity security” means any share or similar security, or any security convertible, with or without consideration, into such a security; or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right or any other security which, the commission, for the protection of security holders, treats as an equity security pursuant to the Pennsylvania Securities Act of 1972 or pursuant to any regulation of the commission.

“Offeree” means a record or beneficial owner of equity securities to whom a takeover offer is made or proposed to be made.

“Offeror” means a person who makes or participates in any way in making a takeover offer. Offeror does not include any bank or broker-dealer loaning funds to an offeror in the ordinary course of its business, or any bank, broker-dealer, attorney, accountant, consultant, employee, or other person furnishing information or advice to or performing ministerial duties for an offeror, and not otherwise participating in the takeover offer.

“Takeover offer” means the acquisition of or offer, other than an offer incident to a vote by security holders pursuant to the articles of

incorporation or the applicable corporation statute or other statute governing such person, or pursuant to a partnership agreement, a declaration of trust, trust indenture or any agreement among security holders on a merger, consolidation, sale of assets in consideration, in whole or in part, of the issuance of securities of another person, reclassification of securities, or reorganization involving the exchange of securities, in whole or in part, for the securities of any other person, to acquire any equity security of a target company, pursuant to a tender offer, if after the acquisition thereof, the offeror would, directly or indirectly, be a beneficial owner of more than 5% of any class of the outstanding equity securities of the target company. "Takeover offer" does not include the following offers or the acquisition of equity securities pursuant to such offers: (i) an offer to acquire equity securities to be effected by a broker-dealer registered with the Securities and Exchange Commission on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function and receives no more than the customary broker's commission and if neither the principal nor the broker solicits or arranges for the solicitation of orders to sell such equity securities, (ii) offers made by a dealer for his own account in the ordinary course of his business of buying and selling such security, (iii) an offer to acquire equity securities of a target company which has no more than 100 equity security holders of record or no more than \$1,000,000 of assets, (iv) an offer which, if accepted by all the offerees, will not result in the offeror having acquired more than 2% of the same class of equity securities of the target company within the preceding 12-month period, (v) an offer by the issuer to acquire its own equity securities, (vi) an offer which, if accepted by all of the offerees, will not result in the offeror having acquired equity securities of the issuer from more than 25 persons within the preceding 12-month period, for purposes of computing the 25 persons for the purpose of this definition any securities purchased pursuant to clause (i) of this section not being included, and (vii) any offer which the commission, by regulation or order, shall exempt from the definition of "takeover offer" as not being made for the purpose of and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this act.

"Target company" means an issuer of securities whose equity securities are or are to be the subject of a takeover offer (i) which is organized under the laws of this Commonwealth, or (ii) which<sup>1</sup> has its principal place of business and substantial assets located in this Commonwealth.

Section 4. Registration of Takeover Offers.—(a) It is unlawful unless the securities or the offer are exempt pursuant to section 8, for any offeror to make a takeover offer involving a target company or to acquire any equity securities of the target company pursuant to the offer, unless at least 20 days prior thereto such offeror (i) files with the commission a registration statement containing the information prescribed by section 5, (ii) sends a copy of the registration statement by certified mail to the target company at its principal office and to the collective bargaining

<sup>1</sup>"which" omitted in original.

representative, if any, of the employees employed at the principal place of business of the target company and (iii) publicly discloses the offering price of the proposed offer and the fact that a registration statement has been filed with the commission which contains substantial additional information about the proposed offer, which registration statement is available for inspection at the commission's principal office during business hours.

(b) The registration statement shall be filed on forms prescribed by the commission, and shall be accompanied by a consent by the offeror to service of process and the filing fee specified in section 10.

(c) The commission may by order or regulation require the offeror to file any other documents, exhibits and information that it deems material to the takeover offer, and may permit the omission of any of the information specified in section 5 if it determines that such information is not required for the protection of offerees. The commission may by order summarily delay the effective date of the offer if it determines that the registration statement does not contain all of the information specified in section 5 or that the solicitation materials do not provide full disclosure to offerees of all material information concerning the offer.

(d) A takeover offer automatically becomes effective 20 days after the date of filing the registration statement with the commission unless delayed by order of the commission or unless prior thereto, the commission schedules a hearing with respect to the offer. The commission may schedule a hearing, on its own initiative or at the request of the target company, if the commission has reason to believe that the takeover offer fails to provide full and fair disclosure to offerees of all material information concerning the offer, or is in violation of this act or the act of December 5, 1972 (P.L.1280, No.284), known as the "Pennsylvania Securities Act of 1972." If a hearing is scheduled, the offer shall not become effective until registered by order of the commission. Registration is not deemed to be approval of the offer by the commission and any representation to the contrary is unlawful.

(e) Any hearing scheduled by the commission under this section shall be held within 30 days of the date of the filing of the registration statement under section 5 and any determination made following the hearing shall be made within 30 days after such hearing has been closed, unless extended by order of the commission for the convenience of the parties or for the protection of offerees in this Commonwealth. If, upon the hearing, the commission finds that the takeover offer fails to provide full and fair disclosure to offerees of all material information concerning the offer, or is in violation of this act or the act of December 5, 1972 (P.L.1280, No.284), known as the "Pennsylvania Securities Act of 1972," the commission shall by order deny registration of the offer. Any hearing held pursuant to this section shall be held according to the provisions of the act of June 4, 1945 (P.L.1388, No.442), known as the "Administrative Agency Law."

**Section 5. Information Filed With the Commission.**—The information to be filed pursuant to section 4 shall include:

(1) Copies of all prospectuses, brochures, advertisements, circulars, letters, or other matter by means of which the offeror proposes to disclose to offerees all information material to a decision to accept or reject the offer.

(2) The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected.

(3) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including, if applicable, a statement describing any securities which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the material terms of any financing arrangements and the names of the parties from whom the funds were borrowed.

(4) A statement of any plans or proposals which the offeror, upon gaining control, may have to liquidate the target company, sell its assets, effect a merger or consolidation of it, or make any other major change in its business, corporate structure, management, personnel, or policies of employment. The offeror shall disclose any changes offeror intends to make with regard to any collective bargaining agreements.

(5) The number of shares or units of any equity security of the target company owned beneficially by such person and any affiliate or associate of such person, together with the name and address of each affiliate or associate.

(6) Particulars as to any contracts, arrangements or understandings to which an offeror is party with respect to any equity security of the target company, including without limitation transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into.

(7) Particulars as to any contract, arrangement or understanding between any offeror and any officer, director or owner of 10% or more of the outstanding stock of the target company relating to employment of or purchase of services or property from any such officer, director or shareholder.

(8) Complete information on the organization and operations of the offeror, including without limitation the year of organization, form of organization, jurisdiction in which it is organized, a description of each class of the offeror's equity securities and of its long term debt, financial statements for the current period and for the three most recent annual accounting periods, a brief description of the location and general

character of the principal physical properties of the offeror and its subsidiaries, a description of its employee relations history during the past five years including strikes and findings of unfair labor practices by the National Labor Relations Board, a description of material pending legal or administrative proceedings other than routine litigation to which the offeror or any of its subsidiaries is a party or of which any of their property is the subject, a brief description of the business done and projected by the offeror and its subsidiaries and any material changes therein during the past three years, the names and residence addresses of all directors and executive officers of the offeror and its affiliates and their principal occupations together with biographical activities and affiliations during the past three years. For the purposes of this paragraph, legal or administrative proceedings involving antitrust, equal opportunity and environmental matters shall be considered material.

(9) Such other and further documents, exhibits, data, and information as may be required by regulation of the commission necessary to make fair, full, and effective disclosure to offerees of all information material to a decision to accept or reject the offer.

Section 6. Filing of Solicitation Materials.—Copies of all advertisements, circulars, letters or other materials published by the offeror or the target company, soliciting or requesting the acceptance or rejection of the takeover offer, shall be filed with the commission and sent to the target company or offeror, respectively, not later than the time copies of such solicitation materials are first published or used or sent to offerees if not previously filed with the commission and mailed to the target company or offeror. The commission may prohibit the use of any solicitation materials deemed false or misleading.

Section 7. Limitations on An offerors.—(a) An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a takeover offer may be withdrawn by or on behalf of any offeree at any time within seven days from the date the offer has become effective under this act and, if the offeror has not taken up the equity securities within 60 days from the date the offer has become effective under this act, except as the commission may otherwise prescribe by regulation or order for the protection of investors.

(b) If an offeror makes a takeover offer for less than all the outstanding equity securities of any class; and copies of the offer, or notice of any increase in the consideration offered, are first published or sent or given to security holders; and the number of securities deposited or tendered pursuant thereto within ten days after the offer has become effective under this act is greater than the number the offeror has offered to accept and pay for, the securities shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

(c) If an offeror varies the terms of a takeover offer before its expiration date by increasing the consideration offered to security holders,

the offeror shall pay the increased consideration for all equity securities accepted whether such securities have been accepted by the offeror before or after the increase in the terms of the offer.

(d) No offeror may make a takeover offer or acquire any equity securities of a target company pursuant to the offer, at any time when an administrative or injunctive proceeding is pending on behalf of the commission against the offeror alleging a violation of this act or the act of December 5, 1972 (P.L.1280, No.284), known as the "Pennsylvania Securities Act of 1972."

(e) No offeror may acquire, remove or exercise control, directly or indirectly, over any assets of a target company unless the takeover offer is effective or exempt under this act, except as permitted by order of the commission.

Section 8. Exempt Transactions and Securities.—The following securities or offers to purchase securities shall be exempted from section 4:

(a) An offer as to which the target company, acting through its board of directors, recommends acceptance to its shareholders, if at the time such recommendation is first communicated to the shareholders, the offeror has filed a notice with the commission containing the following: (i) the information specified in section 13(d) of the Securities Exchange Act of 1934 (48 Stat. 881, 15 U.S.C. 78a et seq.), (ii) an undertaking to notify security holders of the target company that a notice has been filed with the commission which contains substantial additional information about the offering, which notice is available for inspection at the commission's principal office during business hours, (iii) such facts as are necessary to establish this exemption and (iv) the fee specified in section 10.

(b) Any security or offer to purchase any security as to which the commission by regulation or order finds that<sup>1</sup> registration is not necessary or appropriate for the protection of investors.

Section 9. Administration, Rules and Orders.—(a) This act shall be administered by the Pennsylvania Securities Commission which may exercise all powers granted to it under this act and the act of December 5, 1972 (P.L.1280, No.284), known as the "Pennsylvania Securities Act of 1972" in the administration of this act.

(b) The commission may make, amend and rescind any regulations, forms or orders necessary to carry out this act. All regulations of the commission (other than those relating solely to its internal administration) shall be of general application and future effect and shall be made, amended or rescinded in accordance with the act of June 4, 1945 (P.L.1388, No.442), known as the "Administrative Agency Law," and the act of July 31, 1968 (P.L.769, No.240), known as the "Commonwealth Documents Law," and no regulation shall be effective until a public hearing is held thereon or until 30 days after the regulation is published pursuant to such "Commonwealth Documents Law." The commission may, in its discretion, waive any requirement of any regulation or form in situations

<sup>1</sup>"the" in original.

where, in its opinion, such requirement is not necessary in the public interest or for the protection of investors.

Section 10. Fees and Expenses.—(a) The commission shall charge the following fees for registration statements filed pursuant to section 4, the computation of the value of the offer being determined by reference to the maximum cash consideration payable by the offeror for the securities which are the subject of the takeover offer or, if the consideration shall be anything other than solely cash, to the fair market value of the maximum consideration being offered for such securities:

- (1) For an offer valued at less than five million dollars, \$750.
  - (2) For an offer valued at five million dollars or more, but less than ten million dollars, \$1,000.
  - (3) For an offer valued at ten million dollars or more, but less than twenty-five million dollars, \$1,500.
  - (4) For an offer valued at twenty-five million dollars or more, \$2,500.
- (b) The fee for filing a notice under section 8 is \$50.
- (c) Any target company making any filing pursuant to section 6 shall be charged a fee of \$500, payable at the time of the initial filing.
- (d) The fee for any examination, audit or investigation is the actual amount of all salary costs and other compensation paid to the persons making the examination, audit, or investigation, plus the actual amount of expenses reasonably incurred in the performance of the work. Such fee shall only be payable by a registrant, applicant for registration, issuer or other person in connection with an investigation by the commission where such person has been found guilty of a violation of the provisions of this act.

Section 11. Injunctions.—Whenever it shall appear to the commission that any person, including a controlling person of an offeror or target company, has engaged or is about to engage in any act or practice constituting a violation of this act, or any regulation or order promulgated hereunder:

- (1) the commission may issue and cause to be served upon any person violating any of the provisions of this act, an order requiring the persons in violation thereof to cease and desist therefrom; and
- (2) the commission may bring an action in Commonwealth Court to enjoin the acts or practices and to force compliance with this act, or any regulation or order hereunder. Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order without bond to enforce the provisions of this act, and may order rescission of any sales or purchases of securities determined to be unlawful under this act, or any rules or order hereunder.

Section 12. Criminal Penalties.—(a) Any person, including a controlling person of an offeror or target company, who wilfully violates any of the provisions of sections 4, 5, 6 or 7 or any regulation thereunder, or any order of which he has notice, may upon conviction, be sentenced to pay a fine of not more than \$1,000, or to imprisonment for not more than one

year, or to both. Each of the acts specified 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 more than five years after the alleged violation.

(b) The commission may refer such evidence as is available concerning violations of this act or of any regulation or order hereunder to the Attorney General who may institute the appropriate criminal proceedings under this act. If referred to the Attorney General, he shall within 90 days file with the commission a statement concerning any action taken or, if no action has been taken, the reasons therefor.

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

Section 13. Civil Liabilities.—(a) Any offeror who purchases a security in connection with a takeover in violation of this act, shall be liable to the person selling the security to him who may sue either at law or in equity. In an action for rescission the seller shall be entitled to recover the security, plus any income received by the purchaser thereon, upon tender of the consideration received. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last known address of the person liable. If the purchaser no longer owns the security, damages are the excess of either the value of the security on the date of purchase or its present value, whichever is greater, over the present value of the consideration received for the security.

(b) Every person who directly controls a person liable under subsection (a), every partner, principal executive officer or director of such person, every person occupying a similar status or performing similar functions, every employee of such person who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, is also liable jointly and severally with and to the same extent as such person, unless the person who would otherwise be so liable proves that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(c) No action may be maintained under this section unless commenced before the expiration of two years after the act or transaction constituting the violation or the expiration of one year after the discovery of the facts constituting the violation, whichever first expires.

(d) The rights and remedies under this section are in addition to any other rights or remedies that may exist at law or in equity.

Section 14. Application of Corporate Takeover Law.—This act does not apply when:



(1) the offeror or the target company is a public utility or a public utility holding company as defined in section 2 of the Federal "Public Utility Holding Company Act of 1935," 49 Stat. 803, 15 U.S.C. 79, as amended, and the takeover offer is subject to approval by the appropriate Federal agency as provided in such act;

(2) the offeror or the target company is a bank or a bank holding company subject to the Federal "Bank Holding Company Act of 1956," 70 Stat. 133, 12 U.S.C. 1841, as amended, and the takeover offer is subject to approval by the appropriate Federal agency as provided in such act, or the target company is a bank or a bank holding company covered by section 112 of the act of November 30, 1965 (P.L.847, No.356), as amended, known as the "Banking Code of 1965."

(3) The offeror or the target company is a savings and loan holding company as defined in section 2 of the Federal "Savings and Loan Holding Company Amendments of 1967," 82 Stat. 5, 12 U.S.C. 1730A, as amended, and the takeover offer is subject to approval by the appropriate Federal agency as provided in such act.

(4) The target company is a bank and the offer is part of a transaction involving a merger, consolidation, purchase of assets or assumption of liabilities subject to approval by an appropriate Federal supervisory authority.

(5) In the case of a target company, the acquisition of shares of such company is subject to regulation under the act of May 17, 1921 (P.L.682, No.284), known as "The Insurance Company Law of 1921," or under the act of May 28, 1937 (P.L.1053, No.286), known as the "Public Utility Law."

Section 15. Application of Securities Law.—All of the definitions and provisions of the act of December 5, 1972 (P.L.1280, No.284), known as the "Pennsylvania Securities Act of 1972," which are not in conflict with this act shall apply to any takeover offer involving a target company in this Commonwealth.

Section 16. Effective Date.—This act shall take effect immediately.

APPROVED—The 3rd day of March, A. D. 1976.

MILTON J. SHAPP