

No. 1990-36

AN ACT

SB 1310

Amending Title 15 (Corporations and Unincorporated Associations) of the Pennsylvania Consolidated Statutes, clarifying the fiduciary obligations of directors of corporations and other associations; clarifying certain definitions; adding provisions relating to control-share acquisitions; and providing for disgorgement by certain controlling shareholders following attempts to acquire control of certain corporations, for severance compensation for employees terminated following certain control-share acquisitions and for the effect of business combination transactions on labor contracts.

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

Section 1. Section 102 of Title 15 of the Pennsylvania Consolidated Statutes is amended by adding a definition to read:

§ 102. Definitions.

Subject to additional or inconsistent definitions contained in subsequent provisions of this title that are applicable to specific provisions of this title, the following words and phrases when used in this title shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

“Act” or “action.” Includes failure to act.

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Section 2. Sections 511 and 512 of Title 15 are amended to read:

§ 511. Standard of care and justifiable reliance.

(a) Director as fiduciary.—A director of a domestic corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. In performing his duties, a director shall be entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:

- (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.
- (2) Counsel, public accountants or other persons as to matters which the director reasonably believes to be within the professional or expert competence of such person.
- (3) A committee of the board upon which he does not serve, duly designated in accordance with law, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

A director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause his reliance to be unwarranted.

(b) **Consideration of factors.**—In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors may, in considering the best interests of the corporation, consider the effects of any action upon employees, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors. The consideration of those factors shall not constitute a violation of subsection (a).

(c) **Presumption.**—Absent breach of fiduciary duty, lack of good faith or self-dealing, actions taken as a director or any failure to take any action shall be presumed to be in the best interests of the corporation.

(d) Consideration of interests and factors.—*In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors may, in considering the best interests of the corporation, consider to the extent they deem appropriate:*

(1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.

(2) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.

(3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.

(4) All other pertinent factors.

The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor. The consideration of interests and factors in the manner described in this subsection shall not constitute a violation of subsection (a). The duty of the board of directors, committees of the board and individual directors under subsection (a) is solely to the corporation and may be enforced directly by the corporation or may be enforced by a shareholder or member, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder, member or by any other person or group. Notwithstanding the preceding sentence, this subsection does not impose upon the board of directors, committees of the board and individual directors, any legal or equitable duties, obligations or liabilities or create any right or cause of action against, or basis for standing to sue, the board of directors, committees of the board and individual directors.

(e) Specific applications.—*In exercising the powers vested in the corporation, and in no way limiting the discretion of the board of directors, com-*

mittees of the board and individual directors pursuant to subsection (d), the fiduciary duty of directors shall not be deemed to require them to act as the board of directors, a committee of the board or an individual director solely because of the effect such action might have on an acquisition or potential or proposed acquisition of control of the corporation or the consideration that might be offered or paid to shareholders in such an acquisition.

(f) *Presumption.*—Absent breach of fiduciary duty, lack of good faith or self-dealing, any act as the board of directors, a committee of the board or an individual director shall be presumed to be in the best interests of the corporation. In assessing whether the standard set forth in this section has been satisfied, there shall not be any greater obligation to justify, or higher burden of proof with respect to, any act as the board of directors, any committee of the board or any individual director relating to or affecting an acquisition or potential or proposed acquisition of control of the corporation than is applied to any other act as a board of directors, any committee of the board or any individual director. Notwithstanding the preceding provisions of this subsection, any act as the board of directors, a committee of the board or an individual director relating to or affecting an acquisition or potential or proposed acquisition of control to which a majority of the disinterested directors shall have assented shall be presumed to satisfy the standard set forth in this section, unless it is proven by clear and convincing evidence that the disinterested directors did not assent to such act in good faith after reasonable investigation.

(g) *Application to certain corporations.*—Subsections (b) and (c) shall not be applicable to any corporation to which subsections (d) through (f) are applicable. Subsections (d) through (f) shall be applicable to any corporation except a corporation:

(1) the bylaws of which by amendment adopted by the board of directors on or before July 26, 1990, and not subsequently rescinded by an articles amendment, explicitly provide that subsections (d) through (f) shall not be applicable to the corporation; or

(2) the articles of which explicitly provide that subsections (d) through (f) shall not be applicable to the corporation.

(h) *Definition.*—The term “disinterested director” as used in subsection (f) and for no other purpose means:

(1) A director of the corporation other than:

(i) A director who has a direct or indirect financial or other interest in the person acquiring or seeking to acquire control of the corporation or who is an affiliate or associate, as defined in section 2552 (relating to definitions), of, or was nominated or designated as a director by, a person acquiring or seeking to acquire control of the corporation.

(ii) Depending on the specific facts surrounding the director and the act under consideration, an officer or employee or former officer or employee of the corporation.

(2) A person shall not be deemed to be other than a disinterested director solely by reason of any or all of the following:

(i) *The ownership by the director of shares of the corporation.*

(ii) *The receipt as a holder of shares of any class or series of any distribution made to all owners of shares of that class or series.*

(iii) *The receipt by the director of director's fees or other consideration as a director.*

(iv) *Any interest the director may have in retaining the status or position of director.*

(v) *The former business or employment relationship of the director with the corporation.*

(vi) *Receiving or having the right to receive retirement or deferred compensation from the corporation due to service as a director, officer or employee.*

(i) *Interpretation and construction.—Section 1721(l)(2) (relating to interpretation, construction and application) shall be applicable to this section.*

§ 512. Personal liability of directors.

(a) General rule.—Whenever the bylaws of a corporation by a vote of the shareholders or members so provide, a director of a domestic corporation shall not be personally liable, as such, for monetary damages for any action taken[, or any failure to take any action,] unless:

(1) the director has breached or failed to perform the duties of his office under section 511 (relating to standard of care and justifiable reliance); and

(2) the breach or failure to perform constitutes self-dealing, willful misconduct or recklessness.

(b) Exception.—[The provisions of this section] *Subsection (a)* shall not apply to:

(1) the responsibility or liability of a director pursuant to any criminal statute; or

(2) the liability of a director for the payment of taxes pursuant to local, State or Federal law.

Section 3. Section 1103 of Title 15 is amended by adding a definition to read:

§ 1103. Definitions.

Subject to additional definitions contained in subsequent provisions of this subpart that are applicable to specific provisions of this subpart, the following words and phrases when used in this subpart shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Act” or “action.” *Includes failure to act.*

* * *

Section 4. Sections 1721 and 2502 of Title 15 are amended to read:

§ 1721. Board of directors.

(a) General rule.—Unless otherwise provided by statute or in a bylaw adopted by the shareholders, all powers enumerated in section 1502 (relating to general powers) and elsewhere in this subpart or otherwise vested by law in a business corporation shall be exercised by or under the authority of, and the business and affairs of every business corporation shall be managed

under the direction of, a board of directors. If any such provision is made in the bylaws, the powers and duties conferred or imposed upon the board of directors by this subpart shall be exercised or performed to such extent and by such person or persons as shall be provided in the bylaws.

(b) **Standard of care; justifiable reliance.**—A director shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. In performing his duties, a director shall be entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.

(2) Counsel, public accountants or other persons as to matters which the director reasonably believes to be within the professional or expert competence of such person.

(3) A committee of the board upon which he does not serve, duly designated in accordance with law, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

A director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause his reliance to be unwarranted.

(c) **Consideration of factors.**—In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors may, in considering the best interests of the corporation, consider the effects of any action upon employees, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors. The consideration of those factors shall not constitute a violation of subsection (b).

(d) **Presumption.**—Absent breach of fiduciary duty, lack of good faith or self-dealing, actions taken as a director or any failure to take any action shall be presumed to be in the best interests of the corporation.

(e) **Consideration of interests and factors.**—*In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors may, in considering the best interests of the corporation, consider to the extent they deem appropriate:*

(1) *The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.*

(2) *The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans*

and the possibility that these interests may be best served by the continued independence of the corporation.

(3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.

(4) All other pertinent factors.

The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor. The consideration of interests and factors in the manner described in this subsection shall not constitute a violation of subsection (b). The duty of the board of directors, committees of the board and individual directors under subsection (b) is solely to the corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group. Notwithstanding the preceding sentence, this subsection does not impose upon the board of directors, committees of the board and individual directors any legal or equitable duties, obligations or liabilities or create any right or cause of action against, or basis for standing to sue, the board of directors, committees of the board and individual directors.

(f) Specific applications.—In exercising the powers vested in the corporation, including, without limitation, those powers pursuant to section 1502, and in no way limiting the discretion of the board of directors, committees of the board and individual directors pursuant to subsection (e), the fiduciary duty of directors shall not be deemed to require them:

(1) to redeem any rights under, or to modify or render inapplicable, any shareholder rights plan, including, but not limited to, a plan adopted pursuant or made subject to section 2513 (relating to disparate treatment of certain persons);

(2) to render inapplicable, or make determinations under, the provisions of Subchapter E of Chapter 25 (relating to control transactions), Subchapter F of Chapter 25 (relating to business combinations), Subchapter G of Chapter 25 (relating to control-share acquisitions) or Subchapter H of Chapter 25 (relating to disgorgement by certain controlling shareholders following attempts to acquire control) or under any other provision of this title relating to or affecting acquisitions or potential or proposed acquisitions of control; or

(3) to act as the board of directors, a committee of the board or an individual director solely because of the effect such action might have on an acquisition or potential or proposed acquisition of control of the corporation or the consideration that might be offered or paid to shareholders in such an acquisition.

(g) Presumption.—Absent breach of fiduciary duty, lack of good faith or self-dealing, any act as the board of directors, a committee of the board or an individual director shall be presumed to be in the best interests of the corporation. In assessing whether the standard set forth in this section has been

satisfied, there shall not be any greater obligation to justify, or higher burden of proof with respect to, any act as the board of directors, any committee of the board or any individual director relating to or affecting an acquisition or potential or proposed acquisition of control of the corporation than is applied to any other act as a board of directors, any committee of the board or any individual director. Notwithstanding the preceding provisions of this subsection, any act as the board of directors, a committee of the board or an individual director relating to or affecting an acquisition or potential or proposed acquisition of control to which a majority of the disinterested directors shall have assented shall be presumed to satisfy the standard set forth in this section, unless it is proven by clear and convincing evidence that the disinterested directors did not assent to such act in good faith after reasonable investigation.

[(e)] (h) Personal liability of directors.—

(1) If a bylaw adopted by the shareholders so provides, a director shall not be personally liable, as such, for monetary damages for any action taken[, or any failure to take any action,] unless:

- (i) the director has breached or failed to perform the duties of his office under this section; and
- (ii) the breach or failure to perform constitutes self-dealing, willful misconduct or recklessness.

(2) **[The provisions of paragraph] Paragraph (1)** shall not apply to:

- (i) the responsibility or liability of a director pursuant to any criminal statute; or
- (ii) the liability of a director for the payment of taxes pursuant to local, State or Federal law.

[(f)] (i) Notation of dissent.—A director of a corporation who is present at a meeting of its board of directors, or of a committee of the board, at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his dissent is entered in the minutes of the meeting or unless he files his written dissent to the action with the secretary of the meeting before the adjournment thereof or transmits the dissent in writing to the secretary of the corporation immediately after the adjournment of the meeting. The right to dissent shall not apply to a director who voted in favor of the action. Nothing in this section shall bar a director from asserting that minutes of the meeting incorrectly omitted his dissent if, promptly upon receipt of a copy of such minutes, he **[notified] notifies** the secretary, in writing, of the asserted omission or inaccuracy.

(j) Application to certain corporations.—*Subsections (c) and (d) shall not be applicable to any corporation to which subsections (e) through (g) are applicable. Subsection (e) through (g) shall be applicable to:*

(1) Any registered corporation described in section 2502(1)(i) (relating to registered corporation status), except a corporation:

- (i) the bylaws of which explicitly provide that subsections (e) through (g) shall not be applicable to the corporation by amendment adopted by the board of directors on or before July 26, 1990, in the case of a corporation that was a registered corporation described in section 2502(1)(i) on April 27, 1990; or**

(ii) *in any other case, the articles of which explicitly provide that subsections (e) through (g) shall not be applicable to the corporation by a provision included in the original articles, or by an articles amendment adopted on or before 90 days after the corporation first becomes a registered corporation described in section 2502(1)(i).*

(2) *Any other business corporation, except a corporation:*

(i) *the bylaws of which explicitly provide that subsections (e) through (g) shall not be applicable to the corporation by amendment adopted by the board of directors on or before April 27, 1991, in the case of a corporation that was a business corporation on April 27, 1990; or*

(ii) *in any other case, the articles of which explicitly provide that subsections (e) through (g) shall not be applicable to the corporation by a provision included in the original articles, or by an articles amendment adopted on or before one year after the corporation first becomes a business corporation.*

(k) *Definition.—The term “disinterested director” as used in subsection (g) and for no other purpose means:*

(1) *A director of the corporation other than:*

(i) *A director who has a direct or indirect financial or other interest in the person acquiring or seeking to acquire control of the corporation or who is an affiliate or associate, as defined in section 2552 (relating to definitions), of, or was nominated or designated as a director by, a person acquiring or seeking to acquire control of the corporation.*

(ii) *Depending on the specific facts surrounding the director and the act under consideration, an officer or employee or former officer or employee of the corporation.*

(2) *A person shall not be deemed to be other than a disinterested director solely by reason of any or all of the following:*

(i) *The ownership by the director of shares of the corporation.*

(ii) *The receipt as a holder of shares of any class or series of any distribution made to all owners of shares of that class or series.*

(iii) *The receipt by the director of director's fees or other consideration as a director.*

(iv) *Any interest the director may have in retaining the status or position of director.*

(v) *The former business or employment relationship of the director with the corporation.*

(vi) *Receiving or having the right to receive retirement or deferred compensation from the corporation due to service as a director, officer or employee.*

[(g) *Cross references.—See Subchapter B of Chapter 5 (relating to indemnification and corporate directors' liability) and 42 Pa.C.S. Ch. 83 Subch. F (relating to corporate directors' liability).]*

(l) *Interpretation, construction and application.—This section shall control over any inconsistent provision of:*

(1) sections 511 (relating to standard of care and justifiable reliance) and 512 (relating to personal liability of directors); and

(2) 42 Pa.C.S. § 8363 (relating to standard of care and justifiable reliance) or 8364 (relating to personal liability of directors) with respect to any act as a board of directors, committee of the board or an individual director of a business corporation and to any claim made or action or proceeding against any board of directors, a committee of the board or an individual director of a corporation by or in the right of the corporation; or by any third party or otherwise, and any reference in the articles or in a bylaw, contract, agreement, resolution, vote or approval of shareholders, or otherwise of a corporation to 42 Pa.C.S. § 8363 or 8364 shall be deemed to be a reference to this section.

§ 2502. Registered corporation status.

Subject to additional definitions contained in subsequent provisions of this chapter which are applicable to specific subchapters of this chapter, as used in this chapter, the term “registered corporation” shall mean:

(1) A domestic business corporation:

(i) having a class or series of shares entitled to vote generally in the election of directors of the corporation registered under the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.); or

(ii) subject to the reporting obligations imposed by section [13] 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § [78m] 78o(d)) by reason of having filed a registration statement *which has become effective* under the Securities Act of 1933 (15 U.S.C. § 77a et seq.) relating to shares of a class or series of its equity securities.

A corporation which satisfies both subparagraphs (i) and (ii) shall be deemed to be described solely in subparagraph (i) for the purposes of this chapter.

(2) A domestic business corporation all of the shares of which are owned, directly or indirectly, by one or more registered corporations or foreign corporations for profit described in section 4102(b) (relating to registered corporation exclusions).

Section 5. Section 2542 of Title 15 is amended to read:

§ 2542. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Control transaction.” The acquisition by a person or group of the status of a controlling person or group.

“Controlling person or group.” A controlling person or group as defined in section 2543 (relating to controlling person or group).

“Fair value.” A value not less than the highest price paid per share by the controlling person or group at any time during the 90-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.

“Partial payment amount.” The amount per share specified in section 2545(c)(2) (relating to contents of notice).

“Subsidiary.” 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 50% of the votes that all shareholders would be entitled to cast in the election of directors of such subsidiary, except that a subsidiary will not be deemed to cease being a subsidiary as long as such corporation remains a controlling person or group within the meaning of this subchapter.

“Voting shares.” *The term shall have the meaning specified in section 2552 (relating to definitions).*

Section 6. Chapter 25 of Title 15 is amended by adding subchapters to read:

CHAPTER 25
REGISTERED CORPORATIONS

* * *

SUBCHAPTER G
CONTROL-SHARE ACQUISITIONS

Sec.

2561. Application and effect of subchapter.

2562. Definitions.

2562.1. Acquiring person safe harbor.

2563. Voting rights of shares acquired in a control-share acquisition.

2564. Procedure for establishing voting rights of control shares.

2565. Information statement of acquiring person.

2566. Redemption.

2567. Board determinations.

§ 2561. Application and effect of subchapter.

(a) General rule.—Except as otherwise provided in this section, this subchapter shall apply to every registered corporation.

(b) Exceptions.—This subchapter shall not apply to any control-share acquisition:

(1) Of a registered corporation described in section 2502(1)(ii) or (2) (relating to registered corporation status).

(2) Of a corporation:

(i) the bylaws of which explicitly provide that this subchapter shall not be applicable to the corporation by amendment adopted by the board of directors on or before July 26, 1990, in the case of a corporation which was a registered corporation described in section 2502(1)(i) on April 27, 1990; or

(ii) in any other case, the articles of which explicitly provide that this subchapter shall not be applicable to the corporation by a provision

included in the original articles or by an articles amendment adopted on or before 90 days after the corporation first becomes a registered corporation described in section 2502(1)(i).

(3) Consummated before October 17, 1989.

(4) Consummated pursuant to contractual rights or obligations existing before:

(i) October 17, 1989, in the case of a corporation which was a registered corporation described in section 2502(1)(i) on that date; or

(ii) in any other case, the date this subchapter becomes applicable to the corporation.

(5) Consummated:

(i) Pursuant to a gift, devise, bequest or otherwise through the laws of inheritance or descent.

(ii) By a settlor to a trustee under the terms of a family, testamentary or charitable trust.

(iii) By a trustee to a trust beneficiary or a trustee to a successor trustee under the terms of, or the addition, withdrawal or demise of a beneficiary or beneficiaries of, a family, testamentary or charitable trust.

(iv) Pursuant to the appointment of a guardian or custodian.

(v) Pursuant to a transfer from one spouse to another by reason of separation or divorce or pursuant to community property laws or other similar laws of any jurisdiction.

(vi) Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this subchapter.

(vii) Pursuant to a merger, consolidation or plan of share exchange effected in compliance with the provisions of this chapter if the corporation is a party to the agreement of merger, consolidation or plan of share exchange.

(viii) Pursuant to a transfer from a person who beneficially owns voting shares of the corporation that would entitle the holder thereof to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation and who acquired beneficial ownership of such shares prior to October 17, 1989.

(ix) By the corporation or any of its subsidiaries.

(x) By any savings, stock ownership, stock option or other benefit plan of the corporation or any of its subsidiaries, or by any fiduciary with respect to any such plan when acting in such capacity.

(c) Effect of distributions.—For purposes of this subchapter, voting shares of a corporation acquired by a holder as a result of a stock split, stock dividend or other similar distribution by a corporation of voting shares issued by the corporation and not involving a sale of such voting shares shall be deemed to have been acquired by the holder in the same transaction (at the same time, in the same manner and from the same person) in which the holder acquired the shares with respect to which such voting shares were subsequently distributed by the corporation.

(d) Status of certain shares and effect of formation of group on status.—

(1) No share over which voting power, or of which beneficial ownership, was or is acquired by the acquiring person in or in connection with a control-share acquisition described in subsection (b) shall be deemed to be a control share.

(2) In the case of affiliate, disinterested or existing shares, the acquisition of a beneficial ownership interest in a voting share by a group shall not, by itself, affect the status of an affiliate, disinterested or existing share, as such, if and so long as the person who had beneficial ownership of the share immediately prior to the acquisition of the beneficial ownership interest in the share by the group (or a direct or indirect transferee from the person to the extent such shares were acquired by the transferee solely pursuant to a transfer or series of transfers under subsection (b)(5)(i) through (vi)):

(i) is a participant in the group; and

(ii) continues to have at least the same voting and dispositive power over the share as the person had immediately prior to the acquisition of the beneficial ownership interest in the share by the group.

(3) Voting shares which are beneficially owned by a person described in paragraph (1), (2) or (3) of the definition of “affiliate shares” in section 2562 (relating to definitions) shall continue to be deemed affiliate shares, notwithstanding paragraph (2) of this subsection or the fact that such shares are also beneficially owned by a group.

(e) Application of duties.—The duty of the board of directors, committees of the board and individual directors under section 2564 (relating to procedure for establishing voting rights of control shares) is solely to the corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group.

§ 2562. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Acquiring person.” A person who makes or proposes to make a control-share acquisition. Two or more persons acting in concert, whether or not pursuant to an express agreement, arrangement, relationship or understanding, including as a partnership, limited partnership, syndicate, or through any means of affiliation whether or not formally organized, for the purpose of acquiring, holding, voting or disposing of shares of a registered corporation, shall also constitute a person for the purposes of this subchapter. A person, together with its affiliates and associates, shall constitute a person for the purposes of this subchapter.

“Affiliate,” “associate” and “beneficial owner.” The terms shall have the meanings specified in section 2552 (relating to definitions). The corporation may adopt reasonable provisions to evidence beneficial ownership, specifically including requirements that holders of voting shares of the corpora-

tion provide verified statements evidencing beneficial ownership and attesting to the date of acquisition thereof.

“Affiliate shares.” All voting shares of a corporation beneficially owned by:

- (1) an acquiring person;
- (2) executive officers or directors who are also officers (including executive officers); or
- (3) employee stock plans in which employee participants do not have, under the terms of the plan, the right to direct confidentially the manner in which shares held by the plan for the benefit of the employee will be voted in connection with the consideration of the voting rights to be accorded control shares.

The term does not include existing shares beneficially owned by executive officers or directors who are also officers (including executive officers) if the shares are shares described in paragraph (2) of the definition of “existing shares” that were beneficially owned continuously by the same person or entity described in such paragraph since January 1, 1988, or are shares described in paragraph (3) of that definition that were acquired with respect to such existing shares.

“Control.” The term shall have the meaning specified in section 2573 (relating to definitions).

“Control-share acquisition.” An acquisition, directly or indirectly, by any person of voting power over voting shares of a corporation that, but for this subchapter, would, when added to all voting power of the person over other voting shares of the corporation (exclusive of voting power of the person with respect to existing shares of the corporation), entitle the person to cast or direct the casting of such a percentage of the votes for the first time with respect to any of the following ranges that all shareholders would be entitled to cast in an election of directors of the corporation:

- (1) at least 20% but less than 33 1/3%;
- (2) at least 33 1/3% but less than 50%; or
- (3) 50% or more.

“Control shares.” Those voting shares of a corporation that, upon acquisition of voting power over such shares by an acquiring person, would result in a control-share acquisition. Voting shares beneficially owned by an acquiring person shall also be deemed to be control shares where such beneficial ownership was acquired by the acquiring person:

- (1) within 180 days of the day the person makes a control-share acquisition; or
- (2) with the intention of making a control-share acquisition.

“Disinterested shares.” All voting shares of a corporation that are not affiliate shares and that were beneficially owned by the same holder (or a direct or indirect transferee from the holder to the extent such shares were acquired by the transferee solely pursuant to a transfer or series of transfers under section 2561(b)(5)(i) through (vi) (relating to application and effect of subchapter)) continuously during the period from:

(1) the last to occur of the following dates:

(i) 12 months preceding the record date described in paragraph (2);

(ii) five business days prior to the date on which there is first publicly disclosed or caused to be disclosed information that there is a person (including the acquiring person) who intends to engage or may seek to engage in a control-share acquisition or that there is a person (including the acquiring person) who has acquired shares as part of, or with the intent of making, a control-share acquisition, as determined by the board of directors of the corporation in good faith considering all the evidence that the board deems to be relevant to such determination, including, without limitation, media reports, share trading volume and changes in share prices; or

(iii) (A) October 17, 1989, in the case of a corporation which was a registered corporation on that date; or

(B) in any other case, the date this subchapter becomes applicable to the corporation; through

(2) the record date established pursuant to section 2564(c) (relating to notice and record date).

“Exchange Act.” The term shall have the meaning specified in section 2552 (relating to definitions).

“Executive officer.” When used with reference to a corporation, the president, any vice-president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policymaking function or any other person who performs similar policymaking functions. Executive officers of subsidiaries shall be deemed executive officers of the corporation if they perform such policymaking functions for the corporation.

“Existing shares.”

(1) Voting shares which have been beneficially owned continuously by the same natural person since January 1, 1988.

(2) Voting shares which are beneficially owned by any natural person or trust, estate, foundation or other similar entity to the extent the voting shares were acquired solely by gift, inheritance, bequest, devise or other testamentary distribution or series of these transactions, directly or indirectly, from a natural person who had beneficially owned the voting shares prior to January 1, 1988.

(3) Voting shares which were acquired pursuant to a stock split, stock dividend, or other similar distribution described in section 2561(c) (relating to effect of distributions) with respect to existing shares that have been beneficially owned 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 (2), and that are held at such time by a natural person or entity described in paragraph (2).

“Proxy.” Includes any proxy, consent or authorization.

“Proxy solicitation” or “solicitation of proxies.” Includes any solicitation of a proxy, including a solicitation of a revocable proxy of the nature and under the circumstances described in section 2562.1(b)(3) (relating to acquiring person safe harbor).

“Publicly disclosed or caused to be disclosed.” Includes, but is not limited to, any disclosure (whether or not required by law) that becomes public made by a person:

(1) with the intent or expectation that such disclosure become public;
or

(2) to another where the disclosing person knows, or reasonably should have known, that the receiving person was not under an obligation to refrain from making such disclosure, directly or indirectly, to the public and such receiving person does make such disclosure, directly or indirectly, to the public.

“Voting shares.” The term shall have the meaning specified in section 2552 (relating to definitions).

§ 2562.1. Acquiring person safe harbor.

(a) Nonparticipant.—For the purposes of this subchapter, a person shall not be deemed an acquiring person, absent significant other activities indicating that a person should be deemed an acquiring person, by reason of voting or giving a proxy or consent as a shareholder of the corporation if the person is one who:

(1) did not acquire any voting shares of the corporation with the purpose of changing or influencing control of the corporation, seeking to acquire control of the corporation or influencing the outcome of a vote of shareholders under section 2563 (relating to voting rights of shares acquired in a control-share acquisition) or in connection with or as a participant in any agreement, arrangement, relationship, understanding or otherwise having any such purpose;

(2) if the control-share acquisition were consummated, would not be a person that has control over the corporation and will not receive, directly or indirectly, any consideration from a person that has control over the corporation other than consideration offered proportionately to all holders of voting shares of the corporation; and

(3) if a proxy or consent is given, executes a revocable proxy or consent given without consideration in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act under circumstances not then reportable on Schedule 13d under the Exchange Act (or any comparable or successor report) by the person who gave the proxy or consent.

(b) Certain holders.—For the purpose of this subchapter, a person shall not be deemed an acquiring person if such person holds voting power within any of the ranges specified in the definition of “control-share acquisition”:

(1) in good faith and not for the purpose of circumventing this subchapter, 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 any of the ranges in the definition of “control-share acquisition”;

(2) in connection with the solicitation of proxies or consents by or on behalf of the corporation in connection with shareholder meetings or actions of the corporation; or

(3) as a result of the solicitation of revocable proxies or consents with respect to voting shares if such proxies or consents both:

(i) are given without consideration in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act; and

(ii) do not empower the holder thereof, whether or not this power is shared with any other person, to vote such shares except on the specific matters described in such proxy or consent and in accordance with the instructions of the giver of such proxy or consent.

§ 2563. Voting rights of shares acquired in a control-share acquisition.

(a) General rule.—Control shares shall not have any voting rights unless a resolution approved by a vote of shareholders of the registered corporation at an annual or special meeting of shareholders pursuant to this subchapter restores to the control shares the same voting rights as other shares of the same class or series with respect to elections of directors and all other matters coming before the shareholders. Any such resolution may be approved only by the affirmative vote of the holders of a majority of the voting power entitled to vote in two separate votes as follows:

(1) all the disinterested shares of the corporation; and

(2) all voting shares of the corporation.

(b) Lapse of voting rights.—Voting rights accorded by approval of a resolution of shareholders shall lapse and be lost if any proposed control-share acquisition which is the subject of the shareholder approval is not consummated within 90 days after shareholder approval is obtained.

(c) Restoration of voting rights.—Any control shares that do not have voting rights accorded to them by approval of a resolution of shareholders as provided by subsection (a) or the voting rights of which lapse pursuant to subsection (b) shall regain such voting rights on transfer to a person other than the acquiring person or any affiliate or associate of the acquiring person (or direct or indirect transferee from the acquiring person or such affiliate or associate solely pursuant to a transfer or series of transfers under section 2561(b)(5)(i) through (vi) (relating to application and effect of subchapter)) unless such shares shall constitute control shares of the other person, in which case the voting rights of those shares shall again be subject to this subchapter.

§ 2564. Procedure for establishing voting rights of control shares.

(a) Special meeting.—A special meeting of the shareholders of a registered corporation shall be called by the board of directors of the corporation for the purpose of considering the voting rights to be accorded to the control shares if an acquiring person:

(1) files an information statement fully conforming to section 2565 (relating to information statement of acquiring person);

(2) makes a request in writing for a special meeting of the shareholders at the time of delivery of the information statement;

(3) makes a control-share acquisition or a bona fide written offer to make a control-share acquisition; and

(4) gives a written undertaking at the time of delivery of the information statement to pay or reimburse the corporation for the expenses of a special meeting of the shareholders.

The special meeting requested by the acquiring person shall be held on the date set by the board of directors of the corporation, but in no event later than 50 days after the receipt of the information statement by the corporation, unless the corporation and the acquiring person mutually agree to a later date. If the acquiring person so requests in writing at the time of delivery of the information statement to the corporation, the special meeting shall not be held sooner than 30 days after receipt by the corporation of the complete information statement.

(b) Special meeting not requested.—If the acquiring person complies with subsection (a)(1) and (3), but no request for a special meeting is made or no written undertaking to pay or reimburse the expenses of the meeting is given, the issue of the voting rights to be accorded to control shares shall be submitted to the shareholders at the next annual or special meeting of the shareholders of which notice had not been given prior to the receipt of such information statement, unless the matter of the voting rights becomes moot.

(c) Notice and record date.—The notice of any annual or special meeting at which the issue of the voting rights to be accorded the control shares shall be submitted to shareholders shall be given at least ten days prior to the date named for the meeting and shall be accompanied by:

(1) A copy of the information statement of the acquiring person.

(2) A copy of any amendment of such information statement previously delivered to the corporation at least seven days prior to the date on which such notice is given.

(3) A statement disclosing whether the board of directors of the corporation recommends approval of, expresses no opinion and remains neutral toward, recommends rejection of, or is unable to take a position with respect to according voting rights to control shares. In determining the position that it shall take with respect to according voting rights to control shares, including to express no opinion and remain neutral or to be unable to take a position with respect to such issue, the board of directors shall specifically consider, in addition to any other factors it deems appropriate, the effect of according voting rights to control shares upon the interests of employees and of communities in which offices or other establishments of the corporation are located.

(4) Any other matter required by this subchapter to be incorporated into or to accompany the notice of meeting of shareholders or that the corporation elects to include with such notice.

Only shareholders of record on the date determined by the board of directors in accordance with the provisions of section 1763 (relating to determination of shareholders of record) shall be entitled to notice of and to vote at the meeting to consider the voting rights to be accorded to control shares.

(d) Special meeting or submission of issue at annual or special meeting not required.—Notwithstanding subsections (a) and (b), the corporation is not required to call a special meeting of shareholders or otherwise present the issue of the voting rights to be accorded to the control shares at any annual or special meeting of shareholders unless:

(1) the acquiring person delivers to the corporation a complete information statement pursuant to section 2565; and

(2) at the time of delivery of such information statement, the acquiring person has:

(i) entered into a definitive financing agreement or agreements (which shall not include best efforts, highly confident or similar undertakings but which may have the usual and customary conditions, including conditions requiring that the control-share acquisition be consummated and that the control shares be accorded voting rights) with one or more financial institutions or other persons having the necessary financial capacity as determined by the board of directors of the corporation in good faith to provide for any amounts of financing of the control-share acquisition not to be provided by the acquiring person; and

(ii) delivered a copy of such agreements to the corporation.

§ 2565. Information statement of acquiring person.

(a) Delivery of information statement.—An acquiring person may deliver to the registered corporation at its principal executive office an information statement which shall contain all of the following:

(1) The identity of the acquiring person and the identity of each affiliate and associate of the acquiring person.

(2) A statement that the information statement is being provided under this section.

(3) The number and class or series of voting shares and of any other security of the corporation beneficially owned, directly or indirectly, prior to the control-share acquisition and at the time of the filing of this statement by the acquiring person.

(4) The number and class or series of voting shares of the corporation acquired or proposed to be acquired pursuant to the control-share acquisition by the acquiring person and specification of the following ranges of votes that the acquiring person could cast or direct the casting of relative to all the votes that would be entitled to be cast in an election of directors of the corporation that the acquiring person in good faith believes would result from consummation of the control-share acquisition:

(i) At least 20% but less than 33 1/3%.

(ii) At least 33 1/3% but less than 50%.

(iii) 50% or more.

(5) The terms of the control-share acquisition or proposed control-share acquisition, including:

(i) The source of moneys or other consideration and the material terms of the financial arrangements for the control-share acquisition and the plans of the acquiring person for meeting its debt-service and repayment obligations with respect to any such financing.

(ii) A statement identifying any pension fund of the acquiring person or of the corporation which is a source or proposed source of money or other consideration for the control-share acquisition, proposed control-share acquisition or the acquisition of any control shares and the amount of such money or other consideration which has been or is proposed to be used, directly or indirectly, in the financing of such acquisition.

(6) Plans or proposals of the acquiring person with regard to the corporation, including plans or proposals under consideration to:

(i) Enter into a business combination or combinations involving the corporation.

(ii) Liquidate or dissolve the corporation.

(iii) Permanently or temporarily shut down any plant, facility or establishment, or substantial part thereof, of the corporation, or sell any such plant, facility or establishment, or substantial part thereof, to any other person.

(iv) Otherwise sell all or a material part of the assets of, or merge, consolidate, divide or exchange the shares of the corporation to or with any other person.

(v) Transfer a material portion of the work, operations or business activities of any plant, facility or establishment of the corporation to a different location or to a plant, facility or establishment owned, as of the date the information statement is delivered, by any other person.

(vi) Change materially the management or policies of employment of the corporation or the policies of the corporation with respect to labor relations matters, including, but not limited to, the recognition of or negotiations with any labor organization representing employees of the corporation and the administration of collective bargaining agreements between the corporation and any such organization.

(vii) Change materially the charitable or community involvement or contributions or policies, programs or practices relating thereto of the corporation.

(viii) Change materially the relationship with suppliers or customers of, or the communities in which there are operations of, the corporation.

(ix) Make any other material change in the business, corporate structure, management or personnel of the corporation.

(7) The funding or other provisions the acquiring person intends to make with respect to all retiree insurance and employee benefit plan obligations.

(8) Any other facts that would be substantially likely to affect the decision of a shareholder with respect to voting on the control-share acquisition pursuant to section 2563 (relating to voting rights of shares acquired in a control-share acquisition).

(b) Amendment of information statement.—If any material change occurs in the facts set forth in the information statement, including any material increase or decrease in the number of voting shares of the corpora-

tion acquired or proposed to be acquired by the acquiring person, the acquiring person shall promptly deliver, to the corporation at its principal executive office, an amendment to the information statement fully explaining such material change.

§ 2566. Redemption.

Unless prohibited by the terms of the articles of a registered corporation in effect before a control-share acquisition has occurred, the corporation may redeem all control shares from the acquiring person at the average of the high and low sales price of shares of the same class and series as such prices are specified on a national securities exchange, national quotation system or similar quotation listing service on the date the corporation provides notice to the acquiring person of the call for redemption:

(1) at any time within 24 months after the date on which the acquiring person consummates a control-share acquisition, if the acquiring person does not, within 30 days after consummation of the control-share acquisition, properly request that the issue of voting rights to be accorded control shares be presented to the shareholders under section 2564(a) or (b) (relating to procedure for establishing voting rights of control shares); and

(2) at any time within 24 months after the issue of voting rights to be accorded such shares is submitted to the shareholders pursuant to section 2564(a) or (b); and

(i) such voting rights are not accorded pursuant to section 2563(a) (relating to voting rights of shares acquired in control-share acquisition); or

(ii) such voting rights are accorded and subsequently lapse pursuant to section 2563(b) (relating to lapse of voting rights).

§ 2567. Board determinations.

All determinations made by the board of directors of the registered corporation under this subchapter shall be presumed to be correct unless shown by clear and convincing evidence that the determination was not made by the directors in good faith after reasonable investigation or was clearly erroneous.

SUBCHAPTER H
DISGORGEMENT BY CERTAIN CONTROLLING
SHAREHOLDERS FOLLOWING ATTEMPTS
TO ACQUIRE CONTROL

Sec.

2571. Application and effect of subchapter.

2572. Policy and purpose.

2573. Definitions.

2573.1. Controlling person or group safe harbor.

2574. Ownership by corporation of profits resulting from certain transactions.

2575. Enforcement actions.

§ 2571. Application and effect of subchapter.

(a) General rule.—Except as otherwise provided in this section, this subchapter shall apply to every registered corporation.

(b) Exceptions.—This subchapter shall not apply to any transfer of an equity security:

(1) Of a registered corporation described in section 2502(1)(ii) or (2) (relating to registered corporation status).

(2) Of a corporation:

(i) the bylaws of which explicitly provide that this subchapter shall not be applicable to the corporation by amendment adopted by the board of directors on or before July 26, 1990, in the case of a corporation which was a registered corporation described in section 2502(1)(i) on April 27, 1990; or

(ii) in any other case, the articles of which explicitly provide that this subchapter shall not be applicable to the corporation by a provision included in the original articles or by an articles amendment adopted on or before 90 days after the corporation first becomes a registered corporation described in section 2502(1)(i).

(3) Consummated before October 17, 1989, if both the acquisition and disposition of such equity security were consummated before October 17, 1989.

(4) Consummated by a person or group who first became a controlling person or group prior to:

(i) October 17, 1989, if such person or group does not after such date commence a tender or exchange offer for or proxy solicitation with respect to voting shares of the corporation, in the case of a corporation which was a registered corporation described in section 2502(1)(i) on that date; or

(ii) in any other case, the date this subchapter becomes applicable to the corporation.

(5) Constituting:

(i) In the case of a person or group that, as of October 17, 1989, beneficially owned shares entitling the person or group to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation:

(A) The disposition of equity securities of the corporation by the person or group.

(B) Subsequent dispositions of any or all equity securities of the corporation disposed of by the person or group where such subsequent dispositions are effected by the direct purchaser of the securities from the person or group if, as a result of the acquisition by the purchaser of the securities disposed of by the person or group, the purchaser, immediately following the acquisition, is entitled to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation.

(ii) The transfer of the beneficial ownership of the equity security by:

(A) Gift, devise, bequest or otherwise through the laws of inheritance or descent.

(B) A settlor to a trustee under the terms of a family, testamentary or charitable trust.

(C) A trustee to a trust beneficiary or a trustee to a successor trustee under the terms of a family, testamentary or charitable trust.

(iii) The addition, withdrawal or demise of a beneficiary or beneficiaries of a family, testamentary or charitable trust.

(iv) The appointment of a guardian or custodian with respect to the equity security.

(v) The transfer of the beneficial ownership of the equity security from one spouse to another by reason of separation or divorce or pursuant to community property laws or other similar laws of any jurisdiction.

(vi) The transfer of record or the transfer of a beneficial interest or interests in the equity security where the circumstances surrounding the transfer clearly demonstrate that no material change in beneficial ownership has occurred.

(6) Consummated by:

(i) The corporation or any of its subsidiaries.

(ii) Any savings, stock ownership, stock option or other benefit plan of the corporation or any of its subsidiaries, or any fiduciary with respect to any such plan when acting in such capacity, or by any participant in any such plan with respect to any equity security acquired pursuant to any such plan or any equity security acquired as a result of the exercise or conversion of any equity security (specifically including any options, warrants or rights) issued to such participant by the corporation pursuant to any such plan.

(7) (i) Where the acquisition of the equity security has been approved by a resolution adopted prior to the acquisition of the equity security; or

(ii) where the disposition of the equity security has been approved by a resolution adopted prior to the disposition of the equity security if the equity security at the time of the adoption of the resolution is beneficially owned by a person or group that is or was a controlling person or group with respect to the corporation and is in control of the corporation if:

the resolution in either subparagraph (i) or (ii) is approved by the board of directors and ratified by the affirmative vote of the shareholders entitled to cast at least a majority of the votes which all shareholders are entitled to cast thereon and identifies the specific person or group that proposes such acquisition or disposition, the specific purpose of such acquisition or disposition and the specific number of equity securities that are proposed to be acquired or disposed of by such person or group.

(c) Effect of distributions.—For purposes of this subchapter, equity securities acquired by a holder as a result of a stock split, stock dividend or other similar distribution by a corporation of equity securities issued by the

corporation not involving a sale of the securities shall be deemed to have been acquired by the holder in the same transaction (at the same time, in the same manner and from the same person) in which the holder acquired the existing equity security with respect to which the equity securities were subsequently distributed by the corporation.

(d) **Formation of group.**—For the purposes of this subchapter, if there is no change in the beneficial ownership of an equity security held by a person, then the formation of or participation in a group involving the person shall not be deemed to constitute an acquisition of the beneficial ownership of such equity security by the group.

§ 2572. Policy and purpose.

(a) **General rule.**—The purpose of this subchapter is to protect certain registered corporations and legitimate interests of various groups related to such corporations from certain manipulative and coercive actions. Specifically, this subchapter seeks to:

(1) Protect registered corporations from being exposed to and paying “greenmail.”

(2) Promote a stable relationship among the various parties involved in registered corporations, including the public whose confidence in the future of a corporation tends to be undermined when a corporation is put “in play.”

(3) Ensure that speculators who put registered corporations “in play” do not misappropriate corporate values for themselves at the expense of the corporation and groups affected by corporate actions.

(4) Discourage such speculators from putting registered corporations “in play” through any means, including, but not limited to, offering to purchase at least 20% of the voting shares of the corporation or threatening to wage or waging a proxy contest in connection with or as a means toward or part of a plan to acquire control of the corporation, with the effect of reaping short-term speculative profits.

Moreover, this subchapter recognizes the right and obligation of the Commonwealth to regulate and protect the corporations it creates from abuses resulting from the application of its own laws affecting generally corporate governance and particularly director obligations, mergers and related matters. Such laws, and the obligations imposed on directors or others thereunder, should not be the vehicles by which registered corporations are manipulated in certain instances for the purpose of obtaining short-term profits.

(b) **Limitations.**—The purpose of this subchapter is not to affect legitimate shareholder activity that does not involve putting a corporation “in play” or involve seeking to acquire control of the corporation. Specifically, the purpose of this subchapter is not to:

(1) curtail proxy contests on matters properly submitted for shareholder action under applicable State or other law, including, but not limited to, certain elections of directors, corporate governance matters such as cumulative voting or staggered boards, or other corporate matters such as environmental issues or conducting business in a particular

country if, in any such instance, such proxy contest is not utilized in connection with or as a means toward or part of a plan to put the corporation "in play" or to seek to acquire control of the corporation; or

(2) affect the solicitation of proxies or consents by or on behalf of the corporation in connection with shareholder meetings or actions of the corporation.

§ 2573. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Beneficial owner." The term shall have the meaning specified in section 2552 (relating to definitions).

"Control." The power, whether or not exercised, 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.

"Controlling person or group."

(1) (i) A person or group who has acquired, offered to acquire or, directly or indirectly, publicly disclosed or caused to be disclosed (other than for the purpose of circumventing the intent of this subchapter) the intention of acquiring voting power over voting shares of a registered corporation that would entitle the holder thereof to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation; or

(ii) a person or group who has otherwise, directly or indirectly, publicly disclosed or caused to be disclosed (other than for the purpose of circumventing the intent of this subchapter) that it may seek to acquire control of a corporation through any means.

(2) Two or more persons acting in concert, whether or not pursuant to an express agreement, arrangement, relationship or understanding, including as a partnership, limited partnership, syndicate, or through any means of affiliation whether or not formally organized, for the purpose of acquiring, holding, voting or disposing of equity securities of a corporation shall be deemed a group for purposes of this subchapter. Notwithstanding any other provision of this subchapter to the contrary and regardless of whether a group has been deemed to acquire beneficial ownership of an equity security under this subchapter, each person who participates in a group, where such group is a controlling person or group as defined in this subchapter, shall also be deemed to be a controlling person or group for the purposes of this subchapter, and a direct or indirect transferee solely pursuant to a transfer or series of transfers under section 2571(b)(5)(ii) through (vi) (relating to application and effect of subchapter) of an equity security acquired from any person or group that is or becomes a controlling person or group, shall be deemed, with respect to such equity security, to be acting in concert with the controlling person or group, and shall be deemed to have acquired such equity security in the same transaction (at the same time, in the same manner and from the same person) as its acquisition by the controlling person or group.

“Equity security.” Any security, including all shares, stock or similar security, and any security convertible into (with or without additional consideration) or exercisable for any such shares, stock or similar security, or carrying any warrant, right or option to subscribe to or purchase such shares, stock or similar security or any such warrant, right, option or similar instrument.

“Exchange Act.” The term shall have the meaning specified in section 2552 (relating to definitions).

“Profit.” The positive value, if any, of the difference between:

(1) the consideration received from the disposition of equity securities less only the usual and customary broker’s commissions actually paid in connection with such disposition; and

(2) the consideration actually paid for the acquisition of such equity securities plus only the usual and customary broker’s commissions actually paid in connection with such acquisition.

“Proxy.” Includes any proxy, consent or authorization.

“Proxy solicitation” or “solicitation of proxies.” Includes any solicitation of a proxy, including a solicitation of a revocable proxy of the nature and under the circumstances described in section 2573.1(b)(3) (relating to controlling person or group safe harbor).

“Publicly disclosed or caused to be disclosed.” The term shall have the meaning specified in section 2562 (relating to definitions).

“Transfer.” Acquisition or disposition.

“Voting shares.” The term shall have the meaning specified in section 2552 (relating to definitions).

§ 2573.1. Controlling person or group safe harbor.

(a) Nonparticipant.—For the purpose of this subchapter, a person or group shall not be deemed a controlling person or group, absent significant other activities indicating that a person or group should be deemed a controlling person or group, by reason of voting or giving a proxy or consent as a shareholder of the corporation if the person or group is one who or which:

(1) did not acquire any voting shares of the corporation with the purpose of changing or influencing control of the corporation or seeking to acquire control of the corporation or in connection with or as a participant in any agreement, arrangement, relationship, understanding or otherwise having any such purpose;

(2) if control were acquired, would not be a person or group or a participant in a group that has control over the corporation and will not receive, directly or indirectly, any consideration from a person or group that has control over the corporation other than consideration offered proportionately to all holders of voting shares of the corporation; and

(3) if a proxy or consent is given, executes a revocable proxy or consent given without consideration in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act under circumstances not then reportable on Schedule 13d under the Exchange Act (or any comparable or successor report) by the person or group who gave the proxy or consent.

(b) Certain holders.—For the purpose of this subchapter, a person or group shall not be deemed a controlling person or group under paragraph (1)(i) of the definition of “controlling person or group” in section 2573 (relating to definitions) if such person or group holds voting power:

(1) in good faith and not for the purpose of circumventing this subchapter, 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 paragraph (1)(i) of the definition of “controlling person or group” in section 2573;

(2) in connection with the solicitation of proxies or consents by or on behalf of the corporation in connection with shareholder meetings or actions of the corporation; or

(3) in the amount specified in paragraph (1)(i) of the definition of “controlling person or group” in section 2573 as a result of the solicitation of revocable proxies or consents with respect to voting shares if such proxies or consents both:

(i) are given without consideration in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act; and

(ii) do not empower the holder thereof, whether or not this power is shared with any other person, to vote such shares except on the specific matters described in such proxy or consent and in accordance with the instructions of the giver of such proxy or consent.

§ 2574. Ownership by corporation of profits resulting from certain transactions.

Any profit realized by any person or group who is or was a controlling person or group with respect to a registered corporation from the disposition of any equity security of the corporation to any person (including under Subchapter E (relating to control transactions) or otherwise), including, without limitation, to the corporation (including under Subchapter G (relating to control-share acquisitions) or otherwise) or to another member of the controlling person or group, shall belong to and be recoverable by the corporation where the profit is realized by such person or group:

(1) from the disposition of the equity security within 18 months after the person or group obtained the status of a controlling person or group; and

(2) the equity security had been acquired by the controlling person or group within 24 months prior to or 18 months subsequent to the obtaining by the person or group of the status of a controlling person or group.

Any transfer by a controlling person or group of the ownership of any equity security may be suspended on the books of the corporation, and certificates representing such securities may be duly legended, to enforce the rights of the corporation under this subchapter.

§ 2575. Enforcement actions.

(a) Venue.—Actions to recover any profit due under this subchapter may be commenced in any court of competent jurisdiction by the registered corporation issuing the equity security or by any holder of any equity security of

the corporation in the name and on behalf of the corporation if the corporation fails or refuses to bring the action within 60 days after written request by a holder or shall fail to prosecute the action diligently. If a judgment requiring the payment of any such profits is entered, the party bringing such action shall recover all costs, including reasonable attorney fees, incurred in connection with enforcement of this subchapter.

(b) **Jurisdiction.**—By engaging in the activities necessary to become a controlling person or group and thereby becoming a controlling person or group, the person or group and all persons participating in the group consent to personal jurisdiction in the courts of this Commonwealth for enforcement of this subchapter. Courts of this Commonwealth may exercise personal jurisdiction over any controlling person or group in actions to enforce this subchapter. The terms of this section shall be supplementary to the provisions of 42 Pa.C.S. §§ 5301 (relating to persons) through 5322 (relating to bases of personal jurisdiction over persons outside this Commonwealth) and, for the purpose of this section, 42 Pa.C.S. § 5322(a)(7)(iv) shall be deemed to include a controlling person or group as defined in section 2573 (relating to definitions). Service of process may be made upon such persons outside this Commonwealth in accordance with the procedures specified by 42 Pa.C.S. § 5323 (relating to service of process on persons outside this Commonwealth).

(c) **Limitation.**—Any action to enforce this subchapter shall be brought within two years from the date any profit recoverable by the corporation was realized.

SUBCHAPTER I

SEVERANCE COMPENSATION FOR EMPLOYEES TERMINATED FOLLOWING CERTAIN CONTROL-SHARE ACQUISITIONS

Sec.

2581. Definitions.

2582. Severance compensation.

2583. Enforcement and remedies.

§ 2581. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Acquiring person.” The term shall have the meaning specified in section 2562 (relating to definitions).

“Control-share acquisition.” The term shall have the meaning specified in section 2562.

“Control-share approval.”

(1) The occurrence of both:

(i) a control-share acquisition to which Subchapter G (relating to control-share acquisitions) applies with respect to a registered corporation described in section 2502(1)(i) (relating to registered corporation status) by an acquiring person; and

(ii) the according by such registered corporation of voting rights pursuant to section 2563(a) (relating to voting rights of shares acquired in a control-share acquisition) in connection with such control-share acquisition to control shares of the acquiring person.

(2) The term shall also include a control-share acquisition effected by an acquiring person, other than a control-share acquisition described in section 2561(b)(3), (4) or (5) (other than section 2561(b)(5)(vii)) (relating to application and effect of subchapter) if the control-share acquisition:

(i) (A) occurs primarily in response to the actions of an other acquiring person where Subchapter G applies to a control-share acquisition or proposed control-share acquisition by such other acquiring person; and

(B) either:

(I) pursuant to an agreement or plan described in section 2561(b)(5)(vii);

(II) after adoption of an amendment to the articles of the registered corporation pursuant to section 2561(b)(2)(ii); or

(III) after reincorporation of the registered corporation in another jurisdiction;

if the agreement or plan is approved or the amendment or reincorporation is adopted by the board of directors of the corporation during the period commencing after the satisfaction by such other acquiring person of the requirements of section 2564(a) or (b) (relating to procedure for establishing voting rights of control shares) and ending 90 days after the date such issue is voted on by the shareholders, is withdrawn from consideration or becomes moot; or

(ii) is consummated in any manner by a person who satisfied, within two years prior to such acquisition, the requirements of section 2564(a) or (b).

“Control shares.” The term shall have the meaning specified in section 2562.

“Eligible employee.” Any employee of a registered corporation (or any subsidiary thereof) if:

(1) the registered corporation was the subject of a control-share approval;

(2) the employee was an employee of such corporation (or any subsidiary thereof) within 90 days before or on the day of the control-share approval and had been so employed for at least two years prior thereto; and

(3) the employment of the employee is in this Commonwealth.

“Employee.” Any person lawfully employed by an employer.

“Employment in this Commonwealth.”

(1) The entire service of an employee, performed inside and outside of this Commonwealth, if the service is localized in this Commonwealth.

(2) Service shall be deemed to be localized in this Commonwealth if:

(i) the service is performed entirely inside this Commonwealth; or

(ii) the service is performed both inside and outside of this Commonwealth but the service performed outside of this Commonwealth is incidental to the service of the employee inside this Commonwealth, as where such service is temporary or transitory in nature or consists of isolated transactions.

(3) Employment in this Commonwealth shall also include service of the employee, performed inside and outside of this Commonwealth, if the service is not localized in any state, but some of the service is performed in this Commonwealth, and:

(i) the base of operations of the employee is in this Commonwealth;

(ii) there is no base of operations, and the place from which such service is directed or controlled is in this Commonwealth; or

(iii) the base of operations of the employee or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the residence of the employee is in this Commonwealth.

“Minimum severance amount.” With respect to an eligible employee, the weekly compensation of the employee multiplied by the number of the completed years of service of the employee, up to a maximum of 26 times the weekly compensation of the employee.

“Subsidiary.” The term shall have the meaning specified in section 2552 (relating to definitions).

“Termination of employment.” The layoff of at least six months, or the involuntary termination of an employee, except that any employee employed in a business operation who is continued or employed or offered employment (within 60 days) by the purchaser of such business operation, on substantially the same terms (including geographic location) as those pursuant to which the employee was employed in such business operation, shall not be deemed to have been laid off or involuntarily terminated for the purposes of this subchapter by such transfer of employment to the purchaser, but the purchaser shall make the lump-sum payment under this subchapter in the event of a layoff of at least six months or the involuntary termination of the employee within the period specified in section 2582 (relating to severance compensation).

“Weekly compensation.” The average regular weekly compensation of an employee based on normal schedule of hours in effect for such employee over the last three months preceding the control-share approval.

“Year of service.” Each full year during which the employee has been employed by the employer.

§ 2582. Severance compensation.

(a) General rule.—Any eligible employee whose employment is terminated, other than for willful misconduct connected with the work of the employee, within 90 days before the control-share approval with respect to the registered corporation if such termination was pursuant to an agreement, arrangement or understanding, whether formal or informal, with the acquiring person whose control shares were accorded voting rights in connection with such control-share approval or within 24 calendar months after the

control-share approval with respect to the registered corporation shall receive a one-time, lump-sum payment from the employer equal to:

- (1) the minimum severance amount with respect to the employee; less
- (2) any payments made to the employee by the employer due to termination of employment, whether pursuant to any contract, policy, plan or otherwise, but not including any final wage payments to the employee or payments to the employee under pension, savings, retirement or similar plans.

(b) **Limitation.**—If the amount specified in subsection (a)(2) is at least equal to the amount specified in subsection (a)(1), no payment shall be required to be made under this subchapter.

(c) **Due date of payment.**—Severance compensation under this subchapter to eligible employees shall be made within one regular pay period after the last day of work of the employee, in the case of a layoff known at such time to be at least six months or an involuntary termination and in all other cases within 30 days after the eligible employee first becomes entitled to compensation under this subchapter.

§ 2583. Enforcement and remedies.

(a) **Notice.**—Within 30 days of the control-share approval, the employer shall provide written notice to each eligible employee and to the collective bargaining representative, if any, of the rights of eligible employees under this subchapter.

(b) **Remedies.**—In the event any eligible employee is denied a lump-sum payment in violation of this subchapter or the employer fails to provide the notice required by subsection (a), the employee on his or her own behalf or on behalf of other employees similarly situated, or the collective bargaining representative, if any, on the behalf of the employee, may, in addition to all other remedies available at law or in equity, bring an action to remedy such violation. In any such action, the court may order such equitable or legal relief as it deems just and proper.

(c) **Civil penalty.**—In the case of violations of subsection (a), the court may order the employer to pay to each employee who was subject to a termination of employment and entitled to severance compensation under this subchapter a civil penalty not to exceed \$75 per day for each business day that notice was not provided to such employee.

(d) **Successor liability.**—The rights under this subchapter of any individual who was an eligible employee at the time of the control-share approval shall vest at that time, and, in any action based on a violation of this subchapter, recovery may be secured against:

- (1) a merged, consolidated or resulting domestic or foreign corporation or other successor employer; or
- (2) the corporation after its status as a registered corporation has terminated;

notwithstanding any provision of law to the contrary.

SUBCHAPTER J
BUSINESS COMBINATION TRANSACTIONS - LABOR
CONTRACTS

Sec.

2585. Application and effect of subchapter.

2586. Definitions.

2587. Labor contracts preserved in business combination transactions.

2588. Civil remedies.

§ 2585. Application and effect of subchapter.

(a) General rule.—Except as otherwise provided in this section, this subchapter shall apply to every business combination transaction relating to a business operation if such business operation was owned by a registered corporation (or any subsidiary thereof) at the time of a control-share approval with respect to the corporation (regardless of the fact, if such be the case, that such operation after the control-share approval is owned by the registered corporation or any other person).

(b) Exceptions.—This subchapter shall not apply to:

(1) Any business combination transaction occurring more than five years after the control-share approval of the registered corporation.

(2) Any business operation located other than in this Commonwealth.

§ 2586. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Business combination transaction.” Any merger or consolidation, sale, lease, exchange or other disposition, in one transaction or a series of transactions, whether affecting all or substantially all the property and assets, including its good will, of the business operation that is the subject of the labor contract referred to in section 2587 (relating to labor contracts preserved in business combination transactions) or any transfer of a controlling interest in such business operation.

“Control-share approval.” The term shall have the meaning specified in section 2581 (relating to definitions).

“Covered labor contract.” Any labor contract if such contract:

(1) covers persons engaged in employment in this Commonwealth;

(2) was negotiated by a labor organization or by a collective bargaining agent or other representative;

(3) relates to a business operation that was owned by the registered corporation (or any subsidiary thereof) at the time of the control-share approval with respect to such corporation; and

(4) was in effect and covered such business operation and such employees at the time of such control-share approval.

“Employee” and “employment in this Commonwealth.” The terms shall have the meanings specified in section 2581.

“Subsidiary.” The term shall have the meaning specified in section 2552 (relating to definitions).

§ 2587. Labor contracts preserved in business combination transactions.

No business combination transaction shall result in the termination or impairment of the provisions of any covered labor contract, and the contract shall continue in effect pursuant to its terms until it is terminated pursuant to any termination provision contained therein or until otherwise agreed upon by the parties to such contract or their successors.

§ 2588. Civil remedies.

(a) General rule.—In the event that an employee is denied or fails to receive wages, benefits or wage supplements or suffers any contractual loss as a result of a violation of this subchapter, the employee on his or her own behalf or on behalf of other employees similarly situated, or the labor organization or collective bargaining agent party to the labor contract, may, in addition to all other remedies available at law or in equity, bring an action in any court of competent jurisdiction to recover such wages, benefits, wage supplements or contractual losses and to enjoin the violation of this subchapter.

(b) Successor liability.—The rights under this subchapter of any employee at the time of the control-share approval shall vest at that time, and, in any action based on a violation of this subchapter, recovery may be secured against:

- (1) a merged, consolidated or resulting domestic or foreign corporation or other successor employer; or
- (2) the corporation after its status as a registered corporation has terminated;

notwithstanding any provision of law to the contrary.

Section 7. The provisions of this act are severable. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of this act, and the application of such provision to other persons and circumstances, shall not be affected thereby.

Section 8. (a) Nothing contained in this amendatory act shall be deemed to affect, modify or change in any manner whatsoever the rights, obligations or duties of, or the standards pertaining to, any trustee of any Commonwealth or municipal pension system or the actions, activities or investment strategies of any such trustee with respect to any assets of any such pension system.

(b) A director shall not be held liable for taking or omitting to take any action permitted by 15 Pa.C.S. § 511(g) (relating to standard of care and justifiable reliance), 1721(j) (relating to board of directors), 2561(b)(2) (relating to application and effect of subchapter) or 2571(b)(2) (relating to application and effect of subchapter), it being the intention of this act that any such director may exercise absolute discretion in taking or omitting to take any such action.

(c) Other than section 5, nothing contained in this amendatory act shall be construed as having, or be deemed to have, any effect on the existing practice under 15 Pa.C.S. Ch. 25 Subch. E (relating to control transactions) or

the interpretation, construction, scope or applicability of 15 Pa.C.S. Ch. 25 Subch. E or as expressing any agreement or disagreement with any court interpretation relating to 15 Pa.C.S. Ch. 25 Subch. E. Further, nothing in this amendatory act shall be construed as having, or be deemed to have, any effect on the interpretation, construction, scope or applicability of any provision of this title, specifically including 15 Pa.C.S. §§ 511(b) and (c) and 1721(c) and (d), that are not explicitly amended by this amendatory act.

Section 9. This act shall take effect immediately.

APPROVED—The 27th day of April, A. D. 1990.

ROBERT P. CASEY