

ACT 32

S.B. NO. 669

A Bill for an Act Relating to Corporations.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. (a) The legislature finds that take-overs, particularly hostile take-overs:

- (1) Exaggerate the tendency of many businesses to focus on short-term performance to the detriment of such long-term societal interests as increased research and development, improved productivity, and the modernization of physical plant and employee capabilities;
 - (2) Are often inconsistent with the economic interests of shareholders;
 - (3) In many instances threaten the jobs and careers of Hawaii citizens and undermine the ethical foundations of companies, as when jobs are eliminated and career commitments to employees are breached or ignored;
 - (4) Often result in closing or consolidation of business facilities that damage communities dependent on the jobs and taxes provided by these facilities;
 - (5) Not infrequently wipe out long-standing customer/supplier relationships and the stability and continuity which these relationships provide throughout society;
 - (6) Frequently tie-up scarce capital that could be more effectively applied;
 - (7) Are all too often stifling, and ultimately destroy the entrepreneurial, innovative spirit of creative individuals in independent firms; and
 - (8) Are usually conducted in an atmosphere and pursuant to laws that do not provide a reasonable opportunity for affected parties to make informed decisions.
- (b) The purpose of this Act is to amend chapter 417E, Hawaii Revised Statutes, by adding new sections which are intended to:
- (1) Assure that the impacts of take-overs on all affected constituencies are identified and disclosed prior to the consummation of the transaction;
 - (2) Provide to shareholders both necessary information and the opportunity to cast fully informed votes on any take-over transactions;
 - (3) Encourage reason and decision-making by assuring equal financial treatment of all shareholders similarly situated at the time any take-over attempt is initiated; and
 - (4) Conform to requirements suggested by decisions of the Supreme Court of the United States.

SECTION 2. Chapter 417E, Hawaii Revised Statutes, is repealed and a new chapter is substituted as follows:

"CHAPTER 417E CORPORATE TAKE-OVERS

§417E-1 Definitions. As used in this chapter, unless the context otherwise requires:

"Affiliate" of a person means any person controlling, controlled by, or under common control with such person.

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

"Commissioner" means the commissioner of securities as provided for in chapter 485.

"Equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security; or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the commissioner deems to be of similar nature and considers necessary or appropriate, by such rules as the commissioner may prescribe in the public interest and for the protection of investors, to treat as an equity security.

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

"Offeree" means the beneficial owner, residing in Hawaii, of equity securities which an offeror offers to acquire in connection with a take-over offer.

"Take-over offer" means the offer to acquire any equity securities of a target company from a resident of this State pursuant to a tender offer or request or invitation for tenders, if after the acquisition of all securities acquired pursuant to the offer either the offeror would be directly or indirectly a beneficial owner of more than ten per cent of any class of the outstanding equity securities of the target company; or the beneficial ownership by the offeror of any class of the outstanding equity securities of the target company would be increased by more than five per cent, provided that this does not apply if after the acquisition of all securities acquired pursuant to the offer, the offeror would not be directly or indirectly a beneficial owner of more than ten per cent of any class of the outstanding equity securities of the target company.

Take-over offer does not include:

- (1) An offer to exchange the securities of one issuer for the securities of another issuer, if the offer is registered or exempt from registration under this chapter;
- (2) An offer in connection with the acquisition of a security which, together with all other acquisitions by the offeror of securities of the same class of equity securities of the issuer, would not result in the offeror having acquired more than two per cent of this class during the preceding twelve-month period;
- (3) An offer by the issuer to acquire its own equity securities;
- (4) An offer which is approved in writing by the board of directors of the target company.

"Target company" means an issuer of publicly traded equity securities which is organized under the laws of the State or has at least twenty per cent of its equity securities beneficially held by residents of this State, and has substantial assets in this State. For the purposes of this chapter, an equity security is publicly traded if a trading market exists for the security at the time the offeror makes a take-over offer for the security. A trading market exists if the security is traded on a national securities exchange, whether or not registered pursuant to the Securities Exchange Act of 1934, or the over-the-counter market.

"Beneficial owner" includes, but is not limited to, any person who directly or indirectly through any contract, arrangement, understanding, relationship, or otherwise has or shares the power to vote or direct the voting of a security and/or the power to dispose of, or direct the disposition of, the security. Beneficial ownership includes, but is not limited to, the right, exercisable within sixty days, to acquire securities through the exercise of

options, warrants, or rights or the conversion of convertible securities, or otherwise. The securities subject to these options, warrants, rights, or conversion privileges held by a person shall be deemed to be outstanding securities of the class owned by this person, but shall not be deemed to be outstanding for the purpose of computing the percentages of the class owned by any other person. A person shall be deemed the beneficial owner of securities beneficially owned by any relative or spouse or relative of the spouse residing in the home of this person, any trust or estate in which this person owns ten per cent or more of the total beneficial interest or serves as trustee or executor, any corporation or entity in which this person owns ten per cent or more of the equity, and any affiliate or associate of this person.

§417E-2 Registration of take-over offers. (a) It is unlawful for any person to make a take-over offer or to acquire any equity securities pursuant to the offer, unless the offer is effective under this chapter. A take-over offer is effective when the offeror files with the commissioner a registration statement containing the information prescribed in subsection (f). The offeror shall deliver a copy of the registration statement by certified mail to the target company at its principal office and publicly disclose the material terms of the proposed offer, not later than the date of filing of the registration statement. Public disclosure shall require, at a minimum, that a copy of the registration statement be supplied to all broker-dealers maintaining an office in this State currently quoting the security.

(b) The registration shall be filed on forms prescribed by the commissioner, and shall be accompanied by a consent by the offeror to service of process and the filing fee specified in section 417E-7, and shall contain the following information:

- (1) All of the information specified in subsection (f);
- (2) Two copies of all solicitation materials intended to be used in the take-over offer in the form proposed to be published or sent or delivered to offerees;
- (3) If the offeror is other than a natural person, information concerning its organization and operations, including the year, form and jurisdiction of its organization, a description of each class of equity security and long-term debt, a description of the business conducted by the offeror and its subsidiaries and any material changes therein during the past three years, a description of the location and character of the principal properties of the offeror and its subsidiaries, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three years, and financial statements of the offeror in such form and for such period of time as the commissioner may prescribe by rule;
- (4) If the offeror is a natural person, information concerning the offeror's identity and background, including business activities and affiliations during the past three years, and a description of any material pending legal or administrative proceedings in which the offeror is a party.

(c) Registration is not deemed approval by the commissioner and any representation to the contrary is unlawful.

(d) Within three calendar days of the date of filing of the registration statement, the commissioner may by order summarily suspend the effectiveness of the take-over offer if the commissioner determines that the registration

statement does not contain all of the information specified in subsection (f) or that the take-over offer materials provided to offerees do not provide full disclosure to offerees of all material information concerning the take-over offer. The suspension shall remain in effect only until the determination following a hearing held pursuant to subsection (e).

(e) A hearing shall be scheduled by the commissioner with respect to each suspension under this section and shall be held within ten calendar days of the date of the suspension. Chapter 91 does not apply to the hearing. The commissioner's finding shall be made within three calendar days after such hearing has been completed but not more than sixteen calendar days after the date of the suspension. The commissioner may prescribe different time limits than those specified in this subsection by rule or order. If, based upon the hearing, the commissioner finds that the take-over offer fails to provide for full and fair disclosure to offerees of all material information concerning the offer, or that the take-over offer is in material violation of any provision of this chapter, the commissioner shall permanently suspend the effectiveness of the take-over offer, subject to the right of the offeror to correct disclosure and other deficiencies identified by the commissioner and to reinstitute the take-over offer by filing a new or amended registration statement.

(f) The form required to be filed by this section shall contain the following information:

- (1) The identity and background of all persons on whose behalf the acquisition of any equity security of the issuer has been or is to be affected;
- (2) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including, if applicable, a statement describing any securities which are being offered in exchange for the equity securities of the issuer, and if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the material terms of any financing arrangements and the names of the parties from whom the funds were borrowed;
- (3) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals which the person, upon gaining control, has to liquidate the issuer, sell its assets, effect its merger or consolidation, change the location of its principal executive office or of a material portion of its business activities, change its management or policies of employment, materially alter its relationship with suppliers or customers or the communities in which it operates, or make any other major change in its business, corporate structure, management or personnel, and other information which would affect the shareholders' evaluation of the acquisition;
- (4) The number of shares or units of any equity security of the issuer owned beneficially by the person and any affiliate or associate of the person, together with the name and address of each affiliate or associate;
- (5) The material terms of any contract, arrangement, or understanding with any other person with respect to the equity securities of the issuer whereby the person filing the statement has or will acquire any interest in additional equity securities of the issuer, or is or will be obligated to transfer any interest in the equity securities to another.

§417E-3 Filing of solicitation materials. Copies of all advertisements, circulars, letters, or other materials published by the offeror or the target company, soliciting or requesting the acceptance or rejection of the take-over offer, shall be filed with the commissioner and sent to the target company or offeror, respectively, not later than the time copies of such solicitation materials are first published or used or sent to offerees. The commissioner may prohibit the use of any solicitation materials deemed false or misleading.

§417E-4 Fraudulent and deceptive practices. It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive, and manipulative acts or practices include, without limitation:

- (1) The publication or use in connection with the offer of any false statement of a material fact or the omission to state a material fact necessary to make the statements made not misleading;
- (2) The sale by any controlling shareholders of a target company of any of their equity securities to the offeror for a consideration greater than that to be paid other stockholders pursuant to the offer or the purchase of any of the securities of a controlling shareholder of the target company by the offeror for a consideration greater than that to be paid other shareholders, pursuant to an agreement not disclosed to the other shareholders;
- (3) The refusal by a target company to permit an offeror who is a stockholder of record to examine its list of stockholders, and to make extracts therefrom, pursuant to the applicable corporation statutes, for the purpose of making a take-over offer in compliance with this chapter, or in lieu thereof, to mail any solicitation materials published by the offeror to its security holders with reasonable promptness after receipt from the offeror of such materials together with the reasonable expenses of postage and handling;
- (4) The solicitation of any offeree for acceptance or rejection of a take-over offer or acquisition of any equity security pursuant to a take-over offer before the take-over offer is effective under this chapter or while the offer is suspended under this chapter.

§417E-5 Limitations on offerors. (a) No offeror may make a take-over offer which is not made to stockholders in this State on substantially the same terms as the offer is made to stockholders outside this State.

(b) An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a take-over offer may be withdrawn by or on behalf of any offeree at any time within seven days from the date the offer has become effective under this chapter and after sixty days from the date the offer has become effective under this chapter, except as the commissioner may otherwise prescribe by rule or order for the protection of investors.

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

(d) If an offeror varies the terms of a take-over offer before its expiration date by increasing the consideration offered to the security holders, the offeror shall pay the increased consideration for all equity securities accepted, whether such securities have been accepted by the offeror before or after the variation in the terms of the offer.

(e) No offeror shall make a take-over offer or acquire any equity securities in this State pursuant to the take-over offer, at any time when any proceeding by the commissioner is pending against the offeror alleging a violation of any provision of this chapter or chapter 485.

(f) No offeror shall acquire, remove, or exercise control, directly or indirectly, over any target company assets located in this State pursuant to a take-over offer at any time when any proceeding by the commissioner is pending against the offeror alleging a violation of any provision of this chapter.

(g) No offeror shall acquire from any resident of this State in any manner any equity securities of any class of a target company at any time within two years following the last purchase of securities pursuant to a take-over offer with respect to that class, including, but not limited to, acquisitions made by purchase, exchange, merger, consolidation, partial or complete liquidation, redemption, reverse stock split, recapitalization, reorganization, or any other similar transaction, unless the holders of the equity securities are afforded, at the time of the acquisition, a reasonable opportunity to dispose of the securities to the offeror upon substantially equivalent terms as those provided in the earlier take-over offer.

§417E-6 Administration, rules and orders. (a) In administering this chapter, the commissioner may exercise all powers granted to the commissioner under chapter 485, which are not inconsistent with this chapter.

(b) The commissioner may make and adopt such rules and forms as are necessary to carry out the purposes of this chapter including, without limitation, rules defining terms used in this chapter.

(c) The commissioner, by rule or order, may exempt from any provisions of this chapter any proposed take-over offer or any category or type of take-over offer which the commissioner determines does not have the purpose or effect of changing or influencing the control of a target company or where the commissioner determines that compliance with this chapter is not necessary for the protection of the offerees, and the commissioner may similarly exempt any persons from the requirement of filing statements under this chapter.

§417E-7 Fees and expenses. The commissioner shall impose a filing fee of \$250 for a registration statement filed by an offeror.

§417E-8 Injunctions. Whenever it appears to the commissioner that any person, including a controlling person of an offeror or target company, has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order hereunder, the commissioner is authorized to:

- (1) Issue and cause to be served upon any person violating any of the provisions of this chapter an order requiring the person guilty thereof to cease and desist therefrom; and
- (2) Bring an action in the appropriate circuit court to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder, or refer the matter to the attorney general.

Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order and may order rescission of any sales or purchases of securities determined to be unlawful under this chapter or any rule or order hereunder. The court may not require the commissioner to post a bond.

§417E-9 Penalties. (a) Any person, including a controlling person of an offeror or target company, who violates any provision of this chapter or any rule thereunder, or any order of the commissioner of which this person has notice, shall be subject to a fine of not more than \$25,000 or imprisonment for not more than five years, or both. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this chapter more than six years after the alleged violation.

(b) The commissioner may refer such evidence as is available concerning violations of this chapter or of any rule or order hereunder to the attorney general who, with or without any reference, may institute the appropriate criminal proceedings under this chapter.

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

(d) All shares acquired from a Hawaii resident in violation of any provision of this chapter or any rule hereunder, or any order of the commissioner of which the person has notice, shall be denied voting rights for one year after acquisition, the shares shall be nontransferable on the books of the target company for one year after acquisition and the target company, during this one-year period, shall have the option to call the shares for redemption either at the price at which the shares were acquired or at book value per share as of the last day of the fiscal quarter ended prior to the date of the call for redemption. Such a redemption shall occur on the date set in the call notice but not later than sixty days after the call notice is given.

§417E-10 Civil liabilities. (a) Any offeror who purchases a security in connection with a take-over offer in violation of this chapter shall be liable to the person selling the security to the offeror who may sue either at law or in equity. In an action for rescission, the seller shall be entitled to recover the security, plus any income received by the purchaser thereon, upon tender of the consideration received. Tender requires only notice of willingness to pay the amount specified in exchange for the security. Any notice may be given by service as in civil actions or by certified mail to the last known address of the person liable. Damages are the excess of either the value of the security on the date of purchase or its present value, whichever is greater, over the present value of the consideration received for the security.

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

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

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

§417E-11 Application of securities law. All of the provisions of chapter 485 which are not in conflict with this chapter shall apply to any take-over offer involving a target company in this State."

SECTION 3. Chapter 416, Hawaii Revised Statutes, is amended by adding a new part, to be appropriately designated and to read as follows:

"PART . CONTROL SHARE ACQUISITIONS

§416- Definitions. As used in this part, unless the context otherwise requires:

"Acquiring person" means a person who is required to deliver an information statement under this part.

"Beneficial ownership" shall be determined pursuant to section 13 of the federal Securities Exchange Act of 1934 and the rules promulgated thereunder, as amended.

"Control share acquisition" means an acquisition of shares of an issuing public corporation resulting in beneficial ownership by an acquiring person of a new range of voting power specified in this part, but does not include an acquisition:

- (1) Before, or pursuant to an agreement entered into before the effective date of this part;
- (2) By a donee pursuant to an inter vivos gift not made to avoid this part or by a distributee as defined in chapter 560;
- (3) Pursuant to a security agreement not created to avoid this part;
- (4) Under chapter 417, if the issuing public corporation is a party to the transaction; or
- (5) From the issuing public corporation.

"Issuing public corporation" means a corporation incorporated in this State with at least one hundred shareholders and having its principal place of business or substantial assets located in this State.

§416- Control share acquisitions. (a) Unless otherwise expressly provided in the articles of incorporation of an issuing public corporation, this section applies to a control share acquisition.

(b) All shares acquired by an acquiring person in violation of subsection (e) shall be denied voting rights for one year after acquisition, the shares shall be nontransferable on the books of the corporation for one year after acquisition and the corporation, during the one-year period, shall have the option to call the shares for redemption either at the price at which the shares were acquired or at book value per share as of the last day of the fiscal quarter ended prior to the date of the call for redemption. Such a redemption shall occur on the date set in the call notice but not later than sixty days after the call notice is given.

(c) A person proposing to make a control share acquisition shall deliver to the issuing public corporation at its principal executive office an information statement containing all of the following:

- (1) The identity of the person;
- (2) A reference that the statement is made under this section;
- (3) The number of shares of the issuing public corporation beneficially owned by the person;
- (4) A specification of which of the following ranges of voting power in the election of directors would result from consummation of the control share acquisition:
 - (A) At least ten per cent but less than twenty per cent;
 - (B) At least twenty per cent but less than thirty per cent;
 - (C) At least thirty per cent but less than forty per cent;

- (D) At least forty per cent but less than a majority; or
- (E) At least a majority; and
- (5) The terms of the proposed control share acquisition, including, but not limited to, the source of funds or other consideration and the material terms of the financial arrangements for the control share acquisition; any plans or proposals of the acquiring person to liquidate the issuing public corporation, sell all or substantially all of its assets, or merge it or exchange its shares with any other person, change the location of its principal executive office or of a material portion of its business activities, change materially its management or policies of employment, alter materially its relationship with suppliers or customers or the communities in which it operates, or make any other material change in its business, corporate structure, management or personnel, and such other information which would affect the decision of a shareholder with respect to voting on the proposed control share acquisition.

(d) Within five days after receipt of an information statement pursuant to subsection (c), a special meeting of the shareholders of the issuing public corporation shall be called pursuant to section 416-73, to vote on the proposed control share acquisition. The meeting shall be held no later than fifty-five days after receipt of the information statement, unless the acquiring person agrees to a later date, and no sooner than thirty days after receipt of the information statement, unless the acquiring person so requests in writing when delivering the information statement. The notice of the meeting shall at a minimum be accompanied by a copy of the information statement and a statement disclosing that the issuing public company recommends acceptance of, expresses no opinion and is remaining neutral toward, or is unable to take a position with respect to the proposed control share acquisition. The notice of meeting shall be given within twenty-five days after receipt of the information statement.

Notwithstanding any contrary provision of this chapter, a proxy relating to a meeting of shareholders required under this subsection, must be solicited separately from the offer to purchase or solicitation of an offer to sell shares of the issuing public corporation and must not be solicited sooner than thirty days before the meeting unless otherwise agreed in writing by the acquiring person and the issuing public corporation.

(e) The acquiring person may consummate the proposed control share acquisition if and only if both the following occur:

- (1) The proposed control share acquisition is approved by the affirmative vote of the holders of a majority of the voting power of all shares entitled to vote which are not beneficially owned by the acquiring person. A class or series of shares of the corporation is entitled to vote as a class or series if any provision of the control share acquisition would, if contained in a proposed amendment to the articles, entitle the class or series to vote as a class or series; and
- (2) The proposed control share acquisition is consummated within one hundred eighty days after shareholder approval."

SECTION 4. This Act shall not affect the validity of any provisions of articles of incorporation and bylaws which were adopted, any proceedings which were begun, rights which accrued, or penalties or liabilities which were incurred prior to the effective date of this Act.

SECTION 5. Act 167, Session Laws of Hawaii 1983, is amended by transferring the new part enacted in section 3 of this Act to the Hawaii Business

Corporation Act, such part to be appropriately redesignated by the revisor of statutes.

SECTION 6. Section 1 of Act 167, Session Laws of Hawaii 1983, is amended by repealing sections -150 to -161.

SECTION 7. Section 19 of Act 167, Session Laws of Hawaii 1983, is repealed.

SECTION 8. Statutory material to be repealed is bracketed. New statutory material is underscored.¹

SECTION 9. This Act shall take effect upon its approval except that sections 6, 7, and 8 shall take effect on July 1, 1986.

SECTION 10. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

(Approved April 23, 1985.)

Note

1. No underscored material. Edited pursuant to HRS §23G-16.5.