

NEW SECTION. Sec. 4. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate August 10, 1987.

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CHAPTER 4

[Senate Bill No. 6084]

CORPORATIONS—HOSTILE OR UNFRIENDLY ATTEMPTS TO GAIN CONTROL

AN ACT Relating to corporations; amending RCW 23A.32.010; adding a new section to chapter 23A.28 RCW; adding a new section to chapter 23A.32 RCW; adding a new chapter to Title 23A RCW; creating a new section; providing an expiration date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that:

- (1) Corporations that offer employment and health, retirement, and other benefits to a large number of citizens of the state of Washington are vital to the economy of this state and the well-being of all of its citizens;
- (2) The welfare of the employees of these corporations is of paramount interest and concern to this state;
- (3) Many businesses in this state rely on these corporations to purchase goods and services;
- (4) Hostile or unfriendly attempts to gain control of or influence otherwise publicly held corporations can cause corporate management to dissipate a corporation's assets in an effort to resist the takeover by selling or distributing cash or assets, redeeming stock, or taking other steps to increase the short-term gain to shareholders and to dissipate energies required for strategic planning, market development, capital investment decisions, assessment of technologies, and evaluation of competitive challenges that can damage the long-term interests of shareholders and the economic health of the state by reducing or eliminating the ability to finance investments in research and development, new products, facilities and equipment, and by undermining the planning process for those purposes;
- (5) Hostile or unfriendly attempts to gain control or influence otherwise publicly held corporations are often highly leveraged pursuant to financing arrangements which assume that an acquirer will promptly obtain

access to an acquired corporation's cash or assets and use them, or the proceeds of their sale, to repay acquisition indebtedness;

(6) Hostile or unfriendly attempts to gain control of or influence otherwise publicly held corporations can harm the economy of the state by weakening corporate performance, and causing unemployment, plant closings, reduced charitable donations, declining population base, reduced income to fee-supported local government services, reduced tax base, and reduced income to other businesses; and

(7) The state has a substantial and legitimate interest in regulating domestic and foreign corporations that have their most significant business contacts with this state and in regulating hostile or unfriendly attempts to gain control of or influence otherwise publicly held corporations that employ a large number of citizens of the state, pay significant taxes, and have a substantial economic base in the state.

The legislature intends this chapter (sections 2 through 5 and 10 of this act) to balance the substantial and legitimate interests of the state in corporations that employ a large number of citizens of the state and that have a substantial economic base in the state with: The interests of citizens of other states who own shares of such corporations; the interests of the state of incorporation of such corporations in regulating the internal affairs of corporations incorporated in that state; and the interests of promoting interstate commerce. To this effect, the legislature intends to regulate certain transactions between publicly held corporations and acquiring persons that will tend to harm the long-term health of corporations that have their principal executive office and a majority of their assets in this state and that employ a large number of citizens of this state.

(8) This section shall expire December 31, 1988.

NEW SECTION. Sec. 2. The definitions in this section apply throughout this chapter.

(1) "Acquiring person" means a person or group of persons, other than the target corporation or a subsidiary of the target corporation, who beneficially owns ten percent or more of the outstanding voting shares of the target corporation. An agent, bank, broker, nominee, or trustee for another person (if the other person is not an acquiring person) who acts in good faith and not for the purpose of circumventing this chapter, is not an acquiring person;

(2) "Affiliate" means a person who directly or indirectly controls, or is controlled by, or is under common control with, a person.

(3) "Associate" means (a) a domestic or foreign corporation or organization of which a person is an officer, director, or partner or in which a person performs a similar function; (b) a direct or indirect beneficial owner of ten percent or more of any class of equity securities of a person; (c) a trust or estate in which a person has a beneficial interest or as to which a person serves as trustee or in a similar fiduciary capacity; and (d) if having

the same residence as a person, the person's relative, spouse, or spouse's relative.

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

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

(b) Who, individually or with or through any of its affiliates or associates, has (i) the right to acquire the shares, whether the right is exercisable immediately or only after the passage of time, pursuant to any agreement, arrangement, or understanding, whether or not in writing, or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise. A person is not the beneficial owner of shares tendered pursuant to a tender or exchange offer made by the person or any of the person's affiliates or associates until the tendered shares are accepted for purchase or exchange; or (ii) the right to vote the shares pursuant to any agreement, arrangement, or understanding, whether or not in writing. A person is not the beneficial owner of any shares under subsection (4)(b)(ii) of this section if the agreement, arrangement, or understanding to vote the shares arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the exchange act and is not then reportable on a schedule 13D under the exchange act, or any comparable or successor report; or

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

(5) "Control," "controlling," "controlled by," and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise. A person's beneficial ownership of ten percent or more of a domestic or foreign corporation's outstanding voting shares shall create a presumption that such person has control of such corporation. However, a person does not have control of a domestic or foreign corporation if the person holds voting shares, in good faith and not for the purpose of circumventing this chapter, as an agent, bank, broker, nominee, custodian, or trustee for one or more beneficial owners who do not individually or as a group have control of such corporation.

(6) "Exchange act" means the federal securities exchange act of 1934, as amended.

(7) "Market value," in the case of property other than cash or shares, means the fair market value of the property on the date in question as determined by the board of directors of the target corporation in good faith.

(8) "Person" means an individual, domestic or foreign corporation, partnership, trust, unincorporated association, or other entity; an affiliate or associate of any such person; or any two or more persons acting as a partnership, syndicate, or other group for the purpose of acquiring, holding, or dispersing of securities of a domestic or foreign corporation.

(9) "Significant business transaction" means:

(a) A merger or consolidation of a target corporation or a subsidiary of a target corporation with (i) an acquiring person or (ii) any other domestic or foreign corporation which is, or after the merger or consolidation would be, an affiliate or associate of the acquiring person;

(b) A sale, lease, exchange, mortgage, pledge, transfer, or other disposition or encumbrance, whether in one transaction or a series of transactions, to or with an acquiring person or an affiliate or associate of an acquiring person of assets of a target corporation or a subsidiary of a target corporation (i) having an aggregate market value equal to five percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of the target corporation, (ii) having an aggregate market value equal to five percent or more of the aggregate market value of all the outstanding shares of the target corporation, or (iii) representing five percent or more of the earning power or net income, determined on a consolidated basis, of the target corporation;

(c) The termination, whether at one time or over a period of time, of five percent or more of the employees of the target corporation and/or its subsidiaries employed in this state after the acquiring person's share acquisition date, unless the target corporation demonstrates by clear and convincing evidence that the termination of employees is not due to the acquiring person's acquisition of ten percent or more of the shares of the corporation;

(d) The issuance, transfer, or redemption by a target corporation or a subsidiary of a target corporation, whether in one transaction or a series of transactions, of shares or of options, warrants, or rights to acquire shares of a target corporation or a subsidiary of a target corporation to or beneficially owned by an acquiring person or an affiliate or associate of an acquiring person except pursuant to the exercise of warrants or rights to purchase shares offered, or a dividend, distribution, or redemption paid or made pro rata to, all shareholders or holders of options, warrants, or rights to acquire shares of the target corporation, and except for involuntary redemptions permitted by the target corporation's charter or by the law of this state or the state of incorporation;

(d) The adoption of a plan or proposal for the sale of assets, liquidation, or dissolution of a target corporation proposed by, or pursuant to an

agreement, arrangement, or understanding, whether or not in writing, with an acquiring person or an affiliate or associate of an acquiring person;

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

(f) A receipt by an acquiring person or an affiliate or associate of an acquiring person of the benefit, directly or indirectly, except proportionately as a shareholder of a target corporation, of loans, advances, guarantees, pledges, or other financial assistance or tax credits or other tax advantages provided by or through a target corporation; or

(g) An agreement, contract, or other arrangement providing for any of the transactions in this subsection.

(10) "Share acquisition date" means the date on which a person first becomes an acquiring person of a target corporation.

(11) "Subsidiary" means a domestic or foreign corporation that has a majority of its outstanding voting shares owned, directly or indirectly, by another domestic or foreign corporation.

(12) "Target corporation" means every domestic corporation organized under chapter 23A.12 RCW or any predecessor provision and every foreign corporation required to have a certificate of authority to transact business in this state pursuant to chapter 23A.32 RCW, if, as of the share acquisition date:

(a) The assessed valuation of the domestic or foreign corporation's and its subsidiaries' personal and real property in the state for purposes of computing state and local property taxes in the state exceeds the aggregate assessed valuation of its personal and real property in all other states for purposes of computing state and local property taxes in such states;

(b) The domestic or foreign corporation's principal executive office is located in the state;

(c) A majority of the domestic or foreign corporation's and its subsidiaries' employees are residents of the state;

(d) A majority of the domestic or foreign corporation's and its subsidiaries' tangible assets, measured by market value, are located in the state;

(e) The domestic or foreign corporation and its subsidiaries employ more than twenty thousand residents of the state; and

(f) The domestic or foreign corporation and its subsidiaries have: (i) More than ten percent of its shareholders of record resident in the state; or (ii) more than ten percent of its shares owned of record by state residents; or (iii) five thousand or more shareholders of record resident in the state.

For purposes of this subsection, the record date for determining the percentages and numbers of shareholders and shares shall be the last shareholder record date before the event requiring that the determination be made. A shareholder record date shall be determined pursuant to RCW 23A.08.270 for a domestic corporation and the comparable provision of the law of the state in which a foreign corporation is incorporated. If a shareholder record date has not been fixed by the board of directors within the preceding four months, the determination shall be made as of the end of the domestic or foreign corporation's most recent fiscal quarter.

The residence of each shareholder is presumed to be the address appearing in the records of the domestic or foreign corporation. Shares held of record by brokers or nominees shall be disregarded for purposes of calculating the percentages and numbers specified in this subsection. Shares of a domestic or foreign corporation allocated to the account of an employee or former employee or beneficiaries of employees or former employees of a domestic or foreign corporation and held in a plan that is qualified under section 401(a) of the federal internal revenue code of 1986, as amended, and is a defined contribution plan within the meaning of section 414(i) of the code shall be deemed, for the purposes of this subsection, to be held of record by the employee to whose account such shares are allocated.

A domestic or foreign corporation shall be deemed to be a target corporation if the domestic or foreign corporation's failure to satisfy the requirements of this subsection is caused by the action of, or is the result of a proposal by, an acquiring person or affiliate or associate of an acquiring person.

NEW SECTION. Sec. 3. This chapter does not apply:

(1) To a significant business transaction of a target corporation that does not have a class of voting stock registered with the securities and exchange commission pursuant to section 12 of the exchange act; or

(2) To a significant business transaction of a target corporation with an acquiring person of the target corporation which became an acquiring person inadvertently, if the acquiring person (a) as soon as practicable, divests itself of a sufficient amount of the voting shares of the target corporation so that it no longer is the beneficial owner, directly or indirectly, of ten percent or more of the outstanding voting shares of the target corporation, and (b) would not at any time within the five-year period preceding the date of the first public announcement of the significant business transaction have been an acquiring person but for the inadvertent acquisition.

NEW SECTION. Sec. 4. (1) (a) Notwithstanding any provision of chapter 23A.08 RCW, a target corporation shall not engage in any significant business transaction for a period of five years following the acquiring person's share acquisition date unless the significant business transaction or the purchase of shares made by the acquiring person on the share acquisition date is approved prior to the acquiring person's share acquisition date by a majority of the members of the board of directors of the target corporation.

(b) If a good faith proposal for a significant business transaction is made in writing to the board of directors of the target corporation prior to the significant business transaction or prior to the share acquisition date, the board of directors shall respond in writing, within thirty days or such shorter period, if any, as may be required by the exchange act setting forth its reasons for its decision regarding the proposal. If a good faith proposal to purchase shares is made in writing to the board of directors of the target corporation, the board of directors, unless it responds affirmatively in writing within thirty days or a shorter period, if any, as may be required by the exchange act shall be deemed to have disapproved such share purchase.

(2) A target corporation that engages in a significant business transaction that violates subsection (1) of this section and that is not exempt under section 3 of this act shall have its certificate of incorporation or certificate of authority to transact business in this state revoked pursuant to RCW 23A.28.125 or 23A.32.160 for domestic or foreign target corporations, respectively. In addition, such significant business transaction shall be void.

NEW SECTION. Sec. 5. The requirements imposed by this chapter are to be in addition to, and not in lieu of, requirements imposed on a transaction by any provision in the articles of incorporation or the bylaws of the target corporation, or otherwise.

NEW SECTION. Sec. 6. A new section is added to chapter 23A.28 RCW to read as follows:

(1) If a corporation engages in activity in violation of chapter 23A.—RCW (sections 2 through 5 and 10 of this act), then the secretary of state shall revoke the corporation's certificate of incorporation pursuant to the procedures in RCW 23A.28.125.

(2) This section shall expire on December 31, 1988.

NEW SECTION. Sec. 7. A new section is added to chapter 23A.32 RCW to read as follows:

(1) If a corporation engages in activity in violation of chapter 23A.—RCW (sections 2 through 5 and 10 of this act), then the secretary of state shall revoke the corporation's certificate of authority pursuant to the procedures in RCW 23A.32.160.

(2) This section shall expire on December 31, 1988.

Sec. 8. Section 109, chapter 53, Laws of 1965 as amended by section 46, chapter 16, Laws of 1979 and RCW 23A.32.010 are each amended to read as follows:

No foreign corporation shall have the right to transact business in this state until it shall have procured a certificate of authority so to do from the secretary of state. No foreign corporation shall be entitled to procure a certificate of authority under this title to transact in this state any business which a corporation organized under this title is not permitted to transact. A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this state (~~(and)~~). Until December 31, 1988, except as provided in chapter 23A.— RCW (sections 2 through 5 and 10 of this 1987 act), nothing in this title contained shall be construed to authorize this state to regulate the organization or the internal affairs of such corporation.

Without excluding other activities which may not constitute transacting business in this state, a foreign corporation shall not be considered to be transacting business in this state, for the purposes of this title, by reason of carrying on in this state any one or more of the following activities:

(1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

(2) Holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs.

(3) Maintaining bank accounts.

(4) Maintaining offices or agencies for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries with relation to its securities.

(5) Effecting sales through independent contractors.

(6) Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where such orders require acceptance without this state before becoming binding contracts.

(7) Creating as borrower or lender, or acquiring, indebtedness or mortgages or other security interests in real or personal property.

(8) Securing or collecting debts or enforcing any rights in property securing the same.

(9) Transacting any business in interstate commerce.

(10) Conducting an isolated transaction completed within a period of thirty days and not in the course of a number of repeated transactions of like nature.

NEW SECTION. Sec. 9. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 10. (1) This chapter shall expire on December 31, 1988.

(2) This chapter does not apply to any significant business transaction of a target corporation with, with respect to, proposed by or on behalf of, or pursuant to any agreement, arrangement, or understanding, whether or not in writing, with any acquiring person, affiliate, or associate of the acquiring person, if the acquiring person, affiliate, or associate of the acquiring person's share acquisition date is on or after December 31, 1988.

NEW SECTION. Sec. 11. Sections 2 through 5 and 10 of this act shall constitute a new chapter in Title 23A RCW.

NEW SECTION. Sec. 12. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

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