

Legislation

House of Representatives

128TH GENERAL ASSEMBLY
SECOND SESSION — 1976

House Bill No. 916

As Amended By

House Amendment No. 1

Enacted April 24, 1976

AN ACT TO AMEND CHAPTER 1, TITLE 8, DELAWARE CODE,
RELATING TO THE GENERAL CORPORATION LAW.

Be It Enacted by the General Assembly of the State of Delaware (Two-thirds of all the members elected to each House thereof concurring therein) :

Section 1. Amend Subchapter VI, Chapter 1, Title 8, Delaware Code by adding thereto a new Section to be designated as §203 to read as follows :

“§203. *Tender Offers.*

(a) No offeror shall make a tender offer unless :

(1) Not less than 20 nor more than 60 days before the date the tender offer is to be made, the offeror shall deliver to the corporation whose equity securities are to be subject to the tender offer, at its registered office in this State or at its principal place of business, a written statement of the offeror's intention to make the tender offer. The statement shall include the name and address of the offeror and of each director and principal officer of the offeror; a description of the equity securities to be purchased and the con-

sideration to be offered; the duration of the offer; the date on which the offeror may first purchase tendered securities; the amount or number of equity securities to be purchased or the manner in which such number or amount will be determined; whether the offeror will unconditionally accept all or any part of the equity securities tendered and, if not, upon what conditions acceptance will be made; the number or amount of any equity securities of the corporation owned beneficially by the offeror and any associate of the offeror as of the date of the delivery of the statement; a description of any contract, agreement or understanding to which the offeror or any associate of the offeror is a party with respect to the ownership, voting rights or any other interest in any equity security of the corporation; and, if the offeror permits the purchase of less than all the outstanding equity securities issued by the corporation, copies of a balance sheet of the offeror as of the end of its last fiscal year and of its income statements for the three fiscal years preceding the offer:

(2) The tender offer shall remain open for a period of at least 20 days after it is first made to the holders of the equity securities, during which period any stockholder may withdraw any of the equity securities tendered to the offeror, and any revised or amended tender offer which changes the amount or type of consideration offered or the number of equity securities for which the offer is made shall remain open for an additional period of at least 10 days following the amendment; and

(3) The offeror and any associate of the offeror will not purchase or pay for any tendered equity security for a period of at least 20 days after the tender offer is first made to the holders of the equity securities, and no such purchase or payment shall be made within 10 days after an amended or revised tender offer if the amendment or revision changes the amount or type of consideration offered or the number of equity securities for which the offer is made. If during the period the tender offer must remain open pursuant to the provisions of this Section, a greater number of equity securities is tendered than the offeror is bound or willing to purchase, the equity securities shall be purchased pro rata, as nearly as may be, according to the number of shares tendered during such period by each equity security holder;

(b) Notwithstanding the foregoing:

(1) Whenever an offeror has delivered the statement required by subsection (a)(1) of this Section, a subsequent offeror who shall also deliver the statement required by subsection (a)(1) of this Section may thereafter make a tender offer for equity securities of the same class as in the original offer at or after the date this Section permits the original offeror to make an offer.

(2) If the original offeror has made a tender offer in compliance with this Section, the date upon which a sub-

sequent offer for equity securities of the same class may close and the offeror purchase or pay for equity securities tendered thereunder may be the same as provided in the original offer at the date the subsequent offer is made.

(c) As used in this Section, the term:

(1) 'Offeror' means any person, corporation, partnership, unincorporated association or other entity who makes a tender offer, and includes any two or more of the same who make a tender offer jointly or intend to exercise jointly or in concert any voting rights of the equity securities for which the tender offer is made;

(2) 'Tender Offer' means any offer to purchase or invitation to tender equity securities for purchase made by an offeror to more than 30 of the holders of equity securities of any corporation organized under this Chapter if, after the consummation thereof, the offeror and any associate of the offeror would own beneficially, directly or indirectly, more than five percent of any class of the outstanding equity securities of the corporation, unless the offer is exempted by any other provision of this Section;

(3) 'Tender Offer' does not mean:

(i) An offer made by a corporation to purchase its own equity securities or equity securities of another corporation, if a majority of the shares entitled to vote in the election of directors of such corporation is held directly or indirectly by the offering corporation;

(ii) An offer to purchase equity securities to be effected by a registered broker-dealer on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function, and receives no more than the customary broker's commission, and neither the principal nor the broker solicits or arranges for the solicitation of orders to sell such equity securities;

(4) A tender offer is 'made' when it is first published or sent or given to the holders of the equity securities;

(5) 'Equity Security' means any stock, bond, or other obligation the holder of which has the right to vote, or any security convertible into, or any right, option or warrant to purchase, any such stock, bond or other obligation;

(6) 'Associate of the Offeror' means:

(i) Any corporation or other organization of which the offeror is an officer, director or partner, or is, directly or indirectly, the beneficial owner of 10% or more of any class of equity securities;

(ii) Any person who is an officer, director, partner or managing agent of an offeror, or who is, directly or

indirectly, the beneficial owner of 10% or more of any class of equity securities of the offeror ;

(iii) Any trust or other estate in which the offeror has a substantial beneficial interest or as to which the offeror serves as trustee or in a similar fiduciary capacity ; or

(iv) The spouse of the offeror, or any relative of the offeror or of such spouse who has the same home as the offeror ;

(d) The certificate of incorporation of any corporation organized under this Chapter may provide that tender offers for the purchase of its equity securities shall not be subject to the provisions of this Section.

(e) The Court of Chancery is hereby vested with exclusive jurisdiction summarily to hear and determine alleged violations of the provisions of this Section. The Court may, in its discretion, award such relief as it may deem just and proper, including directing the corporation to refuse to transfer on its books and to refuse to recognize the vote with respect to any equity security acquired pursuant to a tender offer which does not comply with or is not exempt under the provisions of this Section."

COMMENTARY

§203. *Tender Offers*

Section 203 is a new provision designed to prevent certain abuses which have arisen in connection with offers for tenders of shares. During the past several years a number of public offers to purchase shares of stock in a corporation have been made upon such short notice that the stockholders have not been given ample opportunity to determine if the offer is fair, or to see if some more favorable offer might be made in the auction of an open market. Even management in some instances has not had time to evaluate the fairness of the offer and to determine whether to recommend it to its stockholders, to oppose it, or to take no position. The statute here [enacted] would require any such offeror to give notice to the corporation of the basic terms of a proposed offer 20 days before it is to open and to keep the offer open for a minimum of 20 days. By providing this minimum period of 40 days, the stockholders will have time to evaluate the offer, and the market place will have an opportunity to react to the offer.

The statute would apply only to offers made to more than 30 stockholders, so it will not affect closely held corporations or casual, non-public offer. It applies only to an offer which will result in the acquisition of 5% of the outstanding stock of the corporation. Provisions are made to permit competing offers, if they should develop, to have an equal opportunity for consideration by stockholders.

The Court of Chancery is empowered to enforce the provisions of this Section by any order deemed appropriate. Specific authority is given to the Court to authorize a corporation to refuse to transfer or recognize the vote of shares purchased in violation of this Section. The jurisdiction of the Court of Chancery is expressly stated to be exclusive to avoid any suggestion that an action under this Section could also lie in the Superior Court.