

State of Arkansas

77th General Assembly

Regular Session, 1989

A Bill

HOUSE BILL

1271

By: Representatives McJunkin, Blair, Thicksten,
Pollan, and Mahony

For An Act To Be Entitled

"AN ACT TO PREVENT THE ACQUISITION OF A CONTROLLING INTEREST
IN DOMESTIC CORPORATIONS BY HOSTILE PERSONS."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. CITATION. This Act is known and may be cited as the
Arkansas Control Share Act.

SECTION 2. APPLICATION. (A) This Act applies to all issuing public
corporations in existence on and after July 1, 1990.

(B) A domestic corporation that is not an issuing public corporation
but that has one hundred (100) or more shareholders of record and meets one of
the requirements set forth in subparagraph 3(G)(1)b, or an issuing public
corporation to which this Act does not apply, may elect to be subject to this
Act as an issuing public corporation by amending its articles of incorporation
to provide that this Act shall apply to the corporation as of a specified date
and filing the amendment in the Office of the Secretary of State on or before
such date.

SECTION 3. DEFINITIONS. For the purposes of this Act the following
terms shall have the following meaning:

(A) "Acquiring person" means a person who makes or proposes to make,
or persons acting as a "group" as defined in Sec. 13(d)(3) of the Securities
Exchange Act of 1934 who make or propose to make, a control share acquisition;
but "acquiring person" does not include the issuing public corporation.

(B) "Affiliate" means a person who directly or indirectly controls the
corporation. "Control", means the possession, direct or indirect, of the power
to direct or cause the direction of the management and policies of the cor-
poration, whether through the ownership of voting securities, by contract, or

otherwise. A person's beneficial ownership of ten percent or more of the voting power of a corporation's outstanding shares entitled to vote in the election of directors (except a person holding voting power in good faith as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group control the corporation) creates a presumption that the person controls the corporation.

(C) "All voting power" means the aggregate voting power that the shareholders of an issuing public corporation would have in the election of directors, except for this Act.

(D) "Control shares" means issued and outstanding shares of an issuing public corporation that, except for this Act, would have voting power when added to all other shares of the issuing public corporation owned of record or beneficially by an acquiring person or in respect to which that acquiring person may exercise or direct the exercise of voting power, that would entitle the acquiring person, immediately after acquisition of the shares (directly or indirectly), to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of voting power:

(1) One-fifth (1/5) or more but less than one-third (1/3) of all voting power;

(2) One third (1/3) or more but less than a majority of all voting power; or

(3) A majority or more of all voting power.

(E) (1) "Control Share acquisition" means acquisition by any person of ownership of , or the power to direct the exercise of voting power with respect to, control shares.

(2) A person who acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing this Act has not made a control share acquisition of shares in respect of which that person is not able to exercise or direct the exercise of votes without further instruction from others.

(3) The acquisition of any control shares does not constitute a control share acquisition if the acquisition is made in good faith and not for the purpose of circumventing this Act in any of the following circumstances:

(a) At a time when the corporation was not subject to this Act.

(b) Pursuant to a contract entered into at a time when the cor-

poration was not subject to this Act.

(c) Pursuant to the laws of descent and distribution.

(d) By a donee under an inter vivos gift.

(e) Pursuant to a transfer between or among immediate family members, or between or among persons under direct common control.

(f) Pursuant to the satisfaction of a pledge or other security interest.

(g) Pursuant to a merger or plan of consolidation or share exchange effected in compliance with (Ark. Code Ann. §4-26-1001-1009 of 1987 or Ark. Code Ann. §4-27-1101-1107 of 1987), if the issuing public corporation is a party to the agreement of merger or plan of consolidation or share exchange.

(h) From any person whose previous acquisition of control shares would have constituted a control share acquisition but for this paragraph 3(E)(3) (other than this subparagraph 3(E)3(h), provided the acquisition does not result in the acquiring person holding voting power within a higher range of voting power than that of the person from whom the control shares were acquired.

(i) Acquisition by a person of additional shares within the range of voting power for which such person has received approval pursuant to Section 5 or within the range of voting power resulting from shares acquired in a transaction described in this paragraph 3(E)(3).

(j) An increase in voting power resulting from any action taken by the issuing public corporation, provided the person whose voting power is thereby affected is not an affiliate of the corporation.

(k) Pursuant to the solicitation of proxies subject to Regulation 14A under the Securities Exchange Act of 1934.

(F) "Interested shares" means the shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise, as of the applicable record date, of the voting power of the corporation in the election of directors, other than solely by the authority of a revocable proxy:

(1) the acquiring Person;

(2) any officer of the issuing public corporation; or

(3) any employee of the issuing public corporation who is also a director of the corporation.

(G) (1) "Issuing public corporation" means a domestic corporation that has:

(a) any securities registered under Section 12 or is subject to Section 15 (d) of the Securities Exchange Act of 1934; and

(b) either

(i) more than ten percent (10%) of its shareholders resident in (state);

(ii) more than ten percent (10%) of its shares owned by (state) residents: or

(iii) ten thousand (10,000) shareholders resident in (state).

(2) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

(3) Shares held by banks (except as trustee or guardian), brokers or nominees are disregarded for purposes of calculating the percentages and numbers in this subsection 3(G).

(H) "Person" means any individual, corporation, partnership, unincorporated association or other entity.

SECTION 4. VOTING RIGHTS OF CONTROL SHARES. Unless otherwise provided in the articles of incorporation before either a control share acquisition occurs or a disclosure statement is delivered, control shares that are the subject of a control share acquisition have only such voting rights as are accorded under this Section 4.

(A) Subject to subsections (B)-(D) of this Section 4, the voting power of control shares having voting power of one-fifth (1/5) or more of all voting power is reduced to zero unless the shareholders of the issuing public corporation approve a resolution pursuant to the procedure set forth in Section 5 according the shares the same voting rights as they had before they became control shares.

(B) Except as provided in subsection 5(G), the voting power of control shares representing voting power of less than one-fifth (1/5) of all voting power is not affected by this Act.

(C) If control shares of the acquiring person previously have been accorded the same voting rights they had before they became control shares pursuant to the procedure set forth in Section 5, or if such control shares were acquired in a transaction excluded from the definition of "control share

acquisition", then only the voting power of shares acquired in a subsequent control share acquisition by such acquiring person shall be reduced to zero.

(D) The voting rights of control shares are restored to those accorded such share prior to the control share acquisition in any of the following circumstances: (i) if, by reason of subsequent issuances of shares or other transactions by the issuing public corporation, the voting power of those control shares is reduced to a range of voting power for which approval has been granted or is not required; or (ii) upon transfer to a person other than an acquiring person; or (iii) the expiration of three years after the date of a vote of shareholders pursuant to Section 5 failing to approve the resolution according voting rights to those control shares.

SECTION 5. APPROVAL PROCEDURE. (A) Any acquiring person who proposes to make a control share acquisition may, and any acquiring person who has made a control share acquisition shall, publish and deliver to the issuing public corporation at its principal office a disclosure statement. To be regarded as a disclosure statement, the document must set forth all of following:

- (1) The identity of the acquiring person;
- (2) A statement that the disclosure statement is delivered pursuant to this Act;
- (3) The number of shares of the issuing public corporation owned (directly or indirectly) by the acquiring person, the acquisition dates and the prices at which such shares were acquire;
- (4) The voting power to which the acquiring person, except for Section 4, would be entitled;
- (5) A form of the resolution to be considered by the shareholders hereunder; and
- (6) If the control share acquisition has not yet occurred
 - (a) a description in reasonable detail of the terms of the proposed control share acquisition; and
 - (b) representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.

(B) If the directors of the issuing public corporation so order, or if

the acquiring person so requests at the time of delivery of a disclosure statement and gives an undertaking to pay the issuing public corporation's expenses in connection therewith, a special meeting of shareholders of the issuing public corporation must be called within ten (10) days after delivery of the disclosure statement for the purpose of considering the resolution relating to the voting rights to be accorded the shares acquired or to be acquired in the control share acquisition. Unless both the acquiring person and the issuing public corporation agree in writing to another date, the special meeting of shareholders must be held not sooner than thirty (30) days nor later than fifty (50) days after receipt by the issuing public corporation of the request or order for a special meeting.

(C) If no special meeting of shareholders is called pursuant to subsection 5 (B), the resolution relating to the voting rights to be accorded the shares acquired in the control share acquisition must be presented to the next special or annual meeting of shareholders.

(D) If a special meeting is called, notice of the special meeting of shareholders must be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for the meeting. If the special meeting was requested by the acquiring person, the directors shall set the record date on a date not later than 15 days after the request was received by the issuing public corporation.

(E) Notice of the special meeting, or the annual meeting if no special meeting is called, must include or be accompanied by

- (1) A copy of the disclosure statement;
- (2) A statement by the board of directors of its position or recommendation, or that it is taking no position or making the recommendation, with respect to the resolution contained in the disclosure statement; and
- (3) A description of any dissent and appraisal rights or any redemption procedure that may accompany or result from the vote of shareholders.

(F) Any other provisions of this Act notwithstanding, a proxy relating to a meeting of shareholders to be held pursuant to this Section 5 must be solicited separately from the offer to purchase or solicitation of an offer to sell shares of the issuing public corporation.

(G) All votes cast at the meeting for or against the resolution contained in the disclosure statement must be identified as non-interested shares. To be approved, the resolution must receive the affirmative votes of

a majority of all voting power, excluding all interested shares. Upon request by the acquiring person, a resolution that is not approved may be presented again for a vote of shareholders in accordance with the Section 5 at any subsequent shareholders meeting and must be presented at each subsequent annual meeting of shareholders of the corporation as long as the voting power of the control shares described in the resolution is reduced.

(H) (1) For purposes of this subsection 5 (H), a "competing control share acquisition: means a control share acquisition that is the subject of a disclosure statement delivered to the issuing public corporation under subsection 5 (A) before a shareholder vote has been held under subsection 5 (G) with respect to a pending control share acquisition.

(2) A resolution relating to the voting rights of control shares that are the subject of a pending control share acquisition is not effective unless it receives approval pursuant to subsection 5 (G) and a resolution relating to the voting rights of control shares that are the subject of a competing control share acquisition does not receive such approval. If a resolution applicable to the competing control share acquisition is approved pursuant to subsection 5 (G), only that resolution is effective.

(3) If a resolution relating to a pending control share acquisition has been approved pursuant to subsection 5 (G) before a disclosure statement with respect to a competing control share acquisition is delivered, the resolution is effective in restoring the voting rights of control shares that are the subject of the pending control share acquisition.

(4) If resolutions relating to two or more control share acquisitions are subject to shareholder vote under subsection 5 (G), shares held by an acquiring person are not considered interested shares with respect to a vote on a resolution relating to a competing control share acquisition.

(a) All provisions of the (the State Business Corporations Act) that are not inconsistent with the procedures set forth in this Section 5 shall apply to the meeting of shareholders of the issuing public corporation.

SECTION 6. SPECIAL MINORITY SHAREHOLDER RIGHTS. (A) This section applies to all transactions that, but for subparagraphs (3) (E), (3) (a) (b) would be control share acquisitions in which:

(1) The acquiring person is or includes an affiliate of the issuing public corporation;

(2) The corporation has, by a provision in its articles of incorporation adopted within the prior 12 months, elected not to be subject to this Act; and

(3) The acquiring person has acquired a majority or more of all voting power.

(B) Within 30 days after a control share acquisition subject to subsection 6 (A) occurs, the acquiring person must make a written offer to purchase the shares of each remaining shareholder at a price at least equal to the highest price at which the control shares were acquired by the acquiring person within the 12 months immediately preceding the offer.

SECTION 7. SEVERABILITY. The provisions of this Act are severable. If any provision is invalid, or if its application to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

SECTION 8. REPEALING CLAUSE. Act 730 of 1977, as amended, the same being Ark. Code Ann. §§23-43-101-117 of 1987, and all other laws and parts of laws in conflict herewith are hereby repealed.

SECTION 9. All provisions of this Act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.