

IC 23-2-3.1

Chapter 3.1. Takeover Offers

IC 23-2-3.1-0.5

Legislative finding; purpose

Sec. 0.5. (a) The general assembly finds that it is often difficult for corporate shareholders to obtain sufficient information to make an informed and timely decision when faced with the questions of accepting or rejecting a takeover offer. Moreover, there have emerged a number of practices which have resulted in shareholders of Indiana corporations losing the benefits of takeover offers because they lacked the sophistication and ability to secure those benefits. These practices have included multiple proration pools, two-step transactions and similar practices, and have resulted in relatively small shareholders losing both the advantages of the takeover offer and their equity positions in the corporation.

(b) By enacting this chapter, it is the intent and purpose of the general assembly to provide for full and fair disclosure of all material information concerning takeover offers to shareholders of Indiana corporations, so that the opportunity of each shareholder to make an informed and well-reasoned investment decision may be secured. It is also the purpose of the general assembly to protect shareholders of Indiana corporations from being disadvantaged by those practices described in subsection (a). Finally, it is the purpose of the general assembly to provide for adequate disclosure and that protection in a manner consistent with the Constitutions of the United States and of Indiana.

As added by Acts 1981, P.L.215, SEC.1. Amended by P.L.242-1983, SEC.1.

IC 23-2-3.1-1

Definitions

Sec. 1. As used in this chapter:

"Affiliate" means any person controlling, controlled by, or under the common control of another person.

"Beneficial owner of a security" means any person who, directly or indirectly, has the power to vote or direct the voting of all or part of the voting rights of the security, or has the power to dispose of or direct the disposition of the security.

"Commissioner" means the securities commissioner as defined in IC 23-19-1-2(4).

"Control" means possession, direct or indirect, of the power to direct or to cause the direction of the management and policies of a person, through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless that power is the result of an official position or corporate office. The term includes "controlling", "controlled by", and "under common control with." Control is presumed to exist if any

person is the beneficial owner of ten percent (10%) or more of any class of the voting securities of any other person. This presumption may be rebutted only by a showing that control does not exist in fact, at a hearing pursuant to section 9 of this chapter.

"Equity security" means:

- (1) any share or similar security carrying, at the time of the takeover offer, the right to vote on any matter by virtue of the articles of incorporation, bylaws, or governing instrument of the target company or the right to vote for directors or persons performing substantially similar functions by operation of law;
- (2) any security convertible into a security described in subdivision (1) or any warrant or right to purchase that security;
- or
- (3) any other security which, for the protection of investors, is an equity security pursuant to a regulation of the commissioner.

"Offeror" means a person who makes or in any way participates in making a takeover offer. The term includes all affiliates of that person and all persons who act jointly or in concert with that person for the purpose of acquiring, holding, or disposing of, or exercising any voting rights attached to, the equity securities of a target company. It also includes the target company with respect to acquisitions of its own equity securities and with respect to periods of time when it is controlled by or under common control with the offeror. It does not include a financial institution or broker-dealer loaning funds or extending credit to any offeror in the ordinary course of its business, or any accountant, attorney, financial institution, broker-dealer, newspaper or magazine of general circulation, consultant, or other person furnishing information, services, or advice to or performing ministerial or administrative duties for an offeror and not otherwise participating in the takeover offer.

"Offeree" means a record or beneficial owner of equity securities of the class which an offeror acquires or offers to acquire in connection with a takeover offer.

"Person" means an individual, corporation, limited liability company, association, partnership, trust, or other entity.

"Substantially equivalent terms" means terms under which the fair market value of the consideration offered any offeree of a class of equity securities of the target company (determined on a per share or a per unit basis) are equal to the highest consideration offered in connection with a takeover offer to any other offeree of that class (determined on a per share or per unit basis).

"Takeover offer" means an offer to acquire or an acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if, after the acquisition, the offeror is directly or indirectly a record or beneficial owner of more than ten percent (10%) of any class of the outstanding equity securities of the target company.

"Target company" means an issuer of securities which is

organized under the laws of this state, has its principal place of business in this state, and has substantial assets in this state. Target company does not include:

- (1) a financial institution subject to regulation by the department of financial institutions under IC 28, if the takeover offer is subject to approval by the department of financial institutions;
- (2) a corporation subject to regulation by the utility regulatory commission under IC 8, if the takeover offer is subject to approval of the commission; or
- (3) a public utility, public utility holding company, bank holding company, or savings association subject to regulation by a federal agency, if the takeover offer is subject to the approval by that federal agency.

As added by Acts 1979, P.L.235, SEC.1. Amended by Acts 1981, P.L.215, SEC.2; P.L.242-1983, SEC.2; P.L.23-1988, SEC.111; P.L.8-1993, SEC.311; P.L.79-1998, SEC.21; P.L.27-2007, SEC.13.

IC 23-2-3.1-2

Compliance with designated sections

Sec. 2. A person shall not make a takeover offer unless the offer is in compliance with sections 3, 4, 5.5, 6.5, 7, and 8 of this chapter.
As added by Acts 1979, P.L.235, SEC.1. Amended by Acts 1981, P.L.215, SEC.3; P.L.242-1983, SEC.3; P.L.229-1989, SEC.1.

IC 23-2-3.1-3

Statement; filing with commissioner; copy to target company

Sec. 3. Any offeror, before making a takeover offer, shall:
(1) file any required statements with the commissioner in compliance with sections 5 and 5.5 of this chapter; and
(2) not later than the filing date of the statements, deliver a copy of each statement to the president of the target company at its principal office.

As added by Acts 1979, P.L.235, SEC.1. Amended by P.L.229-1989, SEC.2.

IC 23-2-3.1-4

Statement; consent to service of process; filing fee

Sec. 4. Each statement required under section 5 or 5.5 of this chapter must be accompanied by:

- (1) a consent of the offeror to service of process specified in IC 23-19-6-11; and
- (2) a filing fee of seven hundred fifty dollars (\$750).

As added by Acts 1979, P.L.235, SEC.1. Amended by P.L.229-1989, SEC.3; P.L.27-2007, SEC.14.

IC 23-2-3.1-5

Contents of statement; document prepared under federal law

Sec. 5. (a) If the takeover offer is subject to any federal law, including the Securities Exchange Act of 1934 (15 U.S.C. 78), the

statement must consist of one (1) copy of each document required to be filed with the Securities and Exchange Commission or any other federal agency.

(b) If the takeover offer is not subject to any requirement of federal law, the statement must be filed on forms prescribed by the commissioner and contain the following information:

(1) The identity of and material information concerning the offeror, including:

(A) if the offeror is a corporation:

(i) information concerning its organization, including the year and jurisdiction of its organization;

(ii) a description of each class of its capital stock and long-term debt;

(iii) a description of the business done by the offeror and its affiliates and any material changes of its business during the past three (3) years;

(iv) a description of the location and character of the principal properties of the offeror and its affiliates;

(v) a description of any material pending legal or administrative proceedings in which the offeror or any of its affiliates is a party;

(vi) the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years; and

(vii) audited financial statements of the offeror and its affiliates for its three (3) most recent annual accounting periods and interim financial statements for any current period; and

(B) if the offeror is not a corporation:

(i) information concerning the background of the person, including the person's material business activities and affiliations during the past three (3) years; and

(ii) a description of any material pending legal or administrative proceeding in which the person is a party.

(2) The source and amount of funds or other consideration used or to be used in acquiring any equity security, including:

(A) a statement describing any securities being offered in exchange for the equity securities of the target company; and

(B) if any part of the acquisition price is or will be represented by borrowed funds or other consideration, a description of the transaction and the names of all the parties.

(3) If the purpose of the acquisition is to gain control of the target company, a statement of any plans or proposals or negotiations with respect to the acquisition which the offeror has upon gaining control to:

(A) liquidate the target company;

(B) sell its assets;

(C) effect its merger or consolidation; or

(D) make any other major change in its business, corporate

structure, management or personnel.

(4) The number of shares or units of any equity security of the target company of which each offeror is the record or beneficial owner or which the offeror has a right to acquire, directly or indirectly.

(5) Information as to any contracts, arrangements, understandings, or negotiations with any person concerning any equity security of the target company, including:

(A) transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guarantees of profits, division of losses or profits; or

(B) the giving or withholding of proxies;

naming the persons with whom those contracts, arrangements, or understandings have been entered into.

(6) Information as to any contracts, arrangements, understandings, or negotiations, with any officer, director, administrator, manager, executive employee, or record or beneficial owner of equity securities of the target company with respect to the tender of any equity securities of the target company, the purchase by the offeror of any equity securities owned by that person otherwise than pursuant to the takeover offer, the retention of any person in the person's present position or in any other management position or with respect to that person giving or withholding a favorable recommendation to the takeover offer.

(7) A description of the provisions made or to be made for providing all material information concerning the takeover offer to the offerees, including a description of the proposed takeover offer in the form proposed to be published or sent the offerees initially disclosing the takeover offer.

(8) Any other information which the commissioner prescribes by rule.

(c) In addition to information required under subsection (a) or (b), a statement filed under this section must include the following information:

(1) A description of any contract between the offeror and a government (other than the United States, a state of the United States, a commonwealth or possession of the United States, a government in free association with the United States, or a political subdivision of a state) executed during the three (3) years preceding the date of the filing of the statement.

(2) A description of any subsidy received by the offeror from a government described in subdivision (1) during the three (3) years preceding the date of the filing of the statement.

(3) A list of any offices or appointments held under a government described in subdivision (1) by the offeror if the offeror is an individual, or by a member of the board of directors or principal officer if the offeror is a corporation.

As added by Acts 1979, P.L.235, SEC.1. Amended by P.L.229-1989, SEC.4.

IC 23-2-3.1-5.5

Definitions; application of section

Sec. 5.5. (a) The definitions in IC 23-1-20 apply to this section, except to the extent of any conflict with section 1 of this chapter.

(b) This section applies to:

(1) a foreign corporation incorporated under a law other than the law of the United States or any state of the United States (as defined in IC 1-1-4-1); or

(2) a person who is not a citizen of the United States.

(c) This section does not apply to the initiation of a new business in Indiana by a person subject to this section.

(d) Notwithstanding any other provision of this title, a person subject to this section may not make a takeover offer unless the person files a statement with the commissioner under this subsection.

(e) The statement filed under subsection (d) must state the following:

(1) The financial sources to be used by the person in the takeover offer.

(2) The proposed consummation date of the takeover.

As added by P.L.229-1989, SEC.5.

IC 23-2-3.1-6

Repealed

(Repealed by Acts 1981, P.L.215, SEC.11.)

IC 23-2-3.1-6.5

Terms of offer; requisites; number of offerees

Sec. 6.5. No takeover offer may be made which is not made to all offerees holding the same class of equity securities of the target company on substantially equivalent terms. A takeover offer to purchase less than any or all equity securities of the same class of the outstanding equity securities of the target company is not considered as having been made to all offerees of that class on substantially equivalent terms if the pro rata portion of equity securities of that class tendered by any offeree which will be accepted by the offeror is not equal to the highest pro rata portion of equity securities of that class tendered by any other offeree which will be accepted by the offeror. A takeover offer permitting offerees to elect to receive one (1) or more differing kinds of consideration is not considered as having been made to all offerees holding the same class of equity securities of the target company on substantially equivalent terms if proration occurs and the pro rata share of any one (1) or more differing kinds of consideration which is allocable to any offeree is not equal to the highest pro rata share allocable to any other offeree.

As added by P.L.242-1983, SEC.4.

IC 23-2-3.1-7

Hearing; findings and order; notices; expenses; right to appear; insurance companies

Sec. 7. (a) A hearing shall be held at any time within twenty (20) business days after the required statements under sections 5 and 5.5 of this chapter are filed. If, following the hearing, and within twenty (20) business days after a statement is filed, the commissioner finds by a preponderance of the evidence that:

(1) the takeover statement fails to provide full and fair disclosure to the offerees of all material information concerning the takeover offer; or

(2) the takeover offer is not made to all offerees of the same class of equity securities of the target company on substantially equivalent terms; the commissioner shall by order prohibit the purchase of shares tendered in response to the takeover offer or condition purchase upon changes or modifications.

(b) At least five (5) days notice shall be given to the target company, the offeror, and such other persons as the commissioner may designate that a hearing will be held under this section.

(c) The expenses, including the cost of transcripts, of all hearings held under this section shall be borne by the offeror. As security for the payment of the expenses, the offeror shall file with the commissioner an acceptable bond or other deposit in an amount determined by the commissioner.

(d) The target company, the offeror, any offeree, and any other person whose interests may be affected have the right to appear at any hearing held pursuant to this chapter and to become a party to the proceeding. Each such person has the right to present evidence, examine and cross-examine witnesses, offer oral written arguments and, in connection with the proceeding may conduct discovery proceedings in the manner provided in the Indiana Rules of Trial Procedure. The commissioner may employ any sanction or power granted courts in the Indiana Rules of Trial Procedure, excluding the power of contempt, to enforce the commissioner's discovery rulings or orders.

(e) In the case of a takeover offer subject to the approval of the insurance commissioner, the offeror within five (5) days after the statement is filed shall mail a notice to all offerees of the target company advising the offerees of the general terms and conditions of the takeover offer and the date of the hearing at which they may appear. No shares shall be tendered, or purchased by the offeror, until after approval by both the securities commissioner and the insurance commissioner. All expenses of notifying the offerees shall be borne by the offeror.

As added by Acts 1979, P.L.235, SEC.1. Amended by Acts 1981, P.L.215, SEC.4; P.L.242-1983, SEC.5; P.L.229-1989, SEC.6.

IC 23-2-3.1-8

Purchase of shares; prohibition

Sec. 8. No shares shall be purchased or paid for pursuant to a takeover offer within the first twenty (20) business days after the offer is made. No shares shall be purchased or paid for in violation of any order of the commissioner.

As added by Acts 1979, P.L.235, SEC.1. Amended by Acts 1981, P.L.215, SEC.5.

IC 23-2-3.1-8.4

Subsequent acquisition of equity securities by offeror; equivalent terms; limitation

Sec. 8.4. No offeror may acquire in any manner any equity security of any class of a target company at any time within two (2) years following the conclusion of a takeover 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, and any other recapitalization or reorganization, unless the holder of that equity security is also afforded, at the time of that acquisition, a reasonable opportunity to dispose of that security to the offeror upon substantially equivalent terms.

As added by P.L.242-1983, SEC.6.

IC 23-2-3.1-8.5

Statements of material fact; omissions; false or misleading statements; fraudulent, deceptive, or manipulative acts

Sec. 8.5. In connection with any takeover offer, or any solicitation of offerees in opposition to or in favor of any takeover offer, it is unlawful for any person to make any untrue statement of a material fact or to omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices.

As added by Acts 1981, P.L.215, SEC.6.

IC 23-2-3.1-8.6

Exempt acquisitions; notice and hearing to precede order

Sec. 8.6. (a) The provisions of sections 2 through 7 of this chapter do not apply to the following:

- (1) An acquisition by an offeror, if the instant transaction and all acquisitions of equity securities of the same class during the preceding twelve (12) months by the offeror or any of its affiliates do not exceed two percent (2%) of that class.
- (2) An acquisition of equity securities of a target company having seventy-five (75) or fewer holders of record of equity securities at the time of the takeover offer.
- (3) An acquisition determined by order of the commissioner to be a takeover offer that is not made for the purpose of, and not having the effect of, changing or influencing the control of a target company.

(b) An order may only be adopted under subsection (a)(3) of this section after a hearing. Not less than five (5) business days' notice of a hearing must be given to the target company, the offeror, and such other persons as the commissioner may designate.

(c) The burden of establishing entitlement to any exemption is on the offeror.

As added by Acts 1981, P.L.215, SEC.7. Amended by P.L.242-1983, SEC.7.

IC 23-2-3.1-9

Administration of chapter; regulations; immunity

Sec. 9. (a) This chapter shall be administered by the secretary of state of Indiana by and through the commissioner, who may exercise all powers granted to the commissioner under IC 23-19.

(b) Subject to the approval of the secretary of state, the commissioner may promulgate regulations necessary to carry out the purposes of this chapter under IC 4-22-2.

(c) Neither the secretary of state, nor the securities commissioner, nor any employee of the securities division, shall be liable in their individual capacity, except to the state of Indiana, for any act done or omitted in connection with the performance of their respective duties under the provisions of this chapter.

As added by Acts 1979, P.L.235, SEC.1. Amended by Acts 1981, P.L.215, SEC.8; P.L.27-2007, SEC.15.

IC 23-2-3.1-10

Cease and desist orders; injunctions; subpoenas; production of books and papers

Sec. 10. (a) Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter or any regulation or order adopted under this chapter, the commissioner may investigate and issue orders and notices, including ex parte cease and desist orders without notice. In addition to all other remedies, he may bring an action in any circuit or superior court in the name and on behalf of the state of Indiana against any person or persons participating in or about to participate in a violation of this chapter to enjoin those persons from continuing or doing any act in violation of this chapter or to enforce compliance with this chapter. In any court proceedings, the commissioner may apply for and on due showing be entitled to have issued the court's subpoena requiring:

(1) the appearance of any defendant or his employees or agents to testify and give evidence concerning the acts or conduct or things complained of; or

(2) the production of documents, books and records;

as may appear necessary for the hearing of the petition.

(b) Whenever any person has engaged or is about to engage in any act or practice constituting a violation of this chapter or any regulation or order adopted under this chapter, the offeror, target

company or any record or beneficial owner of an equity security of the target company may bring an action in the circuit or superior court of the county where the target company has its principal office or Marion County to enjoin that person from continuing or doing any act in violation of this chapter or to enforce compliance with this chapter.

(c) Upon a proper showing, the court may grant a permanent or preliminary injunction or temporary restraining order or may order rescission of any sales, tenders for sale, purchases or tenders for purchase of equity securities determined to be unlawful under this chapter or any regulation or order of the commissioner. The court may not require the commissioner to post a bond.

As added by Acts 1979, P.L.235, SEC.1. Amended by Acts 1981, P.L.215, SEC.9.

IC 23-2-3.1-11

Appeal; notice; transcript; disposition on appeal

Sec. 11. An appeal may be taken by any offeror, target company, or other party to any proceeding before the commissioner from any final order of the commissioner to the court of appeals for errors of law under the same terms and conditions as govern appeals in ordinary civil actions, except as otherwise provided in this section. An assignment of errors that the decision, ruling, or order of the commissioner is contrary to law is sufficient to present both the sufficiency of the facts found to sustain the decision, ruling, or order, and the sufficiency of the evidence to sustain the findings of facts upon which it was rendered. Within twenty (20) days from the entry of an order, the commissioner shall be served with a written notice of the appeal which states the grounds upon which a reversal of the final order is sought and with a demand in writing for a certified transcript of the record and of all papers on file in the commissioner's office affecting or relating to that order. The commissioner shall within twenty (20) days after service of the notice of appeal make, certify, and deliver to the appellant the transcript. The appellant shall, within five (5) days after the receipt of the transcript, file the transcript and a copy of the notice of appeal with the clerk of the court. The notice of appeal shall stand as the appellant's assignment of errors. If the order of the commissioner is reversed, the court shall direct the commissioner's further action in the matter, including the making and entering of any order and the conditions, limitations, or restrictions to be contained in the order. However, the commissioner is not barred from later revoking or altering the order for any proper cause which may later accrue or be discovered. If the order is affirmed, the appellant may file a new disclosure statement after thirty (30) days from the ruling of the court of appeals if the disclosure statement is not otherwise barred or limited. The appeal does not suspend the operation of the order appealed from during the pendency of the appeal unless upon proper order of the court.

As added by Acts 1979, P.L.235, SEC.1. Amended by Acts 1981,

P.L.215, SEC.10; P.L.3-1989, SEC.138.