

HOUSE BILL No. 4548

April 10, 1989, Introduced by Reps. Bennett, Stacey, Alley, Bankes, Randall, Niederstadt, Middaugh, Profit, Wartner, Griffin and Clack and referred to the Committee on Corporations and Finance.

A bill to amend sections 776, 778, 780, 781, and 784 of Act No. 284 of the Public Acts of 1972, entitled "Business corporation act," as added by Act No. 115 of the Public Acts of 1984, being sections 450.1776, 450.1778, 450.1780, 450.1781, and 450.1784 of the Michigan Compiled Laws.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Section 1. Sections 776, 778, 780, 781, and 784 of Act
2 No. 284 of the Public Acts of 1972, as added by Act No. 115 of
3 the Public Acts of 1984, being sections 450.1776, 450.1778,
4 450.1780, 450.1781, and 450.1784 of the Michigan Compiled Laws,
5 are amended to read as follows:

6 Sec. 776. (1) "Affiliate" or "affiliated person" means a
7 person who directly, or indirectly through 1 or more

1 intermediaries, controls, is controlled by, or is under common
2 control with a specified person.

3 (2) "Announcement date" means the first general public
4 announcement or the first communication generally to shareholders
5 of the corporation, whichever is earlier, of the proposal or
6 intention to make a proposal concerning a business combination.

7 (3) "Associate", when used to indicate a relationship with
8 any person, means any 1 of the following:

9 (a) Any corporation or organization, other than the corpora-
10 tion or a subsidiary of the corporation, in which the person is
11 an officer, director, or partner, or is, directly or indirectly,
12 the beneficial owner of 10% or more of any class of equity
13 securities.

14 (b) Any trust or other estate in which the person has a ben-
15 eficial interest of 10% or more or as to which the person serves
16 as trustee or in a similar fiduciary capacity in connection with
17 the trust or estate.

18 (c) Any relative or spouse of the person, or any relative of
19 the spouse, who has the same home as the person or who is a
20 director or officer of the corporation or any of its affiliates.

21 (4) "Beneficial owner", when used with respect to any voting
22 stock, means a person who:

23 (a) Individually or with any of its affiliates or associ-
24 ates, beneficially owns voting stock, directly or indirectly.

25 (b) Individually or with any of its affiliates or associ-
26 ates, has ALL OF THE FOLLOWING:

1 (i) The right to acquire voting shares, whether the right is
2 exercisable immediately or only after the passage of time,
3 pursuant to any agreement, arrangement, or understanding or upon
4 the exercise of conversion rights, exchange rights, warrants or
5 options, or otherwise. A PERSON SHALL NOT BE CONSIDERED THE
6 OWNER OF VOTING SHARES WHICH ARE TENDERED PURSUANT TO A TENDER OR
7 EXCHANGE OFFER MADE BY THE PERSON, OR AN AFFILIATE OR ASSOCIATE
8 OF THE PERSON, UNTIL THE TENDERED VOTING SHARES ARE ACCEPTED FOR
9 PURCHASE OR EXCHANGE.

10 (ii) The right to vote voting shares pursuant to any agree-
11 ment, arrangement, or understanding. A PERSON SHALL NOT BE CON-
12 sidered the BENEFICIAL OWNER OF VOTING SHARES IF THE PERSON'S
13 RIGHT TO VOTE THE SHARES PURSUANT TO THIS SUBPARAGRAPH ARISES
14 SOLELY FROM A REVOCABLE PROXY OR CONSENT GIVEN IN RESPONSE TO A
15 PROXY OR CONSENT SOLICITATION TO 10 OR MORE PERSONS.

16 (iii) ~~Any~~ EXCEPT AS PROVIDED IN SUBPARAGRAPH (ii), ANY
17 agreement, arrangement, or understanding for the purpose of
18 acquiring, holding, voting, or disposing of voting shares with
19 any other person who beneficially owns, or whose affiliates or
20 associates beneficially own, directly or indirectly, the voting
21 shares.

22 (5) "Business combination" means any 1 or more of the
23 following:

24 (a) Any merger, consolidation, or share exchange of the cor-
25 poration or any ~~domestic~~ subsidiary which alters the contract
26 rights of the shares as expressly set forth in the articles of

1 incorporation or which changes or converts, in whole or in part,
2 the outstanding shares of the corporation with either:

3 (i) Any interested shareholder.

4 (ii) Any other corporation, whether or not itself an inter-
5 ested shareholder, which is, or after the merger, consolidation,
6 or share exchange would be, an affiliate of an interested share-
7 holder that was an interested shareholder prior to the
8 transaction.

9 (b) Any sale, lease, transfer, or other disposition, except
10 in the usual and regular course of business, in 1 transaction or
11 a series of transactions in any 12-month period, to any inter-
12 ested shareholder or any affiliate of any interested shareholder,
13 other than the corporation or any of its subsidiaries, of any
14 assets of the corporation or any ~~domestic~~ subsidiary having,
15 measured at the time the transaction or transactions are approved
16 by the board of directors of the corporation, an aggregate book
17 value as of the end of the corporation's most recently ended
18 fiscal quarter of 10% or more of its net worth.

19 (c) The issuance or transfer by the corporation, or any
20 ~~domestic~~ subsidiary, in 1 transaction or a series of transac-
21 tions, of any equity securities of the corporation or any
22 ~~domestic~~ subsidiary which have an aggregate market value of 5%
23 or more of the total market value of the outstanding shares of
24 the corporation to any interested shareholder or any affiliate of
25 any interested shareholder, other than the corporation or any of
26 its subsidiaries, except pursuant to the exercise of warrants or
27 rights to purchase securities offered pro rata to all holders of

1 the corporation's voting shares or any other method affording
2 substantially proportionate treatment to the holders of voting
3 shares.

4 (d) The adoption of any plan or proposal for the liquidation
5 or dissolution of the corporation in which anything other than
6 cash will be received by an interested shareholder or any affili-
7 ate of any interested shareholder.

8 (e) Any reclassification of securities, including any
9 reverse stock split, or recapitalization of the corporation, or
10 any merger, consolidation, or share exchange of the corporation
11 with any of its subsidiaries which has the effect, directly or
12 indirectly, in 1 transaction or a series of transactions, of
13 increasing by 5% or more of the total number of outstanding
14 shares, the proportionate amount of the outstanding shares of any
15 class of equity securities of the corporation or any ~~domestic~~
16 subsidiary which is directly or indirectly owned by any inter-
17 ested shareholder or any affiliate of any interested
18 shareholder.

19 Sec. 778. (1) "Equity security" means any 1 of the
20 following:

21 (a) Any stock or similar security, certificate of interest,
22 or participation in any profit sharing agreement, voting trust
23 certificate, or voting share.

24 (b) Any security convertible, with or without consideration,
25 into an equity security, or any warrant or other security carry-
26 ing any right to subscribe to or purchase an equity security.

1 (c) Any put, call, straddle, or other option or privilege of
2 buying an equity security from or selling an equity security to
3 another without being bound to do so.

4 (2) "Interested shareholder" means any person, other than
5 the corporation or any subsidiary, who is either:

6 (a) The beneficial owner, directly or indirectly, of 10% or
7 more of the voting power of the outstanding voting share of the
8 corporation.

9 (b) An affiliate of the corporation and at any time within
10 the 2-year period immediately prior to the date in question was
11 the beneficial owner, directly or indirectly, of 10% or more of
12 the voting power of the then outstanding voting share of the
13 corporation.

14 (c) For the purpose of determining whether a person is an
15 interested shareholder pursuant to subdivision (a) or (b), the
16 number of shares of voting shares considered to be outstanding
17 shall include all voting shares owned by the person except for
18 those shares which may be issuable pursuant to any agreement,
19 arrangement, or understanding, or upon exercise of conversion
20 rights, warrants or options, or otherwise.

21 (3) "Market value" means either of the following:

22 (a) With respect to shares, the highest closing sale price
23 during the 30-day period immediately preceding the date in ques-
24 tion of a share as listed on:

25 (i) The composite tape for New York stock exchange--listed
26 securities.

1 (ii) If not listed pursuant to subparagraph (i), the New
2 York stock exchange.

3 (iii) If not listed pursuant to subparagraph (i) or (ii),
4 the principal United States security exchange registered under
5 the securities exchange act of 1934, 48 Stat. 881.

6 (iv) If not listed pursuant to subparagraph (i), (ii), or
7 (iii), the highest closing bid quotation during the 30-day period
8 preceding the date in question as listed on the national associa-
9 tion of securities dealers, inc. automated quotations system or
10 any other system then in use.

11 (v) If a listing is not available pursuant to subparagraphs
12 (i) to (iv), then, the fair market value of the shares, on the
13 date in question, as determined in good faith by the
14 corporation's board of directors.

15 (b) With respect to property other than cash or shares, the
16 fair market value of the property on the date in question, as
17 determined in good faith by the corporation's board of
18 directors.

19 (4) "SUBSIDIARY" MEANS A CORPORATION OF WHICH A MAJORITY OF
20 THE VOTING SHARES IS OWNED, DIRECTLY OR INDIRECTLY, BY ANOTHER
21 CORPORATION.

22 Sec. 780. In addition to any vote otherwise required by law
23 or the articles of the corporation, a business combination shall
24 require an advisory statement from the board of directors and
25 approval by an affirmative vote of both of the following:

1 (a) Not less than ~~80%~~ 90% of the votes of each class of
2 stock entitled to be cast by the shareholders of the
3 corporation.

4 (b) Not less than 2/3 of the votes of each class of stock
5 entitled to be cast by the shareholders of the corporation other
6 than voting shares ~~held~~ BENEFICIALLY OWNED by the interested
7 shareholder who is, or whose affiliate is, a party to the busi-
8 ness combination or an affiliate or associate of the interested
9 shareholder.

10 Sec. 781. (1) The vote required by section 780 shall not
11 apply to a business combination if each of the following condi-
12 tions are met:

13 (a) The aggregate amount of the cash and the market value as
14 of the valuation date of consideration other than cash to be
15 received per share by holders of common stock in the business
16 combination is at least equal to the highest of the following:

17 (i) The highest per share price, including any brokerage
18 commissions, transfer taxes, and soliciting dealers' fees, paid
19 by the interested shareholder for any shares of common stock of
20 the same class or series acquired by the interested shareholder
21 within the 2-year period immediately prior to the announcement
22 date of the proposal of the business combination, or in the
23 transaction in which the shareholder became an interested share-
24 holder, whichever is higher.

25 (ii) The market value per share of common stock of the same
26 class or series on the announcement date or on the determination
27 date, whichever is higher.

1 (b) The aggregate amount of the cash and the market value as
2 of the valuation date for consideration other than cash to be
3 received per share by holders of shares of any class or series of
4 outstanding stock other than common stock shall be at least equal
5 to the highest of the following, whether or not the interested
6 shareholder has previously acquired any shares of a particular
7 class or series of stock:

8 (i) The highest per share price, including any brokerage
9 commissions, transfer taxes, and soliciting dealers' fees, paid
10 by the interested shareholder for any shares of the class of
11 stock acquired by it within the 2-year period immediately prior
12 to the announcement date of the proposal of the business combina-
13 tion, or in the transaction in which it became an interested
14 shareholder, whichever is higher.

15 (ii) The highest preferential amount per share to which the
16 holders of shares of the class of stock are entitled in the event
17 of any voluntary or involuntary liquidation, dissolution, or
18 winding up of the corporation.

19 (iii) The market value per share of the class of stock on
20 the announcement date or on the determination date, whichever is
21 higher.

22 (c) The consideration to be received by holders of any class
23 or series of outstanding stock shall be in cash or in the same
24 form as the interested shareholder has previously paid for shares
25 of the same class or series of stock. If the interested share-
26 holder has paid for shares of any class of stock with varying
27 forms of consideration, the form of consideration for the class

1 of stock shall be either cash or the form used to acquire the
2 largest number of shares of the class or series of stock previ-
3 ously acquired by the interested shareholder.

4 (d) After the interested shareholder has become an inter-
5 ested shareholder and prior to the consummation of a business
6 combination, all of the following conditions have been met:

7 (i) Any full periodic dividends, whether or not cumulative,
8 on any outstanding preferred stock of the corporation shall have
9 been declared and paid at the regular date therefor.

10 (ii) The annual rate of dividends paid on any class or
11 series of stock of the corporation that is not preferred stock,
12 except as necessary to reflect any subdivision of the stock,
13 shall not have been reduced, and the annual rate of dividends
14 shall have increased as necessary to reflect any reclassifica-
15 tion, including any reverse stock split, recapitalization, reor-
16 ganization, or any similar transaction which has the effect of
17 reducing the number of outstanding shares of the stock.

18 (iii) After the interested shareholder has become an inter-
19 ested shareholder, the interested shareholder may not have
20 received the benefit, directly or indirectly, except proportion-
21 ately as a shareholder, of any loans, advances, guarantees,
22 pledges, or other financial assistance or any tax credits or
23 other tax advantages provided by the corporation or any of its
24 subsidiaries, whether in anticipation of or in connection with
25 the business combination or otherwise.

26 (iv) The interested shareholder did not become the
27 beneficial owner of any additional shares of the corporation

1 except as part of the transaction which resulted in the
2 interested shareholder becoming an interested shareholder or by
3 virtue of proportionate stock splits or stock dividends.

4 (v) THERE HAS BEEN 5 YEARS BETWEEN THE DATE OF BECOMING AN
5 INTERESTED SHAREHOLDER AND THE DATE THE BUSINESS COMBINATION IS
6 CONSUMMATED.

7 (2) The provisions of subsection (1)(d)(i) and (ii) shall
8 not apply if an interested shareholder or an affiliate or associ-
9 ate of the interested shareholder did not vote as a director of
10 the corporation in a manner inconsistent with subparagraphs (i)
11 and (ii) and the interested shareholder, within 10 days after any
12 act or failure to act inconsistent with subparagraphs (i) and
13 (ii), notifies the board of directors of the corporation in writ-
14 ing that the interested shareholder disapproves thereof and
15 requests in good faith that the board of directors rectify the
16 act or failure to act.

17 Sec. 784. (1) Unless a corporation's articles of incorpora-
18 tion provide otherwise, the requirements of section 780 shall not
19 apply to any business combination of any of the following:

20 (a) A corporation having fewer than 100 beneficial owners of
21 its stock.

22 (b) A corporation whose original articles of incorporation
23 contain a provision or whose shareholders adopt an amendment to
24 the articles of the corporation after the effective date of this
25 chapter by a vote of not less than ~~80%~~ 90% of the votes of each
26 class of stock entitled to be cast by the shareholders of the
27 corporation and not less than 2/3 of the votes of each class of

1 stock entitled to be cast by the shareholders of the corporation
2 other than voting shares ~~held~~ BENEFICIALLY OWNED by interested
3 shareholders of the corporation, expressly electing not to be
4 governed by this chapter.

5 (c) An investment company registered under the investment
6 company act of 1940, 15 U.S.C. 80a-1 to 80a-64.

7 (2) For purposes of subsection (1)(a), all shareholders of a
8 corporation who have executed an agreement to which the corpora-
9 tion is an executing party governing the purchase and sale of
10 shares of the corporation or a voting trust agreement governing
11 shares of the corporation shall be considered a single beneficial
12 owner of the stock covered by the agreement.