

M E M O R A N D U M

TO: MEMBERS OF THE CORPORATION LAW SECTION
OF THE DELAWARE BAR ASSOCIATION

FROM: DAVID B. BROWN

DATE: MAY 28, 1987

RE: SECTION MEETING - JUNE 9, 1987

A meeting of the Corporation Law Section will be held at 10:00 a.m. on Tuesday, June 9, 1987, at the offices of The Corporation Trust Company for the purpose of receiving the comments of Section members upon the enclosed draft of a control share acquisition statute. We particularly solicit the comments of Section members on the bracketed material at pages 5 and 12-13 of the draft legislation.

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Enclosure

Proposed 8 Del. C. §203

CONTROL SHARE ACQUISITIONS

(a) Control shares of a corporation that are acquired in a control share acquisition shall have only such voting rights as shall be conferred pursuant to subsection (e) of this Section.

(b) Any person who announces an intention to make or has made a control share acquisition may deliver to the corporation, personally or by registered mail at its principal place of business and at its registered office in this State, a control share acquisition statement which shall contain the following:

- (1) The identity of the acquiring person and any associate of the acquiring person;
- (2) A statement that it is being made and delivered pursuant to this Section;
- (3) If the acquiring person is not a resident of this State, an agreement that the acquiring person may be served with process in this State in any proceeding arising out of or relating to the control share acquisition and irrevocably appointing the Secretary of State as its agent to accept service of process in any such proceeding,

specifying the address to which a copy of such process shall be mailed by the Secretary of State;

(4) The number and class or series of shares of the corporation owned directly or indirectly by the acquiring person and each associate of the acquiring person prior to the control share acquisition;

(5) The number and class or series of shares acquired or proposed to be acquired pursuant to the control share acquisition and the range of voting power to which the control share acquisition is or, if consummated, would be subject pursuant to subsection (h)(5) of this Section;

(6) A description of the terms and conditions of the proposed or completed control share acquisition including but not limited to the prices paid by the acquiring person in a control share acquisition, the dates upon which the shares were acquired, and, if the control share acquisition has not taken place, a statement by the acquiring person with respect to the acquiring person's financial capacity to consummate the proposed control share acquisition, together with a concise description of the material facts upon which the statement is based.

(c)(1) If the acquiring person so demands contemporaneously with the delivery of a control share acquisition state-

ment, the board of directors of the corporation, within 10 days of the receipt of the demand, shall call a special meeting of stockholders for the purpose of considering the voting rights to be accorded the control shares acquired or to be acquired in the control share acquisition. The demand will not be effective unless accompanied by an undertaking to pay the corporation's reasonable expenses in connection with noticing and holding the special meeting, which expenses shall not include any expenses of the corporation in opposing a resolution to accord voting rights to the acquiring person. Promptly after the board has called the special meeting, the corporation shall give written notice of the special meeting to stockholders. Such notice shall be given not less than 20 days before the date of the special meeting. Unless the acquiring person and the corporation shall agree in writing to a later date, the special meeting shall be held not more than 50 days after the receipt by the corporation of the demand. If the acquiring person so requests in the demand, the special meeting will be held no sooner than 30 days after receipt by the corporation of the demand.

(2) If no demand respecting a special meeting of the corporation's stockholders is made in accordance with subsection (c)(1) of this Section, consideration of the voting rights to be accorded the shares acquired or to be acquired in the control share acquisition shall be presented at the next annual or special meeting of the corporation's stockholders

notice of which has not been given prior to the receipt by the corporation of the control share acquisition statement.

(d) The notice to the corporation's stockholders of any annual or special meeting at which the voting rights to be accorded shares acquired or to be acquired in a control share acquisition shall be directed to all stockholders of record of the corporation as of the record date set for such meeting, whether or not such stockholders shall be entitled to vote at such meeting and shall include or be accompanied by a copy of the acquiring person's control share acquisition statement received by the corporation pursuant to this Section; and

(e) Control shares acquired in a control share acquisition shall have the same voting rights as all other shares of the same class or series only if approved by resolution of the stockholders of the corporation at an annual or special meeting convened pursuant to subsection (c) of this Section. Such resolution must be approved at such meeting by the holders of a majority of all of the shares entitled to vote generally with respect to the election of directors except interested shares, which shall not be entitled to vote with respect to such resolution. If no such resolution is approved, such shares shall regain their voting rights upon transfer to another person unless such transfer constitutes a control share acquisition by the acquiror, in which case the voting rights of such shares shall be subject to the provisions hereof. Sections 102(b)(4) and 228 of this Chapter shall not apply to the stockholder approval contemplated by this Section.

(f) Notwithstanding the provisions of Section 151 of this Chapter but subject to the provisions of Section 160 of this Chapter, a certificate of incorporation [or by-law] provision effective prior to the occurrence of a control share acquisition, may authorize the redemption, at the option of the corporation, of all but not less than all control shares acquired in a control share acquisition at any time during the period ending sixty (60) days after the last acquisition of control shares by an acquiring person, from the acquiring person for the fair value of such shares if:

(i) no control acquisition statement has been filed; or

(ii) a control acquisition statement has been filed and the shares are not accorded voting rights by the stockholders pursuant to subsection (e) of this Section.

For purposes of this subsection, fair value shall be determined as of the effective date of the vote of the stockholders denying voting rights to the acquiring person if a control acquisition statement is filed or, if no control acquisition statement is filed, as of the date of the last acquisition of control shares by the acquiring person in a control share acquisition. Such value shall be determined without regard to the effect of the denial of voting rights hereunder.

(g) A certificate of incorporation [or by-law] provision effective prior to the occurrence of a control share

acquisition may provide that in the event control shares acquired in a control share acquisition are accorded voting rights and the acquiring person has acquired control shares that confer upon such person a majority or more of all voting power entitled to vote generally with respect to the election of directors all stockholders of record of the corporation, other than the acquiring person, who have not voted in favor of granting such voting rights to the acquiring person shall be entitled to an appraisal of the fair value of their shares by the Court of Chancery. For purposes of this subsection, fair value shall be determined as of the date of the approval of voting rights by the shareholders and in accordance with the provisions of Section 262(e) through (k) of this Chapter which shall apply as nearly as practicable. As used in this subsection, "fair value" means a value determined in accordance with Section 262, provided that the date of shareholder approval of voting rights shall apply for purposes of this subsection in lieu of "the effective date of the merger" referred to in Section 262(e). The corporation, not less than 20 days prior to the meeting convened pursuant to subsection (c), shall notify each of its stockholders that appraisal rights may be available for any or all shares of the corporation, and shall include in such notice a copy of this subsection and Section 262 (e) through (k) of this Chapter. Each stockholder electing to demand the appraisal of his shares shall deliver to the corporation, before the taking of the vote described in

subsection (e), a written demand for appraisal of his shares. A proxy or vote against the voting rights of an acquiring person shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after any vote in favor of a resolution granting voting rights to an acquiring person, the corporation shall notify each stockholder who has complied with the provisions of this subsection that the resolution has been adopted. The corporation shall deliver to the acquiring person within 5 days of the taking of the vote under subsection (e) of this Section a statement setting forth the aggregate number of shares not voted in favor of the resolution and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares.

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

(1) "Corporation" means a corporation organized under this chapter which has become subject to this Section pursuant to subsection (i).

(2) "Person" means any individual, corporation, partnership, unincorporated association or other entity, and any Associate (as such term is hereinafter defined) of such individual or entity.

(3) "Associate" when used to indicate a relationship with any person means:

(i) A person that directly or indirectly controls, or is controlled by, or is under

common control with, the person specified or who is or intends to act jointly or in concert with such specified person;

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

(iii) Any trust or other estate in which such person has a beneficial interest or as to which such person serves as trustee in a similar fiduciary capacity.

(4) "Control" means the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of a person, whether through the ownership of voting securities, by contract or otherwise.

(5) "Control shares" means shares which, but for the provisions of this Section, would have voting power with respect to shares of a corporation that, when added to all other shares of the corporation owned by a person or with respect to which that person may exercise or direct the exercise of voting power, except by virtue of a revocable proxy or written consent, would entitle that person, immediately upon acquisition of the

shares, to exercise or direct the exercise of voting power of the corporation in the election of directors within any of the following ranges of voting power:

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

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

(iii) A majority or more of all voting power;

provided, however, that this term shall include such shares only to the extent to which their acquisition causes the acquiring person to exceed any threshold of voting power set forth above for which approval has not been obtained previously pursuant to subsection (e).

(6) (A) "Control share acquisition" means the acquisition directly or indirectly by any person of ownership of, or the power to direct the exercise of voting power with respect to, issued and outstanding control shares. All shares acquired within ninety (90) days, and all shares acquired pursuant to a plan to make a control share acquisition, shall be deemed to have been acquired in the same acquisition for purposes of this provision.

(B) The term "control share acquisition" does not include:

(i) shares acquired for the benefit of others by a person acting in the ordinary course of business, in good faith and not for the purpose of circumventing this Section, to the extent that such person may not exercise or direct the exercise of the voting power of such shares except upon the instruction of others;

(ii) shares, or shares issuable upon conversion, exchange or exercise of securities convertible into or exchangeable or exercisable for shares, acquired:

(a.) before the date on which the issuing corporation becomes subject to this Section;

(b.) pursuant to a contract existing before the date on which the issuing corporation becomes subject to this Section;

(c.) acquired pursuant to the laws of descent and distribution;

(d.) pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this Section;

(e.) pursuant to a merger or consolidation effected in compliance with this Chapter if the issuing public corporation is a party to the agreement of merger or consolidation;

(iii) shares with respect to which voting rights are held pursuant to a revocable proxy conferring the right to vote on any matter, including a vote of stockholders under subsection (e) of this Section, or pursuant to written consent;

(iv) any acquisition described in subsection (h)(6)(C) of this Section.

(C) Unless the acquisition, when added to the shares previously held by the acquiring person, would entitle the acquiring person to exercise or direct the exercise of voting power in a range in excess of a range of voting power previously authorized pursuant to subsections (e) or (h)(6)(B)(ii) of this Section, the acquisition of shares, or of securities convertible into shares, does not constitute a control share acquisition if the acquisition is made:

(i) by or from a person whose voting rights previously were authorized by the

shareholders of the corporation in compliance with this Section;

(ii) by or from a person whose acquisition of shares of the corporation would have constituted a control share acquisition but for the application of any of the exceptions set forth in subsection (h)(6)(B)(ii) of this Section; or

(iii) by a person who acquires any of the shares that were previously transferred pursuant to the provisions of subsection (h)(6)(C)(ii) of this Section;

(7) "Interested shares" means the shares of a corporation which are owned, or with respect to which an irrevocable proxy, is held by:

(i) An acquiring person;

(ii) Any officer of the corporation;

(iii) Any employee of the corporation who is also a director of the corporation.

(i) This Section shall be applicable to any corporation organized under this Chapter the certificate of incorporation [or by-laws] of which contains an express declaration that control share acquisitions respecting the stock of the corporation are governed by and subject to the provisions of this Section. Subsections (f) and (g) of this Section, or either of them, shall apply to such corporation only if such

declaration explicitly so provides. [In the event that the by-laws of the corporation are amended to include or eliminate such a declaration, a certificate setting forth the relevant by law provision as amended and certifying that it was duly adopted in accordance with the provisions of this subsection shall be executed, acknowledged, filed and recorded and shall become effective in accordance with Section 103 of this Chapter.]

(j) The Court of Chancery may hear and determine summarily any matter arising under the provisions of this Section. In the event of service upon the Secretary of State in accordance with subsection (b)(3), the Secretary of State shall forthwith notify the acquiring person thereof by letter, certified mail, return receipt requested, directed to such acquiring person at his address specified in the control share acquisition statement, unless such acquiring person shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of \$25.00 for the use of the State, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State

shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served upon him, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than five years from his receipt of the service of process.

[Effective date to provide that statute does not apply with respect to any control share acquisition publicly announced prior to July 1, 1987.]

