

ACT 47

H.B. NO. 2681-74

A Bill for an Act Relating to Take-over Bid Disclosures.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Hawaii Revised Statutes is amended by adding thereto a new chapter to read as follows:

“Sec. -1 Definitions. As used in this chapter, unless otherwise indicated by the context:

- (1) ‘Person’ means an individual, a partnership, a corporation, a joint-stock company, an unincorporated organization or a trust.
- (2) ‘Offeror’ means each person who makes or in any way participates in making a take-over bid and includes two or more persons (i) whose take-over bids are made jointly or in concert or (ii) who intend to exercise jointly or in concert any voting rights attaching to the shares for which a take-over bid is made. An ‘offeror’ does not include any bank or broker-dealer loaning funds to an offeror in the ordinary course of its business or any broker-dealer, attorney, accountant consultant, employee or other persons furnishing information or advice to or performing administrative or ministerial duties for an offeror and not otherwise participating in the take-over bid.
- (3) ‘Associate of an offeror’ means: (i) any corporation or other organization of which the offeror is an officer or partner, or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, (ii) any person who is, directly or indirectly, the beneficial owner of 10 percent 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 a trustee or in a similar fiduciary capacity, and (iv) any relative or spouse of the offeror or any relative of such spouse, who has the same home as the offeror.
- (4) ‘Offeree’ means a person to whom a take-over bid is made.
- (5) ‘Offeree company’ means a corporation incorporated under the laws of the Kingdom, Republic or Territory of Hawaii or under the laws

of this State and doing business in this State whose shares are the subject of a take-over bid.

- (6) 'Equity security' means any shares of stock or similar securities or any securities convertible into such securities or carrying any warrant or right to subscribe to or purchase such securities or any such warrant or right.
- (7) 'Take-over bid' means the offer, other than an exempt offer, to acquire any equity security of an offeree company pursuant to a tender offer or a request or invitation for tenders if after the acquisition thereof the offeror would be directly or indirectly the beneficial owner of more than 10% of any class of the outstanding equity securities of the offeree company.
- (8) 'Exempt offer' means with respect to any class of equity securities of the offeree company (a) an isolated offer to purchase shares from individual stockholders and not made to stockholders generally, (b) an offer made by a corporation to purchase (i) its own shares or (ii) shares of a subsidiary at least 51% of the voting stock of which is owned beneficially by the parent corporation, (c) an offer to acquire shares of a corporation with less than 100 shareholders and one million dollars in assets.
- (9) 'Commissioner' means the Commissioner of Securities as provided for in Chapter 485."

"Sec. -2 Mandatory provisions of take-over bids. The following provisions shall apply to every take-over bid:

- (1) The period of time within which shares may be deposited pursuant to a take-over bid shall be not less than 21 days nor more than 35 days from the date the take-over bid commences.
- (2) Shares deposited pursuant to a take-over bid may be withdrawn by an offeree or his agent by demand in writing on the offeror or the depository at any time up to 5 days prior to the date the take-over bid terminates.
- (3) A take-over bid may not be made for less than all the shares of a class.
- (4) Where an offeror varies the terms of a take-over bid before the expiration thereof by increasing the consideration offered, the offeror shall pay the increased consideration to each offeree whose securities are taken up even if they have been taken up and paid for before such variation of the take-over bid.
- (5) No offeror may make a take-over bid which is not made to offerees in this State or which is not made to offerees in this State on the same terms as the take-over bid is made to offerees outside this State."

"Sec. -3 Registration of take-over bids; disclosure. (a) It shall be unlawful for any person to make a take-over bid unless the take-over bid has been registered in accordance with the provisions of this chapter.

(b) The Commissioner shall receive and act upon applications for registration of take-over bids and may prescribe the forms upon which he may

require the applications to be duly signed by the applicant and sworn to by any person having knowledge of the facts and shall be filed in the office of the Commissioner.

(c) An application for registration of a take-over bid shall contain the following information and such other information as the Commissioner prescribes:

- (1) The name, nationality, address and business experience of the offeror and each associate of the offeror;
- (2) The terms and conditions of the take-over bid, which shall include the applicable provisions of Section -2;
- (3) The source and amount of the funds or other consideration used or to be used in making the take-over bid, and if any part of such funds or consideration is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of making such bid, a description of the transaction and the names of the parties thereto;
- (4) Any plans to sell or mortgage any assets of the offeree company to finance the take-over bid.
- (5) Any plans or proposals that the offeror may have to liquidate the offeree company, to sell its assets to or merge it with any other person, or to make any other material change in its business or corporate structure;
- (6) The number of shares for which the take-over bid is made which are owned directly or indirectly by the offeror and each associate of the offeror;
- (7) Any information as to any contracts, arrangements, or understandings with any person with respect to any securities of the offeree company, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof;
- (8) Complete information on the organization of the offeror, including without limitation the year of organization, form of organization, jurisdiction in which it is organized, a description of each class of the offeror's capital stock and of its long term debt, financial statements for the current period and for the three most recent annual accounting periods, a brief description of the location and general character of the principal physical properties of the offeror and its subsidiaries, a description of pending legal proceedings other than routine litigation to which the offeror or any of its subsidiaries is a party or of which any of their property is subject, a brief description of the business done and projected by the offeror and its subsidiaries and the general development of such business over the past five years, the names of all directors and executive officers together with biographical summaries of each for the preceding five years to date,

and the approximate amount of any material interest, direct or indirect, of any of the directors or officers in any material transaction during the past three years, or in any proposed material transactions to which the offeror or any of its subsidiaries was or is to be a party;

- (9) Material information concerning the identity and background of any offeror who is not a corporation, including his material business activities and affiliations during the past three years and a description of any pending legal or administrative proceedings in which the offeror is a party.

(d) A record of the registration of take-over bids shall be kept in a register to be kept in the office of the Commissioner in which register shall also be recorded any orders entered by the Commissioner with respect thereto. The register and all information with respect to the take-over bid registered therein shall be open to public inspection.

(e) At the time of filing the application for registration as prescribed in this section, the applicant shall pay to the Commissioner, a fee of one-tenth of one percent of the aggregate consideration which the offeree is bound to pay for the equity securities for which a take-over bid is proposed to be made or \$200, whichever is greater.

(f) Registration of a take-over bid shall become effective 60 days after the date of filing the application for registration with the Commissioner unless delayed by order of the Commissioner, or unless prior thereto the Commissioner calls a hearing with respect to the take-over bid. The Commissioner may call a hearing if he deems it necessary or appropriate for the protection of offerees in this State, and shall call a hearing if so requested by the offeree company, acting by resolution of its board of directors. If a hearing is called, the registration of the take-over bid shall not become effective until so ordered by the Commissioner.

(g) If, following the hearing, the Commissioner finds that the take-over bid fails to provide for full and fair disclosure to offerees of all material information concerning the take-over bid or that the take-over bid is unfair or inequitable to offerees or will not be made to all stockholders on substantially equal terms or is in violation of this chapter, he shall by order deny registration of the take-over bid. If he finds that the take-over bid provides for full and fair disclosure to offerees of all material information concerning the take-over bid and that the take-over bid is fair and equitable to offerees and is made on substantially equal terms to all stockholders and complies with this chapter, he shall by order register the take-over bid. Registration of the take-over bid shall not be deemed an approval or recommendation of the take-over bid by the Commissioner."

"Sec. -4 Revocation of registration of take-over bid; suspension during investigation; hearing. (a) The Commissioner may issue a stop order denying effectiveness to, or suspending, or revoking the effectiveness of, any registration of a take-over bid if he finds that:

- (1) The application for registration fails to provide full and fair disclosure to offerees of all material information concerning the take-over bid or that the take-over bid is not fair and equitable to offerees;

- (2) This chapter or any rule, order, or condition imposed under this chapter has been wilfully violated, in connection with the take-over bid by the offeror, any associate of the offeror, any partner, officer, or director of the offeror, any person occupying a similar status or performing similar functions, or any person, directly or indirectly, controlling or controlled by the offeror;
- (3) The take-over bid registered or sought to be registered is the subject of an administrative stop order or similar order or a permanent or temporary injunction of any court of competent jurisdiction.”

“Sec. -5 Commissioner as agent to accept service; consent to; actions in what circuit; notice to issuer. Upon any application for registration of a take-over bid where the offeror is not domiciled in this State, there shall be filed with the application the irrevocable written consent of the offeror that in suits, proceedings, and actions growing out of the violation of this chapter, the service on the Commissioner of any notice, process, or pleading therein, authorized by laws of the State, shall be as valid and binding as if due service had been made on the offeror. Any such action shall be brought either in the circuit of the plaintiff’s residence or in the circuit in which the Commissioner has his office. The written consent shall be authenticated by the seal of the offeror if it has a seal and by the acknowledged signature of a member of the copartnership or company, or by the acknowledged signature of any officer of the incorporated or unincorporated association, if it is an incorporated or unincorporated association, duly authorized by resolution of the board of directors, trustees, or managers of the corporation or association, and shall in such case be accompanied by a duly certified copy of the resolution of the board of directors, trustees, or managers of the corporation or association, authorizing the officers to execute the same. In case any process or pleadings mentioned in this chapter are served upon the Commissioner it shall be by duplicate copies, one of which shall be filed in the office of the Commissioner and another immediately forwarded by the Commissioner by registered mail to the principal office of the offeror against which the process or pleadings are directed.”

“Sec. -6 Delivery of application for registration to offeree company. Each application for registration of a take-over bid shall be delivered to the offeree company prior to the date it is filed with the Commissioner and a certificate certifying as to such delivery shall accompany the application.”

“Sec. -7 Terms and conditions of take-over bid; recommendations to accept or reject. A take-over bid shall be made only upon the terms and conditions set forth in the application for registration of the take-over bid. Any written solicitation or recommendation to offerees made by the offeree company to accept or reject a take-over bid shall be filed with the Commissioner not later than the time any such solicitations or recommendations are first published or sent or given to offerees.”

“Sec. -8 Injunctions. Whenever it shall appear to the Commissioner, either upon complaint or otherwise, that any person is making a take-over bid in violation of this chapter, the Commissioner may, in addition to any other

remedies, bring suit in the name and on behalf of the State against such person and any other person or persons concerned in or in any way participating in or about to participate in such take-over bid or acting in violation of this chapter, to enjoin such person and such other person or persons from continuing such take-over bid or engaging therein or doing any act or acts in furtherance thereof or in violation of this chapter.

In any such court proceedings, the Commissioner may apply for and on due showing be entitled to have issued the court's subpoena requiring forthwith the appearance of any defendant and his employees, salesmen, or agents and the production of documents, books, and records as may appear necessary for the hearing of such petition to testify and give evidence concerning the acts or conduct or things complained of in the application for injunction. In the suit the equity courts have jurisdiction of the subject matter and a judgment may be entered awarding such injunction as may be proper."

"Sec. -9 Remedies. (a) Any offeror who:

- (1) Makes a take-over bid which does not comply with the provisions of this chapter, or
- (2) Makes a take-over bid by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to any offeree whose shares are taken up pursuant to the take-over bid who may sue (i) to recover such shares, together with all dividends received thereon, costs and reasonable attorneys' fees, upon the tender of the consideration received from the offeror, or (ii) for the equivalent in damages, together with costs and attorneys' fees, if the offeror no longer owns such shares.

(b) Every person who materially participates or aids in a take-over bid made by an offeror liable under subsection (a), or who directly or indirectly controls any offeror so liable, shall also be liable jointly and severally with and to the same extent as the offeror so liable, unless the person who so participates, aids or controls, sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(c) No suit shall be maintained to enforce any liability created under this section unless brought within two years after the transaction upon which it is based; provided, that if any person liable by reason of subsection (a) or (b) makes a written offer, before suit is brought, to return the shares taken up pursuant to the take-over bid, together with all dividends received thereon, upon the tender of the consideration received from the offeror, or to pay damages if the offeror no longer owns such shares, no offeree shall maintain a suit under this section who shall have refused or failed to accept such offer within ninety days of its receipt.

(d) Any condition, stipulation or provision binding any offeree to waive

compliance with any provision of this chapter or of any rule or order hereunder shall be void.”

“**Sec. -10 Penalty.** Whoever violates this chapter shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both.”

“**Sec. -11 Statutory or common-law remedies.** Nothing in this chapter shall limit any statutory or common-law right of any person to bring any action in any court for any act involved in a take-over bid or the right of the State to punish any person for any violation of any law.”

“**Sec. -12 Appeals to circuit court, first circuit; time; bonds; costs; trial de novo; decree; further appeal.** An appeal may be taken by any aggrieved person from any final order of the Commissioner to the circuit court of the first circuit in the manner provided in chapter 91. The appellant shall execute a bond in the penal sum of \$1,000 to the State, with sufficient surety, to be approved by the Commissioner or the court, conditioned upon the faithful prosecution of the appeal to final judgment, and the payment of all such costs as shall be adjudged against the appellant. The appeal shall be heard de novo, and it may be given precedence by the court over other matters pending in the court. The court shall receive and consider evidence, whether oral or documentary, concerning the order of the Commissioner. If the order of the Commissioner is reversed the court shall by its mandate specifically direct the Commissioner as to his further action in the matter, including the making and entering of any order or orders in connection therewith, and the conditions, limitations, or restrictions to be therein contained; provided that the Commissioner shall not thereby be barred from thereafter revoking or altering the order for any proper cause which may thereafter accrue or be discovered. If the order is affirmed, the appellant shall not be barred after thirty days from filing a new application provided the application is not otherwise barred or limited. The appeal shall not in anywise suspend the operation of the order appealed from during the pendency of the appeal unless upon proper order of the Commissioner or the court. An appeal may be taken from the decree of the circuit court to the supreme court.”

“**Sec. -13 Transfer prohibited.** The offeree company shall not transfer of record to an offeror any shares for which a take-over bid is made in violation of any provision of this chapter.”

“**Sec. -14 Applicability of Chapter 485.** All of the provisions of Chapter 485 which are not in conflict with this chapter shall apply to each take-over bid.”

“**Sec. -15 Severability.** If any provision or clause of this chapter or application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application.”

SECTION 2. This Act shall take effect upon its approval.

(Approved May 24, 1974.)