

## LEGISLATIVE BILL 1110

Approved by the Governor April 8, 1988

Introduced by Hartnett, 45; Landis, 46; Wesely, 26;  
Lynch, 13; Goodrich, 20; Abboud, 12;  
Johanns, 27; Conway, 17

AN ACT relating to corporations; to amend section 21-2035, Revised Statutes Supplement, 1987; to adopt the Shareholders' Protection Act; to repeal the Corporate Takeover Act; to change provisions relating to duties and liability of directors as prescribed; to provide severability; to repeal the original section, and also sections 21-2418 to 21-2430, Reissue Revised Statutes of Nebraska, 1943; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. It is declared that:

(1) This state has traditionally regulated the affairs of corporations, including the regulation of mergers and other business combinations. The United States Supreme Court has recently reaffirmed the power of states to regulate these affairs;

(2) Issuing public corporations encompass, represent, and affect, through their ongoing business operations, a variety of constituencies including shareholders, employees, customers, suppliers, and local communities and their economies whose welfare is vital to this state's interests;

(3) In order to promote the welfare of these constituencies, the regulation of the internal affairs of issuing public corporations by the laws of this state governing business corporations should allow for the stable, long-term growth of issuing public corporations;

(4) Business combinations involving public corporations frequently occur through acquisition techniques which in effect coerce shareholders to participate in the transaction;

(5) Business combinations involving public corporations are also frequently financed largely through debt to be repaid in the short term through changes in operations of the public corporation, the sale of assets of the public corporation, and other means. These measures involve a substantial risk of unfair business dealing, may prevent shareholders from

realizing the full value of their holdings through forced mergers and other coercive devices, and may undermine the state's interest in promoting stable relationships involving the corporations that it charters; and

(6) The Shareholders' Protection Act is not intended to alter the case law development on directors' fiduciary duties of care and loyalty in responding to challenges to control or the burden of proof with regard to compliance with those duties, nor is the act intended to prevent the use of any other lawful defensive measure.

Sec. 2. Sections 1 to 23 of this act shall be known and may be cited as the Shareholders' Protection Act.

Sec. 3. For purposes of the Shareholders' Protection Act, unless the context otherwise requires, the definitions found in sections 4 to 17 of this act shall be used.

Sec. 4. Acquiring person shall mean a person who makes or proposes to make a control-share acquisition. If two or more persons act as a partnership, limited partnership, syndicate, or other group pursuant to any agreement, arrangement, relationship, or understanding, whether or not in writing, for the purpose of acquiring, owning, or voting shares of an issuing public corporation, all members of the partnership, limited partnership, syndicate, or other group shall constitute a person for purposes of this section.

Sec. 5. Affiliate shall mean a person who directly or indirectly controls, is controlled by, or is under common control with another person.

Sec. 6. Associate, when used to indicate a relationship with any person, shall mean any of the following: (1) Any corporation or organization of which the person is an officer, director, or partner or is, directly or indirectly, the owner of ten percent or more of any class of voting stock; (2) any trust or estate in which the person has at least a ten percent beneficial interest or as to which the person serves as trustee or personal representative or in a similar fiduciary capacity; and (3) any relative or spouse of the person, or any relative of the spouse, who has the same residence as such person.

Sec. 7. Business combination, when used in reference to any issuing public corporation and any interested shareholder of the issuing public corporation, shall mean:

(1) Any merger or consolidation of the issuing public corporation or any subsidiary of the issuing public corporation with:

(a) The interested shareholder; or

(b) Any other corporation, whether or not such other corporation is an interested shareholder of the issuing public corporation, that is or after the merger or consolidation would be an affiliate or associate of the interested shareholder;

(2) Any sale, lease, exchange, mortgage, pledge, transfer, or other disposition in a single transaction or a series of transactions to or with the interested shareholder or any affiliate or associate of the interested shareholder of assets of the issuing public corporation or any subsidiary of the issuing public corporation;

(a) Having an aggregate market value equal to ten percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of the issuing public corporation; or

(b) Having an aggregate market value equal to ten percent or more of the aggregate market value of all the outstanding shares of the issuing public corporation;

(3) Any transaction or series of transactions which results in the issuance or transfer by the corporation or by any subsidiary of the corporation of any stock of the corporation or of such subsidiary to the interested shareholder if such stock has an aggregate market value equal to at least five percent of the aggregate market value of all the outstanding shares of the corporation except pursuant to the exercise of warrants or rights to purchase stock offered or distributed, or a dividend or distribution paid or made, pro rata to all shareholders of the issuing public corporation and except pursuant to the exercise or conversion of securities exercisable for or convertible into stock of such corporation or any such subsidiary, which securities were outstanding prior to the time that the interested shareholder became an interested shareholder;

(4) Any transaction involving the corporation or any subsidiary of the corporation which has the effect, directly or indirectly, of increasing the proportionate share of the stock of any class or series, or securities convertible into the stock of any class or series, of the corporation or of any such subsidiary which is owned directly or indirectly by the interested shareholder except as a result of immaterial changes due

to fractional share adjustments; or

(5) Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the issuing public corporation, of any loans, advances, guarantees, pledges, or other financial assistance or any tax credits or other tax advantages provided by or through the issuing public corporation or any subsidiary of the issuing public corporation.

Sec. 8. Control, controlling, controlled by, or under common control with shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person who is the owner of ten percent or more of a corporation's outstanding voting stock shall be presumed to have control of the corporation in the absence of proof by a preponderance of the evidence to the contrary. A person shall not be considered to have control of a corporation if the person holds voting power, in good faith and not for the purpose of avoiding the Shareholders' Protection Act, as an agent, bank, broker, nominee, custodian, or trustee for one or more owners who do not individually or as a group have control of the corporation.

Sec. 9. Control-share acquisition shall mean an acquisition, directly or indirectly, by an acquiring person of ownership of voting stock of an issuing public corporation that, except for the Shareholders' Protection Act, would, when added to all other shares of the issuing public corporation owned by the acquiring person, entitle the acquiring person, immediately after the acquisition, to exercise or direct the exercise of a new range of voting power within any of the following ranges of voting power: (1) At least twenty percent but less than thirty-three and one-third percent; (2) at least thirty-three and one-third percent but less than or equal to fifty percent; or (3) over fifty percent.

The acquisition of any shares of an issuing public corporation shall not constitute a control-share acquisition if the acquisition is consummated in any of the following circumstances: (a) Before the effective date of this act; (b) pursuant to a contract existing before the effective date of this act; (c) 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 the Shareholders' Protection Act; (e)

pursuant to a merger or plan of share exchange effected in compliance with section 21-2070 if the issuing public corporation is a party to the agreement of merger or plan of share exchange; or (f) from a person who owns over fifty percent of the shares of an issuing public corporation and who acquired the shares prior to the effective date of this act.

All shares, the ownership of which is acquired within a one-hundred-twenty-day period, and all shares, the ownership of which is acquired pursuant to a plan to make a control-share acquisition, shall be deemed to have been acquired in the same acquisition.

Sec. 10. Interested shareholder shall mean any person, other than the issuing public corporation or any subsidiary of the issuing public corporation, who is (1) the owner, directly or indirectly, of ten percent or more of the outstanding voting stock of such corporation or (2) an affiliate or associate of such corporation and at any time within the five-year period immediately prior to the date in question was the owner, directly or indirectly, of ten percent or more of the then outstanding voting stock of such corporation. For the purpose of determining whether a person is an interested shareholder, the number of shares of voting stock of such corporation deemed to be outstanding shall include shares deemed to be owned by such person but shall not include any other unissued shares of voting stock of such corporation which may be issuable pursuant to any agreement, arrangement, or understanding or upon exercise of conversion rights, warrants, or options or otherwise.

Sec. 11. Interested shares shall mean the voting stock of an issuing public corporation owned by an acquiring person.

Sec. 12. Issuing public corporation shall mean:

(1) A domestic corporation (a) which has one hundred or more shareholders and (b) which has (i) its principal executive offices within Nebraska, (ii) assets in Nebraska with a market value of at least ten million dollars, or (iii) ten percent or more of its shareholders resident in Nebraska or ten percent or more of its shares owned by Nebraska residents. For purposes of section 23 of this act only, the determination described in this subdivision shall be made as of the share acquisition date in question. The residence of a shareholder shall be presumed to be the address appearing on the records of the corporation; or

(2) A foreign corporation which has (a) one

hundred or more shareholders, (b) its principal executive offices within Nebraska, (c) assets in Nebraska with a market value of at least ten million dollars, (d) ten percent or more of its shareholders resident in Nebraska or ten percent or more of its shares owned by Nebraska residents, and (e) at least five hundred employees in Nebraska. For purposes of section 23 of this act only, the determination described in this subdivision shall be made as of the share acquisition date in question. The residence of a shareholder shall be presumed to be the address appearing on the records of the corporation.

Sec. 13. Owner, when used with respect to any stock of any class or series, shall mean a person who individually or with or through any affiliates or associates (1) beneficially owns such stock, directly or indirectly, (2) has (a) the right to acquire such stock, whether such right is exercisable immediately or only after the passage of time, pursuant to any agreement, arrangement, or understanding or upon the exercise of conversion rights, exchange rights, warrants, or options or otherwise, except that a person shall not be deemed the owner of stock tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates until such tendered stock is accepted for purchase or exchange or (b) the right to vote such stock pursuant to any agreement, arrangement, or understanding, except that a person shall not be deemed the owner of any stock if the agreement, arrangement, or understanding to vote such stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made to ten or more persons, or (3) has any agreement, arrangement, or understanding for the purpose of acquiring, holding, voting, except voting pursuant to a revocable proxy or consent as described in subdivision (2)(b) of this section, or disposing of such stock with any other person who beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

Sec. 14. Person shall mean any individual, corporation, partnership, unincorporated association, or other entity.

Sec. 15. Share acquisition date, with respect to any person and any issuing public corporation, shall mean the date that the person first becomes an interested shareholder of the issuing public corporation.

Sec. 16. Subsidiary of an issuing public

corporation shall mean any other corporation of which voting stock having a majority of the votes entitled to be cast is owned, directly or indirectly, by such issuing public corporation.

Sec. 17. Voting stock shall mean stock of any class or series entitled to vote generally in the election of directors.

Sec. 18. The market value of stock or property other than cash or stock shall be determined as follows:

(1) In the case of stock, by:

(a) The highest closing sale price during the thirty days immediately before the date in question of a share of the same class or series of stock on the composite tape for stocks listed on the New York Stock Exchange or, if the same class or series of stock is not quoted on the composite tape or if the same class or series of stock is not listed on the New York Stock Exchange, on the principal United States securities exchange registered under the federal Securities Exchange Act of 1934 on which the same class or series of stock is listed;

(b) If the same class or series of stock is not listed on an exchange described in subdivision (1)(a) of this section, the highest closing bid quotation for a share of the same class or series of stock during the thirty days immediately before the date in question on the National Association of Securities Dealers Automated Quotation System or any similar system then in use; or

(c) If no quotations described in subdivision (1)(b) of this section are available, the fair market value on the date in question of a share of the same class or series of stock as determined in good faith by the board of directors of the issuing public corporation; and

(2) In the case of property other than cash or stock, the fair market value of the property on the date in question as determined in good faith by the board of directors of the issuing public corporation.

Sec. 19. (1) An acquiring person may deliver to the issuing public corporation at its principal executive office an information statement which shall contain all of the following:

(a) The identity of the acquiring person and the identity of each affiliate and associate of the acquiring person;

(b) A reference that the information statement is made under the Shareholders' Protection Act;

(c) The number and class or series of shares of the issuing public corporation owned, directly or indirectly, prior to the control-share acquisition by each such person;

(d) The number and class or series of shares of the issuing public corporation acquired or proposed to be acquired pursuant to the control-share acquisition by each such person and specification of the following ranges of voting power that the acquiring person in good faith believes would result from consummation of the control-share acquisition;

(i) At least twenty percent but less than thirty-three and one-third percent;

(ii) At least thirty-three and one-third percent but less than or equal to fifty percent; or

(iii) Over fifty percent; and

(e) The terms of the control-share acquisition or proposed control-share acquisition, including such objective facts as would be substantially likely to affect the decision of a shareholder with respect to voting on the control-share acquisition.

(2) If any material change occurs in the facts set forth in the information statement including any material increase or decrease in the number of shares of the issuing public corporation acquired or proposed to be acquired by such person, the acquiring person shall promptly deliver to the issuing public corporation at its principal executive office an amendment to the information statement containing information relating to such material change.

Sec. 20. (1) If the acquiring person (a) makes a request in writing for a special meeting of the shareholders at the time of delivery of the information statement, (b) has made a control-share acquisition or has made a bona fide written offer to make a control-share acquisition, and (c) gives a written undertaking, within ten days after receipt by the issuing public corporation of the information statement, to pay or reimburse the issuing public corporation's expenses of a special meeting of the shareholders, a special meeting of the shareholders of the issuing public corporation shall be called for the purpose of considering the voting rights to be accorded to shares acquired or to be acquired pursuant to the control-share acquisition. The special meeting shall be held no later than fifty days after receipt of the information statement unless the acquiring person agrees to a later date. If the acquiring person so requests in writing at the time of delivery of the information statement, the



special meeting shall not be held sooner than thirty days after receipt by the issuing corporation of the information statement.

(2) If no request for a special meeting is made, consideration of the voting rights to be accorded to shares acquired or to be acquired pursuant to the control-share acquisition shall be presented at the next special or annual meeting of the shareholders, notice of which has not been given prior to the receipt of the information statement, unless the matter of the voting rights becomes moot.

(3) The notice of the meeting shall be accompanied at a minimum by a copy of the information statement, a copy of any amendment to the information statement previously delivered to the issuing public corporation, and a statement disclosing that the board of the issuing public corporation recommends approval of, expresses no opinion and is remaining neutral toward, recommends rejection of, or is unable to take a position with respect to according voting rights to shares acquired or to be acquired in the control-share acquisition. The notice of meeting shall be given at least thirty days before the meeting.

Sec. 21. Shares acquired in a control-share acquisition shall have the same voting rights as other shares of the same class or series in all elections of directors but shall have voting rights on all other matters only if approved by a vote of shareholders of the issuing public corporation at a special or annual meeting of shareholders pursuant to the Shareholders' Protection Act and, to the extent so approved, shall have the same voting rights as other shares of the same class or series. Any such control-share acquisition shall be approved by (1) the affirmative vote of the holders of a majority of the shares entitled to vote which are not interested shares and (2) in the case of any shares entitled to vote as a class, the affirmative vote of the holders of a majority of the shares of such class which are not interested shares.

Any shares acquired in a control-share acquisition which do not have voting rights accorded to them by approval of a resolution of shareholders shall regain such voting rights on transfer to a person other than the acquiring person or any affiliate or associate of the acquiring person, unless the acquisition of the shares by the other person constitutes a control-share acquisition, in which case the voting rights of the shares shall be subject to the Shareholders' Protection Act.

Sec. 22. Except as provided in section 23 of this act, no issuing public corporation shall engage in any business combination with any interested shareholder of the issuing public corporation for a period of five years after the interested shareholder's share acquisition date unless the business combination or the acquisition of shares made by the interested shareholder on the interested shareholder's share acquisition date is approved by the board of directors of the issuing public corporation prior to the interested shareholder's share acquisition date.

Sec. 23. The Shareholders' Protection Act shall not apply to any of the following:

(1) Unless the articles of incorporation provide otherwise, a business combination with an interested shareholder who was an interested shareholder immediately before the effective date of this act, unless the interested shareholder subsequently increased its ownership of the voting power of the outstanding voting stock of the issuing public corporation to a proportion in excess of the proportion of voting power that the interested shareholder owned immediately before the effective date of this act, excluding an increase approved by the board of directors of the issuing public corporation before the increase occurred;

(2) An issuing public corporation if the corporation's original articles of incorporation contain a provision expressly electing not to be governed by the act;

(3) An issuing public corporation if the corporation, by action of its board of directors, adopts an amendment to its bylaws within forty-five days of the effective date of this act expressly electing not to be governed by the act, which amendment shall not be further amended by the board of directors;

(4) An issuing public corporation if the corporation does not have a class of voting stock that is listed on a national securities exchange or is authorized for quotation on an interdealer quotation system of a registered national securities association unless such circumstances result from action taken by an interested shareholder or a transaction in which a person becomes an interested shareholder;

(5) A business combination of an issuing public corporation with an interested shareholder which became an interested shareholder inadvertently and as soon as practicable divested sufficient shares so that the shareholder ceased to be an interested shareholder;  
or

(6) A business combination of an issuing public corporation with an interested shareholder which was an interested shareholder immediately before the effective date of this act and inadvertently increased its ownership of the voting power of the outstanding voting stock of the issuing public corporation to a proportion in excess of the proportion of voting power that the interested shareholder owned immediately before the effective date of this act if the interested shareholder divests itself of a sufficient amount of voting stock so that the interested shareholder is no longer the owner of a proportion of the voting power in excess of the proportion of voting power that the interested shareholder held immediately before the effective date of this act.

Sec. 24. That section 21-2035, Revised Statutes Supplement, 1987, be amended to read as follows:

21-2035. (1) All corporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors, except as may be otherwise provided in the Nebraska Business Corporation Act or in the articles of incorporation. If any provision is made in the articles of incorporation, the powers and duties conferred or imposed upon the board of directors by such act shall be exercised or performed to such extent and by such person or persons as shall be provided in the articles of incorporation. Directors need not be residents of this state or shareholders of the corporation unless the articles of incorporation or bylaws so require. The articles of incorporation or bylaws may prescribe other qualifications for directors, but any change in qualifications that the articles of incorporation or bylaws may make shall not affect the incumbent directors during the term for which they were elected. The board of directors shall have authority to fix the compensation of directors unless otherwise provided in the articles of incorporation.

A director shall, based on facts then known to the director, perform his or her duties as a director, including his or her duties as a member of any committee of the board upon which he or she may serve, in good faith, in a manner he or she reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. For purposes of this section, facts then known to the director shall mean information or knowledge actually possessed by the

director and information and facts contained in material given or presented, either orally or in writing, to the director by other directors or by officers, employees, agents, or consultants engaged by or representing the corporation.

In performing his or her duties, a director shall be entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by:

{1} (a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

{2} (b) Counsel, public accountants, or other persons as to matters which the director reasonably believes to be within such person's professional or expert competence; or

{3} (c) A committee of the board upon which he or she does not serve, duly designated in accordance with a provision of the articles of incorporation or the bylaws, as to matters within its designated authority, which committee the director reasonably believes to merit confidence, but the director shall not be considered to be acting in good faith if he or she has knowledge concerning the matter in question that would cause such reliance to be unwarranted. A person who so performs his or her duties shall have no liability by reason of being or having been a director of the corporation.

A director may, but need not, in considering the best interests of the corporation, consider, among other things, the effects of any action on employees, suppliers, creditors, and customers of the corporation and communities in which offices or other facilities of the corporation are located.

A director of a corporation who is present at a meeting of its board of directors at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent is entered in the minutes of the meeting or unless he or she files his or her written dissent to such action with the secretary of the meeting before the adjournment thereof or forwards such dissent by certified or registered mail to the secretary of the corporation immediately after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

(2) In addition to the matters required to be set forth in the articles of incorporation by section

21-2052, the articles of incorporation may also contain a provision eliminating or limiting the personal liability of an outside director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. Such a provision shall not eliminate or limit the liability of an outside director for:

(a) Any act or omission not in good faith which involves intentional misconduct or a knowing violation of the law;

(b) Any transaction from which the outside director derived an improper direct or indirect financial benefit;

(c) Paying a dividend or approving a stock repurchase which was in violation of the Nebraska Business Corporation Act;

(d) Any act or omission which violates a declaratory or injunctive order obtained by the corporation or its shareholders; and

(e) Any act or omission occurring prior to the date such provision becomes effective.

For purposes of this section, outside director shall mean a member of the board of directors of a corporation incorporated or domesticated under the laws of the State of Nebraska who is not an officer or a person who may control the conduct of the corporation through management agreements, voting trusts, directorships in related corporations, or any other device or relationship.

Sec. 25. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 26. That original section 21-2035, Revised Statutes Supplement, 1987, and also sections 21-2418 to 21-2430, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Sec. 27. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.