1977 WL 37165 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
February 10, 1977

***1 In re: Proposed Takeover Statute**

Mr. Carl W. Littlejohn Jr.
Secretary
Graniteville Company
Graniteville, South Carolina 29829

Dear Carl:
I have received memorandum from Joe Allen, who is the Assistant assigned to the Tax Commission, in which he states that he finds no tax questions involved in the proposed statute. He adds that '[a] tax may result from the purchase and sale, however, that would be independent of this proposal.'

I understand that Stan Lewis is meeting with you in the near future.

With best wishes,
Cordially,

Daniel R. McLeod
Attorney General

ATTACHMENT

CHAPTER SIX

TITLE 62

Proposed State Takeover Statute

§ 1. DEFINITIONS.—As used in this chapter, the following terms shall have the following meanings:

(1) 'Takeover bid' means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after acquisition the offeror would be directly or indirectly a record or beneficial owner of more than ten per cent (10%) of any class of the outstanding equity securities of the target company. [1] The term does not include an offer to acquire or acquisition of any security in connection with:

(a) An offer to purchase equity securities to be effected by a broker, registered under the laws of this state, on a stock exchange or in the over-the-counter market if the broker performs only the customary broker's function, and receives no more than the customary broker's commissions, and neither the principal nor the broker solicits or arranges for the solicitation of orders to sell such equity securities; [2]

(b) An offer made by a corporation to purchase its own equity securities, or equity securities of another corporation if more than 50% of the shares entitled to vote in the election of directors of such other corporation are held directly or indirectly by the offering corporation; [3]

(c) An offer the acceptance of which will require a vote by stockholders of the target company, under the certificate of incorporation or the applicable corporation statute, on a merger, consolidation, share exchange, reclassification of securities or sale of corporate assets in consideration, in whole or in part, of the issuance of securities of another corporation; [4]

(d) An offer in which the acquisition by the offeror, in the instant transaction and in all acquisitions of equity securities of the same class during the preceding twelve (12) months, does not exceed two per cent (2%) of that class of equity securities of the target company; [5]

(e) An offer for the sole account of the offeror to not more than twenty (20) beneficial owners of the equity securities in question within any consecutive twelve (12) month period, in good faith and not for the purpose of avoiding this section; [6]

(f) An offer solely in exchange for other securities (except to the extent of cash for fractions of a unit of securities), for the sole account of the offeror, in good faith and not for the purpose of avoiding this section, where the offeror has registered such offer pursuant to the terms of the Securities Act of 1933, as amended, and where such offer has also been registered under the provisions of the law of this state or is exempted from such registration by the terms of such law; [7]

***2** (g) An offer in which the target company is: (i) a domestic insurance company, as defined in § 37-2(5) of the general statutes; (ii) a bank, as defined in § 8-599.102(a) of the general statutes, or a bank holding company, as defined in § 8-599.102(b) of the general statutes; (iii) a public utility company or a holding company, as defined in section 2 of the Federal Public Utility Holding Company Act of 1935, presently constituted as section 79 of title 15 of the United States Code, an acquisition of or by, or merger with which, is subject to approval by the appropriate federal agency as provided in such act; (iv) a bank or bank holding company subject to the Federal Bank Holding Company Act of 1956, presently constituted as section 1841, et seq. of title 12 of the United States Code, an acquisition of or by, or merger with which, is subject to approval by the appropriate federal agency as provided in such act; or (v) a savings and loan holding company, as defined in section 2 of the Federal Savings and Loan Holding Company Amendments of 1967, presently constituted as section 1730a of title 12 of the United States Code, an acquisition of or by, or merger with which, is subject to approval by the appropriate federal agency as provided in such act. [8]

(2) 'Target company' means a corporation organized under the laws of this state and having, either directly or through majority-owned subsidiaries, either a substantial portion of its assets or a substantial number of its employees within this state. [9]

(3) 'Equity security' means 1) any stock, bond or other obligation of a corporation, the holder of which has the right to vote for the election of members of the board of directors of such corporation; 2) any security convertible into a security carrying such rights; or 3) any right, option or warrant to purchase any of the foregoing. [10]

(4) 'Offeror' means a person who makes a takeover bid, and includes persons acting jointly or in concert, or who intend to exercise jointly or in concert any voting rights attached to the securities for which such takeover bid is made. An 'offeror' does not include any bank, broker-dealer, attorney, accountant or consultant furnishing information or advice to an offeror and not otherwise participating in the takeover bid. [11]

(5) 'Offeree' means the beneficial or record owner of securities which an offeror acquires or offers to acquire in connection with a takeover bid. [12]

§ 2. DISCLOSURE STATEMENT.—(1) Not less than twenty (20) nor more than forty (40) days before making an offer which will constitute a takeover bid within the meaning of this chapter, the offeror shall file with the Securities Commissioner and with the target company, at its registered office in this state a written disclosure statement of the offeror's intention to make the takeover bid. [13]

(2) Such disclosure statement shall include: [14]
(a) The name and address of the offeror(s);

(b) The number of shares to be purchased;

***3** (c) The consideration to be offered;

(d) The time at which the offer is intended to be made and at which it is intended to expire;

(e) Whether the offeror will unconditionally accept all or any part of the shares tendered;

(f) The conditions, if any, upon which acceptance will be made;

(g) The other contractual terms of the offer;

(h) Copies of all prospectuses, brochures, advertisements, circulars, letters, or other matter by means of which the offeror proposes to disclose to offerees all information material to a decision to accept or reject the offer or, if the same are not then in a final form, drafts thereof.

(3) If any material change occurs in the facts set forth in the disclosure statement required by this section, and, in the event any of the material described in subsection (2)(h) of this section 2 shall have been filed in draft form, then when the definitive form thereof has been prepared, the offeror who filed such statement shall promptly notify the Securities Commissioner and the target company of such change or of the existence of such definitive form, as the case may be, and shall amend the disclosure statement to reflect such change or furnish such definitive form, as the case may be, within two (2) days. If such amendment or furnishing of such definitive form occurs fewer than twenty (20) days before the date set for the commencement of the offer constituting the takeover bid, the Securities Commissioner may in his discretion delay such offer until a date twenty (20) days subsequent to the filing of such amendment or definitive form, if he finds that the changes inherent in such amendment or definitive form are of such materiality as to warrant such delay. [15]

§ 3. EFFECTIVE DATE OF TAKEOVER BID; HEARING.—(1) If the offeror has filed a disclosure statement pursuant to § 2 above, the tender offer described therein may be made on the date specified therein, unless accelerated or delayed by order of the Securities Commissioner. [16]

(2) The Securities Commissioner may in his discretion accelerate the time at which such offer may be made if, after consideration, it appears to the Securities Commissioner that requirements of this chapter have been met and neither the price nor any other substantial term of such offer is unfair to the offerees. [17]

(3) The Securities Commissioner may in his discretion order a hearing to determine whether the requirements of this chapter have been met and/or whether the price or any other substantial term of such offer is unfair to the offerees. If such a hearing is ordered, the offer shall not be made unless and until declared effective by order of the Securities Commissioner. [18]

(4) Any hearing called by the Securities Commissioner under this section shall be called within fifteen (15) days after filing of a disclosure statement or amendment thereto, and shall be commenced within ten (10) days after being called. Within fifteen (15) days after the conclusion of the hearing, the Securities Commissioner shall either issue an order permitting such offer to be made at once and to remain open for a period of time equal to that specified in the filing hereunder or, if the Securities Commissioner shall have found that the offer fails to provide full and fair disclosure to the offerees of all material information

concerning the offer, or that the price or any other substantial term of the offer is unfair to the offerees, or that the takeover bid is not in compliance with this chapter, issue an order prohibiting such offer, stating the basis for such order. [19]

***4** § 4. PROVISIONS OF TAKEOVER BIDS.—The following provisions shall apply to every takeover bid:

(1) No offeror may make a takeover bid which is not made to all holders of the class or series of the target company's equity securities in this state on substantially the same terms as made to holders who reside in other states. [20]

(2) The period of time within which securities may be deposited pursuant to a takeover bid shall not be less than twenty (20) days after the date of the first invitation to deposit securities. [21]

(3) Securities deposited pursuant to a takeover bid may be withdrawn by an offeree by demand in writing to the offeror or the depository at any time within twenty (20) days after the date of the first invitation to deposit securities and at any time after thirty-five (35) days after the date of the first invitation to deposit securities. [22]

(4) Where a takeover bid is made for less than all the outstanding equity securities of a class and where a greater number of securities is deposited pursuant thereto than the offeror is bound or willing to take up and pay for, the securities taken up by the offeror shall be taken up as nearly as possible on a pro rata basis, disregarding fractions, according to the number of securities deposited by each depositor. [23]

§ 5. REGULATIONS AND ORDERS; REMEDIES OF SECURITIES COMMISSIONER; SERVICE OF PROCESS.—(1) The Securities Commissioner may promulgate regulations and orders necessary to carry out the purposes of this chapter. [24]

(2) Whenever it appears to the Securities Commissioner that any person has engaged or is about to engage in an act or practice constituting a violation of any provision of this chapter or any regulation or order adopted under this chapter, the Securities Commissioner may investigate and issue orders and notices including cease and desist orders and notices. In addition to all other remedies, he may bring an action in a court of competent jurisdiction in the name and on behalf of the state of South Carolina 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 Securities Commissioner may apply for and on due showing be entitled to have issued the court's subpoena requiring the appearance of any defendant and his employees or agents and the production of documents, books and records as may appear necessary for the hearing of the petition, to testify and give evidence concerning the acts or conduct or things complained of in the action. 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 Securities Commissioner. [25]

***5** (3) Every nonresident offeror, except a foreign corporation which has appointed and keeps a resident agent in this state, shall be deemed to have appointed the Securities Commissioner as his agent upon whom may be served any lawful process, authorized by this chapter, with the same effect as though served upon the offeror personally. Service of process pursuant to this section shall be accomplished by leaving a copy of the process in the office of the Securities Commissioner, but it shall not be effective unless notice of the service and a copy of the process is sent by registered mail to the nonresident offeror served at his last known address. [26]

§ 6. LIABILITY TO SELLERS FOR ILLEGAL OR FRAUDULENT PURCHASES. Any offeror who:

(1) Purchases an equity security in connection with a takeover bid not in compliance with this chapter; or

(2) Purchases an equity security in connection with a takeover bid by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the seller not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

Is liable to the person selling the security to him, who may sue either at law or in equity (a) to recover the security, plus any income received thereon by the offeror, upon tender of the consideration received; or (b) for damages, including interest at six percent (6%) per year; together with costs and reasonable attorneys' fees.

No findings made by the Securities Commissioner pursuant to § 3 herein, including any decision regarding the calling of a hearing and any findings made in conjunction with such hearing, shall preclude any claim under this Section. [27]

§ 7. VALIDITY; SAVING CLAUSE.—In the event any provision or application of this article shall be held illegal or invalid for any reason, such holding shall not affect the legality or validity of any other provision or application thereof. [28]

Footnotes

1 Indiana, § 23-2-31(i). The ten percent potential ownership requirement also exists in the statutes of Colorado, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, Ohio, South Dakota, Tennessee and Virginia. Alaska, Delaware, Idaho, Kentucky, Louisiana, Maryland, Michigan, New York, Pennsylvania, Utah and Wisconsin set the limit at five percent; and Kansas, at twenty percent. Of these twenty-three states, only Hawaii, Nevada and Virginia do not make specific reference to indirect ownership.

2 Delaware, § 203(c)(3)(ii). Nearly identical exceptions exist in Alaska, Colorado, Nevada, Pennsylvania and Virginia. Similar exceptions are also found in other states, though the requirements of customary commission and no solicitation are not both specifically articulated in those states.

3 Delaware, § 203(c)(3)(i). Hawaii and Michigan have similar provisions. Alaska, Colorado, Maryland, Massachusetts, Nevada, Tennessee, Utah and Virginia differ in specifying that the offeror own at least two-thirds of the voting stock of a subsidiary company to qualify under that part of the exception. Connecticut, Idaho, Indiana, Louisiana, Minnesota, Pennsylvania, South Dakota and Wisconsin exempt any purchase by a company of its own shares.

4 Maryland, § 11-907(B). (However, note changes.) The Pennsylvania provision is similar. Like exceptions included in the statutes of Connecticut, Idaho, Minnesota, South Dakota, Tennessee and Wisconsin omit reference to a reclassification of securities.

5 Indiana, § 23-2-3-1(i)(3). Similar provisions are found in Colorado, Connecticut, Idaho, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Pennsylvania, South Dakota, Utah and Wisconsin.

6 New York, § 1601(b)(3). (While the language is drawn from the New York statute, note that the proposed statute reduces the number of offerees from 50 to 20 and adds a twelve month counting period.) No other statute specifies 20 holders, though various states have exceptions regarding offers to individual shareholders, or to 10, 15, 25, 30 or 50 shareholders. Several states impose a twelve month period as the bounds for counting the number of offerees.

7 New York statute, note that the New York statute exempts only those exchange transactions exempted under the Securities Act whereas the proposed statute requires for exemption registration under the Securities Act plus registration or exemption under South Carolina Blue Sky law.) No other state sets forth exactly this same set of requirements for an exchange transaction exemption. The variations include:
1) Exempt under Securities Act and registered or exempt under Blue Sky law—Idaho, South Dakota;
2) Exempt under both Securities Act and Blue Sky law—Wisconsin;
3) Registered or exempt under both Securities Act and Blue Sky law—Minnesota;
4) Registered under Securities Act—Massachusetts, Nevada;
5) Exempt under Securities Act—Connecticut, Kentucky, New York, Ohio, Tennessee;
6) Registered under Securities Act or registered or exempt under Blue Sky law—Maryland.

8 Connecticut, Tender Offer Act § 2 (enacted by P.A. 76-362, L. '76, eff. 6-2-76). The provisions dealing with state-regulated industries will have to be modified to conform with South Carolina law. Similar exemptions are found in the statutes of Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New York, Ohio, Pennsylvania, South Dakota, Tennessee and Wisconsin.

9 The jurisdictional requirements as to corporate presence in the state as articulated in the proposed statute are not identical to those of any other state. Various other states specify different alternatives, including:

1) incorporation in the state;
2) incorporation in the state plus doing business in the state;
3) incorporation in the state or principal place of business in the state;
4) incorporation in the state or principal place of business plus substantial assets in the state;
5) incorporation in the state or substantial assets in the state.
6) incorporation plus substantial assets in the state or principal place of business plus substantial assets in the state.

10 New York, § 1601(f).

11 New York, § 1601(c).

12 New York, § 1601(d).

13 Delaware, § 203(a)(1). (Note that the Delaware statute specifies 'not more than 60 days.') The various states with takeover statutes have a variety of time limits for filing of a disclosure statement, but most specify that such a statement must be filed 10 or 20 days before the effective date of a takeover bid.

14 Items a-g under this section have been taken from the Maryland Statute, § 11-902(B)(1)-(7), and item h has been taken from the New York statute, § 1603(a)(1). While the requirements as to contents of such disclosure statements vary too greatly from state to state to allow detailed comparison here, it should be noted that the requirements set forth in the proposed statute are far less extensive than in most state takeover statutes, many of which trace the requirements of federal disclosure under the Williams Act.

15 New York, § 1603(b). (However, note changes, including reduction of notice deadline from ten days to two, and specific provision for delay of effective date.)

16 Indiana, § 23-2-3-2(e). (Note changes.)

17 Id.

18 Id.

19 Indiana, § 23-2-3-2(f). (Note changes.) The procedural details of such hearings vary from state to state, but with many states specifying 15 or 20 day time limits for the calling of such hearings. The substantive findings specified in the proposed statute are like those found in many states' statutes. One such finding not specified here but found in a number of statutes is that the offer be made on substantially equal terms to all shareholders. (But see § 4(1) of the proposed statute.)

20 Colorado, § 11-51.5-103(1)(a). (Note changes.) A similar requirement is imposed by the statutes of Connecticut, Hawaii, Idaho, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Ohio, South Dakota, Tennessee, Utah and Wisconsin.

21 Colorado, § 11-51.5-103(1)(b). (Note change from 15 to 20 days.) Colorado and Utah specify 15 days; Delaware, 20 days; Alaska, Hawaii, Nevada and Virginia, 21 days; and Massachusetts and Michigan, 60 days.

22 Colorado, § 11-51.5-103(1)(c). (Note change from 15 to 20 days.) The various state statutes vary greatly as to the periods when shares may be withdrawn.

23 Colorado, § 11-51.5-103(1)(d). All states except Hawaii and New York having takeover bid statutes have some similar sort of pro rata acceptance provision.

24 Indiana, § 23-2-3-6(b).

25 Indiana, § 23-2-3-8(a). Remedy provisions vary greatly in the various state takeover statutes. It should be noted that the proposed statute, as presently drafted, does not contain criminal sanctions, though such sanctions are commonly found in other states.

26 New York, § 1610(a).

27 The language used here traces the language used in § 62-309 of the South Carolina Uniform Securities Act, a provision dealing with liability to buyers for illegal or fraudulent sales or offers, and also draws from the language of the Indiana statute, § 23-2-3-10.

28 New York, § 1613.

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