

CONTROL SHARES ACQUISITION

2000 GENERAL SESSION

STATE OF UTAH

Sponsor: John E. Swallow

AN ACT RELATING TO CONTROL SHARES ACQUISITIONS; CLARIFYING THE DEFINITION OF CONTROL SHARES; AND MAKING TECHNICAL CHANGES.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

61-6-2, as last amended by Chapter 268, Laws of Utah 1995

61-6-3, as last amended by Chapter 268, Laws of Utah 1995

61-6-5, as enacted by Chapter 2, Laws of Utah 1987, First Special Session

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **61-6-2** is amended to read:

61-6-2. "Control shares" defined.

(1) (a) As used in this chapter, "control shares" means shares that except for this chapter would have voting power with respect to shares of an issuing public corporation that, when added to all other shares of the issuing public corporation owned by a person or in respect to which that person may exercise or direct the exercise of voting power, would entitle that person, immediately after acquisition of the shares (directly or indirectly, alone or as a part of a group), to exercise or direct the exercise of the voting power, including voting power pursuant to a revocable proxy, of the issuing public corporation in the election of directors within any of the following ranges of voting power:

~~[(1)]~~ (i) 1/5 or more but less than 1/3 of all voting power;

~~[(2)]~~ (ii) 1/3 or more but less than a majority of all voting power; or

~~[(3)]~~ (iii) a majority or more of all voting power.

(b) Shares entitling a person, immediately after acquisition of the shares (directly or indirectly, including pursuant to a revocable proxy or as part of a group), to exercise or direct the exercise of less than 1/5 of all voting power of the issuing public corporation in the election of directors shall not be control shares, even if acquired in a control share acquisition. Shares cease

to be control shares upon their transfer to a person who is not an affiliate of the transferor or an affiliate or member of a group with which the applicable control share acquisition was made, except to the extent the shares become control shares as a result of their acquisition by the transferee.

Section 2. Section **61-6-3** is amended to read:

61-6-3. Control share acquisition defined.

(1) (a) As used in this chapter, "control share acquisition" means:

(i) the acquisition, directly or indirectly, by any person of ownership of issued and outstanding control shares; or

(ii) the acquisition of power to direct the exercise of voting power with respect to issued and outstanding control shares, including the acquisition of voting power pursuant to a revocable proxy except as provided in Subsection (1)(b).

(b) "Control share acquisition" does not mean the acquisition of voting power pursuant to a revocable proxy if the revocable proxy is solicited by the issuing public corporation or the board of directors of the issuing public corporation in connection with shareholders' meetings or actions of the issuing public corporation.

(2) For purposes of this section, shares acquired within 90 days or shares acquired pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition.

(3) For purposes of this section, a person who acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing this chapter has voting power only of shares in respect of which that person would be able to exercise or direct the exercise of votes without further instruction from others.

(4) The acquisition of any shares of an issuing public corporation does not constitute a control share acquisition if the acquisition is consummated in any of the following circumstances:

(a) before May 29, 1987;

(b) pursuant to a contract existing before May 29, 1987;

(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 this chapter;

(e) pursuant to a direct issue by or transfer from the issuing public corporation of its own shares, except that shares issued or transferred upon the conversion of a convertible security or upon exercising an option, warrant, or other right to purchase shares constitutes a control share acquisition unless the convertible security, option, warrant, or other right was acquired directly from the issuing public corporation by the acquiring person; or

(f) pursuant to a merger or plan of share exchange effected in compliance with Title 16, Chapter 10a, Part 11, Merger and Share Exchange, or Title 16, Chapter 10a, Part 12, Sale of Property, if the issuing public corporation is a party to the agreement of merger or plan of share exchange.

(5) (a) The acquisition of shares of an issuing public corporation in good faith and not for the purpose of circumventing this chapter does not constitute a control share acquisition if the acquisition of shares is by or from:

(i) any person whose voting rights had previously been authorized by shareholders in compliance with this chapter; or

(ii) any person whose previous acquisition of shares of an issuing public corporation would have constituted a control share acquisition were it not for Subsection (4).

(b) Subsection (5)(a) does not apply if the acquisition entitles any person (directly or indirectly, alone or as part of a group) to exercise or direct the exercise of voting power of the corporation in the election of directors in excess of the range of the voting power otherwise authorized.

Section 3. Section **61-6-5** is amended to read:

61-6-5. "Issuing public corporation" defined.

(1) As used in this chapter, "issuing public corporation" means a corporation [~~organized under the laws of this state~~], other than a depository institution, that is organized under the laws of this state and that has:

(a) 100 or more shareholders;

(b) its principal place of business, its principal office, or substantial assets within the state;

and

- (c) (i) more than 10% of its shareholders resident in the state;
- (ii) more than 10% of its shares owned by Utah residents; or
- (iii) 10,000 shareholders resident in the state.

(2) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

(3) Shares held by banks or other depository institutions (except as trustee or guardian), brokers, or nominees shall be disregarded for purposes of calculating the percentages or numbers described in this section.

(4) As used in this chapter, "depository institution" means a depository institution or a depository holding company as defined in Section 7-1-103.