



Understanding the Landscape: The Minnesota Control Share Acquisition Act

By Chad Stewart and Thomas Barnes

A buyer seeking to acquire a Minnesota corporation should understand that Minnesota is one of approximately 27 states that have a control share acquisition statute. Such anti-takeover statutes were adopted in response to hostile takeover activity and generally function to deny an insurgent the right to vote its shares to the extent they exceed specified ownership thresholds. Many of these statutes were adopted or amended by state legislatures to help local corporations defeat unsolicited takeover attempts.

This article focuses on the Minnesota Control Share Acquisition Act (the “Act”). As discussed further below, the Act has a rich history and can have certain unintended consequences due to the breadth of its application.

Background on the Minnesota Statute

In June 1987 Dayton Hudson (now known as Target Corporation) learned that Dart Group Corporation had acquired a meaningful amount of its common stock and knew the company was in play. Dayton’s immediately appealed to Minnesota governor Rudy Perpich seeking legislative protection from a potential

hostile takeover, which Dayton’s argued would destroy the company and result in significant job loss in Minnesota. Dayton’s had the governor’s ear—at the time it employed approximately 34,000 people in Minnesota, making it one of the state’s largest employers. The governor called a special legislative session to vote on several amendments to the then-existing control share acquisition statute that would make it more difficult for corporate raiders to acquire Minnesota corporations. The bill swiftly passed both the house and the senate by overwhelming margins. Not long thereafter, Dart Group launched a tender offer that ultimately failed, partly because of the revised statute, but largely due to the October 1987 stock market crash.

How The Minnesota Statute Works

Application. The Act applies to “issuing public corporations,” a term defined as either: (i) a public company that has at least 50 shareholders or (ii) any other corporation that has at least 100 shareholders. All issuing public corporations are subject to the Act, unless their shareholders have approved articles or bylaws that expressly provide otherwise.

Triggers and Voting Rights. A “control share acquisition” occurs when a shareholder, directly or indirectly, acquires shares that, when added to any other shares beneficially held by that shareholder, exceed one of three thresholds—20%, 33.33% or 50% of the outstanding shares of the issuing public corporation. Upon exceeding the initial threshold, the acquiring shareholder can vote only 19.99% of the issuing public corporation’s outstanding voting shares. The remaining shares owned by the acquiring shareholder (the “Control Shares”) are stripped of their voting rights unless approved at a shareholder meeting by: (i) a majority of the voting power of the corporation’s outstanding shares (including the shares held by the acquiring shareholder) *and* (ii) a majority of the voting power of the corporation’s outstanding shares that are not owned by the acquiring shareholder, officers or employees who also are directors of the corporation.

Exceptions. There are exceptions to the definition of “control share acquisition” that remove certain types of transactions from the Act’s purview. The most important of these exceptions are ones that relate to (i) a purchase of shares from the issuing public corporation, (ii) a merger to which the issuing public corporation is party or (iii) a tender offer for more than 50% of the outstanding voting shares that has been approved by a disinterested committee of the board of directors. In other words, the Act’s intent is not to frustrate transactions that have the support of the target company’s board of directors.

Information Provided By and Undertakings of Acquiring Shareholder. The issuing public corporation is not required to hold a special meeting of shareholders to determine whether voting rights will be accorded to the Control Shares unless the acquiring shareholder (i) requests a meeting in writing, (ii) agrees in writing to pay or reimburse the corporation’s expenses relating to the special meeting, (iii) provides copies of definitive financing agreements for any portion of the consideration that will not be provided with its own funds, and (iv) provides the corporation, for redistribution to all of its shareholders, a detailed information statement.

The information statement must include, without limitation, information concerning the acquiring shareholder and its affiliates, the number of shares the acquiring shareholder acquired in the control share acquisition, the terms of the control share acquisition, any intent to sell any substantial assets of the corporation, any intent to change materially the corporation’s management or employment policies or charitable or community contributions, and any “other objective facts as would be substantially likely to affect the decision of a shareholder with respect to voting on the control share acquisition.”

Special Shareholder Meeting. If the above conditions are met, the board of directors of the issuing public corporation must call a special shareholder meeting, to be held no later than 55 days after the acquiring shareholder’s satisfaction of those conditions. The notice of the special meeting must include the

information statement provided by the acquiring shareholder and disclosure of the board of director's recommendation for shareholders relating to the control share acquisition. If the acquiring shareholder obtains the required vote at the shareholder meeting, the Control Shares will be accorded voting rights. But if the acquiring shareholder fails to obtain the necessary shareholder approval, the Control Shares may not be voted by the acquiring shareholder.

Redemption. The Act provides the issuing public corporation the right to redeem the Control Shares at market value under two circumstances. First, they may be redeemed if the acquiring shareholder fails to deliver the required information statement by the 10th day following the control share acquisition. Second, the corporation may redeem the Control Shares if an information statement has been delivered, as required, but the shareholders have voted against granting voting rights to the Control Shares.

Unintended Consequences

Many have criticized the Act for being overbroad. While there are a number of examples that support this argument, we focus on a most perplexing and hypothetical one here. Consider a private Minnesota corporation ("Company X") that has only common stock, 110 shareholders, and one shareholder who owns nearly 75% of the issued and outstanding capital stock (the "Majority Shareholder"). Although a private company, Company X is subject to the Act because it has more than 100 shareholders. Let us assume that, following an auction, Company X has agreed to merge

with another Minnesota corporation (the "Suitor"). In this situation, the Majority Shareholder can ensure the transaction will be approved by the shareholders, and the Suitor asks the Majority Shareholder to execute a voting agreement to provide the Suitor with comfort that the Majority Shareholder will vote in favor of the deal. The Majority Shareholder, who is supportive of the transaction, wants to do so. Not a problem, right?

Wrong. In this instance, the execution and delivery of the voting agreement itself would give the Suitor the indirect right to vote the shares (see "How The Minnesota Statute Works - Triggers and Voting Rights" above), which makes that transaction itself subject to the Act. There simply is no exception in the Act for this situation.

Of course this does not kill the deal, and Company X is able to get the Suitor comfortable by agreeing to pay a break-up fee in the event the Majority Shareholder votes against the deal. But, when viewed in light of the Act's purpose (*e.g.*, to protect shareholders from coercive tender offer tactics; to provide the target time to evaluate alternatives; to facilitate obtaining the best price for shareholders; to protect the local economy and jobs), it is difficult to see how the Act helps anyone at all in this context. Assuming the Majority Shareholder is supportive, the consummation of the transaction is a *fait accompli*. In addition, whether the Majority Shareholder executes the voting agreement or not would seem to be of no consequence to the minority shareholders of Company X. In either instance, the minority shareholders are free to exercise

their statutory appraisal rights if they are not satisfied with the offered price.

Comparison to Delaware

A discussion of Delaware anti-takeover legislation is beyond the scope of this article, but it is worth noting that Delaware does not have a control share acquisition statute. Delaware considered a control share acquisition statute in the late 1980's but ultimately did not act (largely because of questions relating to such a statute's effectiveness as an anti-takeover device). In addition, as referenced in the first paragraph above, many control share acquisition statutes have arisen in connection with (or been shaped by) hostile attempts to acquire a company that contributes significantly to the local economy and employs a large number of people. Very few large companies call Delaware their principal place of business.

Conclusion

The Act can be a trap for the unwary, and dealmakers and their counsel should be aware of it when pursuing transactions involving Minnesota corporations. Perhaps the most uncontroversial criticism of the Act is that it is overly broad and can lead to consequences that were not intended (or even contemplated) at the time the Minnesota legislature took action to thwart the Dart Group bid for Dayton's in 1987.



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