

## **CHAPTER 26.1-06 TAKEOVER BIDS FOR DOMESTIC COMPANIES**

**26.1-06-01. Definitions.** As used in this chapter, unless the context or subject matter otherwise requires:

1. "Equity security" means any shares or similar securities, or voting trust certificates, or any securities convertible into such securities.
2. "Horizontal combination" means two or more corporations each of which has a majority of its equity securities owned by the same other corporation.
3. "Offeree" means the beneficial or record owner of equity securities which an offeror acquires or offers to acquire in connection with a takeover bid.
4. "Offeror" means a person who makes or in any way participates or aids in making 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 equity securities for which the takeover bid is made.
5. "Takeover bid" means the acquisition of, or offer to acquire, pursuant to a tender offer or request or invitation for tenders, any equity security of a North Dakota domestic insurance company, if after acquisition thereof the offeror would, directly or indirectly, be a record or beneficial owner of more than five percent of any class of the issued and outstanding equity securities of such corporation. A takeover bid does not include:
  - a. A bid made by a dealer for the dealer's own account in the ordinary course of the dealer's business of buying and selling the security.
  - b. Any offer to acquire or acquisition of an equity security pursuant to the offer, for the sole account of the offeror, from not more than twenty persons, in good faith and not for the purpose of avoiding this chapter.
  - c. Any tender offer or request or invitation for tenders to which the target company consents, by action of its board of directors, if the board has recommended acceptance to shareholders and the terms, including notice of any inducements to officers or directors which are not made available to all shareholders, have been furnished to shareholders.
6. "Target company" means a corporation whose equity securities are or are to be the subject of a takeover bid.
7. "Vertical combination" means a chain of ownership in which one corporation has a majority of its equity securities owned by another corporation and which chain of corporate ownership may or may not continue through other corporations in which a majority of the equity securities of one corporation are owned by another.

**26.1-06-02. Takeover bid - Restrictions.**

1. No offeror may make a takeover bid unless at least twenty days prior thereto the offeror files with the commissioner and the target company copies of all information required by subsection 2 and either within ten days following the filing no hearing is ordered by the commissioner or requested by the target company, or a hearing is requested by the target company within that time but the commissioner finds that no cause for hearing exists, or a hearing is ordered within that time and upon the hearing the commissioner adjudicates that the proposed takeover bid and the materials being or to be distributed are not a violation of this title and that the offeror

proposed to make fair, full, and effective disclosure to offerees of all information material to a decision to accept or reject the offer. No offeror may make a takeover bid if the offeror owns five percent or more of the issued and outstanding equity securities of any class of the target company, any of which were purchased within one year before the proposed takeover bid, and the offeror, before making any such purchase, or before July 31, 1971, whichever is later, failed to publicly announce the offeror's intention to gain control of the target company, and failed to make fair, full, and effective disclosure of the intention to the persons from whom the offeror acquired the securities.

2. The information to be filed with the commissioner and the target company pursuant to subsection 1 must include:
  - a. 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.
  - b. The identity and background of all persons on whose behalf the acquisition of any equity security of the target company has been or is to be effected.
  - c. The names of all insurance companies doing business in North Dakota in which the offeror has ownership or debt interests, setting forth the ownership or debt interests, or management functions, setting forth the management functions.
  - d. The source and amount of funds or other consideration used or to be used in acquiring any equity security, including a statement describing any securities, other than the existing capital stock or long-term debt of the offeror, which are being offered in exchange for the equity securities of the target company.
  - e. If the offeror has ownership or debt interests, or management functions in other insurance companies doing business in the state of North Dakota, what plans exist for consolidation of any functions whatsoever of the target company with the offeror's other companies, including ratemaking, investment policies, or consolidation of sales functions.
  - f. A statement of any plans or proposals which the offeror, upon gaining control, may have to liquidate the target company, sell its assets, effect a merger or formal consolidation of it, or make any other major change in its business, corporate structure, management personnel, or policies of employment; or to assume any portion of the risks of the target company or to have the target company assume any portion of the risks, or to reinsure any of the risks of the offeror.
  - g. The number of shares of any equity security of the target company of which each offeror is beneficial or record owner or has a right to acquire, directly or indirectly, together with the name and address of each offeror.
  - h. Particulars as to any contracts, arrangements, or understandings to which an offeror is party with respect to any equity security of the target company, including without limitation transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loan, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the parties to the contracts, arrangements, or understandings.
  - i. Complete information on the organization and operations of the offeror, including without limitation the year of organization, form of organization, the 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 assets 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 the 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.

- j. If the offeror is a member of a horizontal combination or a vertical combination, then the same information must be furnished and filed for each member corporation or limited liability company of the horizontal combination or vertical combination.

**26.1-06-03. Takeover - Offer - Terms.** No offeror may make a takeover bid not made to all resident holders of the equity security that is the subject of the takeover bid, or not made to the holders on the same terms as the takeover bid is made to nonresident holders of the equity security. If an offeror makes a tender offer or request or invitation for tenders for less than all the outstanding equity securities of a class, and if a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation for tenders are first published or sent or given to securityholders than the offeror is bound or willing to take up and pay for, the securities taken up must be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each offeree. If the terms of a takeover bid are changed before its expiration by increasing the consideration offered to offerees, the offeror shall pay the increased consideration for all equity securities taken up, whether or not the securities are deposited or taken up before or after the change in the terms of the takeover bid. The pro rata requirement applies to securities deposited within ten days after notice of an increase in the consideration offered to securityholders is first published or sent or given to securityholders.

**26.1-06-04. Deceptive practices.** It is unlawful for any person to misstate any material fact or omit to state any material fact, necessary to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any takeover bid, or any solicitation of offerees in opposition to or in favor of any takeover bid.

**26.1-06-05. Hearing.** Any hearing pursuant to this chapter must be held within forty days of the date a filing is made pursuant to section 26.1-06-02. Adjudications made pursuant to this chapter must be made within sixty days after the filing. Upon filing an application with the commissioner for a hearing under this section, the target company shall deposit with the commissioner the sum the commissioner requires to defray the costs of the hearing and any investigation which the commissioner makes in connection therewith. If the commissioner finds that the takeover bid is in violation of chapters 26.1-05 and 26.1-07 or that effective provision is not made for fair and full disclosure to offerees of all information material to a decision to accept or reject the offer, or that the takeover bid would comply with this section if amended in certain respects, or that the takeover bid is not in violation of chapters 26.1-04, 26.1-05, and 26.1-07 and that effective provision is made for fair and full disclosure to offerees of all information material to a decision to accept or reject the offer, the commissioner shall so adjudicate.

**26.1-06-06. Offenses punishable by the commissioner - Penalty.** The commissioner, by order entered after a hearing on notice duly served on the defendant not less than thirty days before the date of the hearing, if it is proved that the defendant has knowingly made any misrepresentation of a material fact for the purpose of inducing the commissioner to take any action or to refrain from taking action, or has violated this chapter, or any order of the

commissioner issued pursuant to this chapter, may impose a penalty not exceeding five thousand dollars.

**26.1-06-07. Separate offenses.** Each takeover bid made in violation of the provisions of this chapter constitutes a separate offense. The commissioner may request the offeror to rescind the bid and to make restitution to the offeree, and if the offeror complies with the request no penalty may be imposed on the offeror on account of that illegal takeover bid.

**26.1-06-08. Civil liabilities.**

1. Any offeror who makes a takeover bid which does not comply with this chapter, or makes a takeover 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 (the offeree not knowing of such untruth or omission), and who does not sustain the burden of proof that the offeror did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to any offeree whose shares are taken up pursuant to the takeover bid who may sue to recover the shares, together with all dividends received thereon, costs, and reasonable attorney's fees, upon the tender of the consideration received from the offeror, or may sue for the substantial equivalent in damages if the offeror no longer owns the shares.
2. Every person who materially participates or aids in a takeover bid made by an offeror liable under subsection 1, or who directly or indirectly controls any offeror so liable, is also 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 the person did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist. The contribution is as in cases of contract among the several persons so liable.
3. Any tender specified in this section may be made at any time before entry of judgment.
4. No suit may 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 subsections 1 and 3 makes a written offer, before suit is brought, to return the shares taken up pursuant to the takeover 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 the shares, no offeree may maintain a suit under this section who has refused or failed to accept the offer within thirty days of its receipt.
5. Any condition, stipulation, or provision binding any offeree to waive compliance with this chapter or of any rule or order pursuant to this chapter is void.
6. The rights and remedies provided by this chapter are in addition to any and all other rights and remedies that may exist at law or in equity.

**26.1-06-09. Consent to service of process.** Every nonresident offeror who makes a takeover bid is deemed to have appointed the commissioner as agent upon whom may be served, in any matter arising under this chapter, any process, notice, order, or demand except one issued by the commissioner. The commissioner or a designated person in the commissioner's office shall serve any process, notice, order, or demand issued by the commissioner by registered mail addressed to the offeror at the offeror's latest address on file. A foreign corporation which has a duly appointed agent for service of process need not comply with this section.

**26.1-06-10. Enforcement - Enjoining violations.** If at a hearing before the commissioner, the commissioner determines that the offeror has violated this chapter, or the commissioner's rules administering this chapter, the commissioner shall issue and cause to be served on the offeror an order requiring the offeror to cease and desist from the violation and may issue and cause to be served on the offeror an order preventing the offeror from making any further tender offers, and may take any affirmative action as will effectuate the policies of this chapter.

The commissioner may petition any district court of this state for the enforcement of the order and for appropriate temporary relief or restraining order and shall file in the court the record of the proceedings. Upon the filing of the petition, the court must serve notice upon the offeror and thereupon has jurisdiction of the proceeding and of the question determined therein and may grant the temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or for setting aside in whole or in part the order. The court must enforce the order unless it finds that the order was not in accordance with law, that it was in violation of the constitutional rights of the offeror, that the commissioner's rules or procedure did not afford the offeror a fair hearing, that the commissioner's findings of fact were not supported by the evidence, or that the order was not supported by the findings of fact.

**26.1-06-11. Rulemaking.** The commissioner may adopt reasonable rules:

1. Defining fraudulent, evasive, deceptive, or grossly unfair practices in connection with takeover bids and the terms used in this chapter.
2. Exempting from this chapter takeover bids not made for the purpose of, and not having the effect of, changing or influencing the control of a target company.
3. Covering such other matters as are necessary to give effect to this chapter.

**26.1-06-12. Securities laws.** This chapter does not limit or modify in any way any responsibility, authority, power, or jurisdiction of the securities commissioner or of the securities laws of this state.

**26.1-06-13. Offenses - Penalties - Statute of limitation.** Any person who knowingly makes or causes to be made any false statement with respect to any matter subject to this chapter or commits any act declared unlawful by this chapter and any offeror who makes a takeover bid which does not comply with this section and sections 26.1-06-02, 26.1-06-03, and 26.1-06-04 is guilty of a class A misdemeanor. Prosecutions under this section must be instituted within two years from the date of the offense.