Title 13-C: MAINE BUSINESS CORPORATION ACT

Chapter 11: MERGERS AND SHARE EXCHANGES

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§1101. DEFINITIONS

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

1. **Eligible entity.** "Eligible entity" means a domestic or foreign unincorporated entity or a domestic or foreign nonprofit corporation.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

2. **Eligible interests.** "Eligible interests" means interests and memberships.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

3. **Merger.** "Merger" means a business combination pursuant to section 1102.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

4. **Party to a merger or party to a share exchange.** "Party to a merger" or "party to a share exchange" means any domestic or foreign corporation or eligible entity that will:

A. Merge under a plan of merger; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. Acquire shares or eligible interests of another corporation or an eligible entity in a share exchange; or [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. Have all of its shares or eligible interests or all of one or more classes or series of its shares or eligible interests acquired in a share exchange. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

5. **Share exchange.** "Share exchange" means a business combination pursuant to section 1103.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

6. **Survivor.** "Survivor" in a merger means the corporation or eligible entity into which one or more other corporations or eligible entities are merged. A survivor of a merger may preexist the merger or be created by the merger.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF).

§1102. MERGER

1. **General authority of domestic corporations.** One or more domestic business corporations may merge with one or more domestic or foreign business corporations or eligible entities pursuant to a plan of merger under this section.

[2003, c. 344, Pt. B, §97 (AMD) .]

2. **Merger with foreign entities.** A foreign business corporation or a foreign eligible entity may be a party to a merger with a domestic business corporation or may be created by the terms of a plan of merger under this section only if the merger is permitted by the laws under which the foreign business corporation or eligible entity is organized or by which it is governed; and

[2003, c. 344, Pt. B, §97 (AMD) .]

3. **Merger not contemplated in organic law.** If the organic law of a domestic eligible entity does not provide procedures for the approval of a merger, a plan of merger may be adopted and approved, the merger effectuated, and appraisal rights exercised in accordance with the procedures in this chapter and chapter 13. For the purposes of applying this chapter and chapter 13:

A. The eligible entity, its members or interest holders, eligible interests and organic documents taken together are deemed to be a domestic business corporation, shareholders, shares and articles of incorporation, respectively and vice versa as the context may require; and [2003, c. 344, Pt. B, §97 (AMD).]

B. If the business and affairs of the eligible entity are managed by a group of persons that is not identical to the members or interest holders, that group is deemed to be the board of directors. [2003, c. 344, Pt. B, §97 (AMD).]

[2003, c. 344, Pt. B, §97 (AMD) .]

4. **Plan of merger.** A plan of merger must include:

A. The name of each domestic or foreign business corporation or eligible entity that will merge and the name of the corporation or eligible entity that will be the survivor of the merger; [2003, c. 344, Pt. B, §97 (AMD).]

B. The terms and conditions of the merger; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. The manner and basis of converting the shares of each merging domestic or foreign business corporation and eligible interests of each merging domestic or foreign eligible entity into shares or other securities, eligible interests, obligations, rights to acquire shares or other securities or eligible interests, cash or other property or any combination thereof; [2003, c. 344, Pt. B, §97 (AMD).]

D. The articles of incorporation of any domestic or foreign business or nonprofit corporation or the organic documents of any domestic or foreign unincorporated entity to be created by the merger or, if a new domestic or foreign business or nonprofit corporation or unincorporated entity is not to be created by the merger, any amendments to the survivor's articles of incorporation or organic documents; and [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

E. Any other provisions required by the laws under which any party to the merger is organized or by which it is governed, or by the articles of incorporation or organic documents of any such person. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2003, c. 344, Pt. B, §97 (AMD) .]

5. **Extrinsic facts.** Terms of a plan of merger may be made dependent upon facts objectively ascertainable outside the plan in accordance with section 121, subsection 10.

[2003, c. 344, Pt. B, §97 (AMD) .]

6. **Amend plan prior to filing articles of merger.** The plan of merger may also include a provision that the plan may be amended prior to filing the articles of merger with the Secretary of State under section 1106, subsection 2. Subsequent to any approval of the plan by shareholders of a domestic corporation that is a party to the merger, the plan may not without further shareholder approval be amended to:

A. Change the amount or kind of shares or other securities, eligible interests, obligations, rights to acquire shares or other securities, cash or other property to be received under the plan by the shareholders or owners of eligible interests in any party to the merger; [2003, c. 344, Pt. B, §97 (AMD).]

B. Change the articles of incorporation or the organic documents of any eligible entity that will survive or be created as a result of the merger, except for changes permitted by section 1005 or by comparable provisions of the organic laws of any such foreign corporation or domestic or foreign eligible entity; or [2003, c. 344, Pt. B, §97 (AMD).]

C. Change any of the other terms or conditions of the plan if the change would adversely affect the shareholders in any material respect. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2005, c. 302, §3 (AMD) .]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF). 2003, c. 344, §B97 (AMD). 2005, c. 302, §3 (AMD).

§1103. SHARE EXCHANGE

1. **Share exchange.** Through a share exchange:

A. A domestic corporation may acquire all of the shares of one or more classes or series of shares of another domestic or foreign business corporation, or all of the eligible interests of one or more classes or series of eligible interests of a domestic or foreign eligible entity, in exchange for shares or other securities, eligible interests, obligations, rights to acquire shares or other securities or eligible interests, cash or other property or any combination thereof pursuant to a plan of share exchange; or [2003, c. 344, Pt. B, §97 (AMD).]

B. All of the shares of one or more classes or series of shares of a domestic corporation may be acquired by another domestic or foreign business corporation or eligible entity in exchange for shares or other securities, eligible interests, obligations, rights to acquire shares or other securities or eligible interests, cash or other property or any combination thereof pursuant to a plan of share exchange. [2003, c. 344, Pt. B, §97 (AMD).]

[2003, c. 344, Pt. B, §97 (AMD) .]

2. **Party to share exchange.** A foreign corporation or an eligible entity may be a party to a share exchange under this section only if the share exchange is permitted by the laws under which the corporation or eligible entity is organized or governed.

[2003, c. 344, Pt. B, §97 (AMD) .]

3. **Share exchange not contemplated in organic law.** If the organic law of a domestic eligible entity does not provide procedures for the approval of a share exchange, a plan of share exchange may be adopted and approved and the share exchange effectuated in accordance with the procedures, if any, for a merger. If the organic law of a domestic eligible entity does not provide procedures for the approval of either a share exchange or a merger, a plan of share exchange may be adopted and approved, the share exchange effectuated and appraisal rights exercised in accordance with the procedures in this chapter and chapter 13. For the purposes of applying this chapter and chapter 13:

A. The eligible entity, its members or interest holders, eligible interests and organic documents taken together are deemed to be a domestic business corporation, shareholders, shares and articles of incorporation, respectively and vice versa as the context may require; and [2003, c. 344, Pt. B, §97 (AMD).]

B. If the business and affairs of the eligible entity are managed by a group of persons that is not identical to the members or interest holders, that group is deemed to be the board of directors. [2003, c. 344, Pt. B, §97 (AMD).]

[2003, c. 344, Pt. B, §97 (AMD) .]

4. **Plan of share exchange.** A plan of share exchange must include:

A. The name of each corporation or eligible entity whose shares or eligible interests will be acquired and the name of the corporation or eligible entity that will acquire those shares or eligible interests; [2003, c. 344, Pt. B, §97 (AMD).]

B. The terms and conditions of the share exchange; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. The manner and basis of exchanging shares of a corporation or eligible interests in an eligible entity whose shares or eligible interests will be acquired under the share exchange into shares, other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash or other property or any combination thereof; and [2003, c. 344, Pt. B, §97 (AMD).]

D. Any other provisions required by the laws under which any party to the share exchange is organized, or by the articles of incorporation or organic documents of any such party. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2003, c. 344, Pt. B, §97 (AMD) .]

5. **Extrinsic facts.** Terms of a plan of share exchange may be made dependent on facts objectively ascertainable outside the plan in accordance with section 121, subsection 10.

[2003, c. 344, Pt. B, §97 (AMD) .]

6. **Amend plan prior to filing articles of share exchange.** The plan of share exchange also may include a provision that the plan may be amended prior to filing the articles of share exchange with the Secretary of State under section 1106, subsection 2. If the shareholders of a domestic corporation that is a party to the share exchange are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by the shareholders the plan may not be amended to:

A. Change the amount or kind of shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash or other property to be issued by the corporation or to be received under the plan by the shareholders of or holders of eligible interests in any party to the share exchange; or [2003, c. 344, Pt. B, §97 (AMD).]

B. Change any of the terms or conditions of the plan if the change would adversely affect the shareholders in any material respect. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2003, c. 344, Pt. B, §97 (AMD) .]

This section does not limit the power of a domestic corporation to acquire shares of another corporation or eligible interests in an eligible entity in a transaction other than a share exchange. [2003, c. 344, Pt. B, §97 (AMD).]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF). 2003, c. 344, §B97 (AMD).

§1104. ACTION ON PLAN OF MERGER OR SHARE EXCHANGE

In the case of a domestic corporation that is a party to a merger or share exchange under this chapter: [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

1. **Plan adopted by board of directors.** The plan of merger or share exchange must be adopted by the corporation's board of directors;

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

2. **Shareholders approve plan.** Except as provided in subsection 7 and in section 1105, after adopting the plan of merger or share exchange, the corporation's board of directors shall submit the plan to the shareholders for their approval. The board of directors also shall transmit to the shareholders a recommendation that the shareholders approve the plan, unless:

A. The board of directors makes a determination that because of conflicts of interest or other special circumstances the board of directors should not make that recommendation; or [2011, c. 274, §52 (NEW).]

B. Section 827 applies. [2011, c. 274, §52 (NEW).]

If paragraph A or B applies, the board of directors shall transmit to the shareholders the basis for so proceeding;

[2011, c. 274, §52 (RPR) .]

3. **Conditional submission of plan.** The corporation's board of directors may condition its submission of the plan of merger or share exchange to the shareholders on any basis;

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

4. **Notice of meeting.** If the plan of merger or share exchange is required to be approved by the shareholders and if the approval is to be given at a meeting of shareholders, the corporation shall notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan is to be submitted for approval. The notice must state that the purpose or one of the purposes of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. If the corporation is to be merged into an existing corporation or eligible entity, the notice also must include or be accompanied by a copy or summary of the articles of incorporation or organizational documents of that corporation or eligible entity. If the corporation is to be merged into a corporation or eligible entity that is to be created pursuant to the merger, the notice also must include or be accompanied by a copy or a summary of the articles of incorporation or organizational documents of the new corporation or eligible entity;

[2003, c. 631, §22 (AMD) .]

5. **Majority vote.** Unless the corporation's articles of incorporation, or the corporation's board of directors acting pursuant to subsection 3, require a greater vote, approval of the plan of merger or share exchange requires the approval of the shareholders by a majority of all the votes entitled to be cast on the plan by that voting group and, if any class or series is entitled to vote as a separate voting group on the plan, the approval of each separate voting group by a majority of all the votes entitled to be cast on the plan by that voting group. The corporation's articles of incorporation may provide that a plan of merger or share exchange may be approved by a lesser vote of each voting group entitled to vote on the plan, but in no case less than a majority of the votes cast by that voting group at a meeting at which there exists for each such voting group a quorum consisting of at least a majority of the votes entitled to be cast on the plan by each voting group entitled to vote on the plan;

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

6. **Voting groups.** Subject to subsection 6-A, separate voting by voting group is required:

A. On a plan of merger by each class or series of shares that:

(1) Are to be converted under the plan of merger into shares or other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash or other property or any combination thereof; or

(2) Is entitled to vote as a separate group on a provision in the plan that constitutes a proposed amendment to articles of incorporation of a surviving corporation that requires action by separate voting groups under section 1004; [2011, c. 274, §53 (AMD).]

B. On a plan of share exchange by each class or series of shares included in the exchange, with each class or series constituting a separate voting group; and [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. On a plan of merger or share exchange if a voting group is entitled under the articles of incorporation to vote as a voting group to approve a plan of merger or share exchange; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2011, c. 274, §53 (AMD) .]

6-A. **Limitations on separate voting groups.** The corporation's articles of incorporation may expressly limit or eliminate the separate voting rights provided in subsection 6, paragraph A, subparagraph (1) and subsection 6, paragraph B as to any class or series of shares, except for a transaction that:

A. Includes what is or would be, if the corporation were the surviving corporation, an amendment subject to subsection 6, paragraph A, subparagraph (2); and [2011, c. 274, §54 (NEW).]

B. Will effect no significant change in the assets of the resulting entity, including all parents and subsidiaries on a consolidated basis. [2011, c. 274, §54 (NEW).]

[2011, c. 274, §54 (NEW) .]

7. **Approval not required.** Unless the corporation's articles of incorporation otherwise provide, approval by the corporation's shareholders of a plan of merger or share exchange is not required if:

A. The corporation will survive the merger or is the acquiring corporation in a share exchange; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. The corporation's articles of incorporation will not be changed, except for amendments permitted by section 1005; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. Each shareholder of the corporation whose shares are outstanding immediately before the effective date of the merger or share exchange will hold the same number of shares, with identical preferences, limitations and relative rights, immediately after the effective date of the change; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. The number of voting shares outstanding immediately after the merger plus the number of voting shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed by more than 20% the total number of voting shares of the surviving corporation outstanding immediately before the merger; and [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

E. The number of participating shares outstanding immediately after the merger plus the number of participating shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed by more than 20% the total number of participating shares outstanding immediately before the merger. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

For the purposes of this subsection, "participating shares" means shares that entitle their holders to participate without limitation in distributions, and "voting shares" means shares that entitle their holders to vote unconditionally in elections of directors;

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

8. **Personal liability; written consent.** If as a result of a merger or share exchange one or more shareholders of a domestic corporation would become subject to owner liability for the debts, obligations or liabilities of any other person or entity, approval of the plan of merger or share exchange must require the execution by each such shareholder of a separate written consent to become subject to that owner liability;

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

9. **Participating corporation.** A corporation organized under any special act of the Legislature of this State may be a participating corporation in a merger or share exchange unless the act authorizing the creation of the corporation provides to the contrary; and

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

10. **Consent of shareholders.** A plan of merger or share exchange may be approved for a participating corporation by written consent of shareholders entitled to vote as provided in section 704. If the plan of merger or share exchange is approved by written consent of all shareholders, whether or not entitled to vote, a resolution of the board of directors of the participating corporation approving, proposing, submitting, recommending or otherwise respecting the plan of merger or share exchange is not necessary and shareholders of the participating corporation are not entitled to receive notice of or to dissent from the plan of merger or share exchange.

[2003, c. 344, Pt. B, §100 (AMD) .]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF). 2003, c. 344, §§B98-100 (AMD). 2003, c. 631, §22 (AMD). 2011, c. 274, §§52-54 (AMD).

§1105. MERGER BETWEEN PARENT CORPORATION AND SUBSIDIARY CORPORATION OR BETWEEN SUBSIDIARY CORPORATIONS

1. **Merger of subsidiary corporations.** A domestic parent corporation that owns shares of a domestic or foreign subsidiary corporation that carry at least 90% of the voting power of each class and series of the outstanding shares of the subsidiary that have voting power may merge the subsidiary into the parent corporation or another such subsidiary or may merge the parent corporation into the subsidiary without the approval of the board of directors or shareholders of the subsidiary unless the articles of incorporation of any of the corporations otherwise provide and unless, in the case of a foreign subsidiary, approval by the subsidiary's board of directors or shareholders is required by the laws under which the subsidiary is organized.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

2. **Notice to shareholders.** If approval of a merger by a subsidiary corporation's shareholders is not required under subsection 1, the parent corporation shall, within 10 days after the effective date of the merger, notify each of the subsidiary's shareholders that the merger has become effective.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

3. **Provisions of merger.** Except as provided in subsections 1 and 2, a merger between a parent corporation and a subsidiary corporation is governed by the provisions of this chapter applicable to mergers generally.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF).

§1106. ARTICLES OF MERGER OR SHARE EXCHANGE

1. **Signing of plan of merger or share exchange.** After a plan of merger or share exchange has been adopted and approved as required by this Act, articles of merger or share exchange must be signed on behalf of each party to the merger or share exchange by an officer or other duly authorized representative. The articles must set forth:

A. The names, types of entity and jurisdictions of the parties to the merger or share exchange and the date on which the merger or share exchange occurred or is to be effective; [2003, c. 344, Pt. B, §101 (AMD).]

B. If the articles of incorporation of the survivor of a merger are amended or if a new corporation is created as a result of a merger, the amendments to the survivor's articles of incorporation or the articles of incorporation of the new corporation; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. If the plan of merger or share exchange required approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement that the plan was duly approved by the shareholders and, if voting by any separate voting group was required, by each separate voting group in the manner required by this Act and the corporation's articles of incorporation; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. If the plan of merger or share exchange did not require approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement to that effect; and [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

E. For each foreign corporation and eligible entity that was a party to the merger or share exchange, a statement that the participation of the foreign corporation or eligible entity was duly authorized as required by the organic law of the corporation or eligible entity. [2003, c. 344, Pt. B, §101 (AMD).]

[2011, c. 274, §55 (AMD) .]

2. **File articles with Secretary of State.** Articles of merger or share exchange must be delivered to the Secretary of State for filing by the survivor of the merger or the acquiring corporation in a share exchange and take effect at the effective time provided in section 125. Articles of merger or share exchange filed under this section may be combined with any filing required under the organic law of any domestic eligible entity involved in the transaction if the combined filing satisfies the requirements of both this section and the organic law.

[2003, c. 344, Pt. B, §102 (AMD) .]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF). 2003, c. 344, §§B101,102 (AMD). 2011, c. 274, §55 (AMD).

§1107. EFFECT OF MERGER OR SHARE EXCHANGE

1. **Merger.** When a merger becomes effective:

A. The corporation or eligible entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be; [2003, c. 344, Pt. B, §103 (AMD).]

B. The separate existence of every corporation or eligible entity that is merged into the survivor ceases; [2003, c. 344, Pt. B, §103 (AMD).]

C. All property owned by and every contract right possessed by each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment; [2003, c. 344, Pt. B, §103 (AMD).]

D. All liabilities of each corporation or eligible entity that is merged into the survivor are vested in the survivor; [2003, c. 344, Pt. B, §103 (AMD).]

E. The name of the survivor may but need not be substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

F. The articles of incorporation or organizational documents of the survivor are amended to the extent provided in the plan of merger; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

G. The articles of incorporation or organizational documents of a survivor that is created by the merger become effective; and [2003, c. 344, Pt. B, §103 (AMD).]

H. The shares of each corporation that is a party to the merger and the eligible interests in an eligible entity that is a party to a merger that are to be converted under the plan of merger into shares, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash or other property or any combination thereof are converted, and the former holders of the shares or eligible interests are entitled only to the rights provided to them in the plan of merger or to any rights they may have under chapter 13 or the organic law of the eligible entity. [2003, c. 344, Pt. B, §103 (AMD).]

[2003, c. 344, Pt. B, §103 (AMD) .]

2. **Share exchange.** When a share exchange becomes effective, the shares of each domestic corporation that are to be exchanged for shares, other securities, eligible interests, obligations, rights to acquire shares or other securities or eligible interests, cash or other property or any combination thereof are entitled only to the rights provided to them in the plan of share exchange or to any rights they may have under chapter 13.

[2003, c. 344, Pt. B, §103 (AMD) .]

3. **Shareholder's liabilities and obligations.** A person who becomes subject to owner liability for some or all of the debts, liabilities or obligations of any entity as a result of a merger or share exchange has owner liability only to the extent provided in the organic law of the entity and only for those debts, liabilities and obligations that arise after the effective time of the articles of merger or share exchange.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

4. **Foreign corporation.** When a merger becomes effective, a foreign corporation or a foreign eligible entity that is the survivor of the merger is deemed to:

A. Agree that service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is a party to the merger who exercise appraisal rights may be made in the manner provided in Title 5, section 113; and [2007, c. 323, Pt. C, §16 (AMD); 2007, c. 323, Pt. G, §4 (AFF).]

B. Agree to promptly pay the amount, if any, to which the shareholders under paragraph A are entitled under chapter 13. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2007, c. 323, Pt. C, §16 (AMD); 2007, c. 323, Pt. G, §4 (AFF) .]

5. **Effect of merger or share exchange on liability.** The effect of a merger or share exchange on the owner liability of a person who had owner liability for some or all of the debts, obligations or liabilities of a party to the merger or share exchange is as follows.

A. The merger or share exchange does not discharge any liability under the organic law of the entity in which the person was a shareholder, member or interest holder to the extent any such owner liability arose before the effective time of the articles of merger or share exchange. [2003, c. 344, Pt. B, §103 (AMD).]

B. The person does not have owner liability under the organic law of the entity in which the person was a shareholder, member or interest holder prior to the merger or share exchange for any debt, obligation or liability that arises after the effective time of the articles of merger or share exchange. [2003, c. 344, Pt. B, §103 (AMD).]

C. The provisions of the organic law of any entity for which the person had owner liability before the merger or share exchange continue to apply to the collection or discharge of any owner liability preserved by paragraph A, as if the merger or share exchange had not occurred. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. The person has whatever rights of contribution from other persons are provided by the organic law of the entity for which the person had owner liability with respect to any owner liability preserved by paragraph A, as if the merger or share exchange had not occurred. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2003, c. 344, Pt. B, §103 (AMD) .]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF). 2003, c. 344, §B103 (AMD). 2007, c. 323, Pt. C, §16 (AMD). 2007, c. 323, Pt. G, §4 (AFF).

§1108. ABANDONMENT OF MERGER OR SHARE EXCHANGE

1. **Abandoned merger or share exchange prior to becoming effective.** Unless otherwise provided in a plan of merger or share exchange or in the laws under which a foreign business corporation or a domestic or foreign eligible entity that is a party to a merger or a share exchange is organized or by which it is governed, after the plan has been adopted and approved as required by this chapter, and at any time before the merger or share exchange has become effective, the merger or share exchange may be abandoned by a domestic business corporation that is a party to the merger or share exchange without action by the party's shareholders, in accordance with any procedures set forth in the plan of merger or share exchange or, if procedures are not set forth in the plan, in the manner determined by the corporation's board of directors, subject to any contractual rights of other parties to the merger or share exchange.

[2003, c. 344, Pt. B, §103 (AMD) .]

2. **Abandoned merger or share exchange after articles of merger or share exchange are filed.** If a merger or share exchange is abandoned under subsection 1 after articles of merger or share exchange have been filed with the Secretary of State under section 1106, subsection 2 but before the merger or share exchange has become effective, a statement that the merger or share exchange has been abandoned in accordance with this section, signed on behalf of a party to the merger or share exchange by an officer or other duly authorized representative, must be delivered to the Secretary of State for filing prior to the effective date of the merger or share exchange. The statement must also include the names, types of entity and the jurisdictions of the parties to the merger or share exchange. Upon filing, the statement takes effect and the merger or share exchange is considered abandoned and does not become effective.

[2011, c. 274, §56 (AMD) .]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF). 2003, c. 344, §B103 (AMD). 2011, c. 274, §56 (AMD).

§1109. REQUIRED VOTE OF SHAREHOLDERS IN CERTAIN BUSINESS COMBINATIONS

1. **Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with a specified person. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. "Announcement date," when used in reference to any business combination, means the date of the first public announcement of the final, definitive proposal for that business combination. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. "Associate," when used to indicate a relationship with a person, means:

(1) Any corporation or organization of which that person is a director, officer or partner or is, directly or indirectly, the beneficial owner of 10% or more of any class of voting shares;

(2) Any trust or other estate in which that person has a substantial beneficial interest or to which that person serves as trustee or in a similar fiduciary capacity; and

(3) Any relative or spouse of that person, or any relative of that spouse, who has the same home as that person. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. "Beneficial owner," when used with respect to shares, means a person that:

(1) Individually or with or through any affiliate or associate, beneficially owns shares, directly or indirectly;

(2) Individually or with or through any affiliate or associate, has the right to:

(a) Acquire shares, whether that right is exercisable immediately or only after the passage of time, pursuant to any agreement, arrangement or understanding, whether or not in writing, or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise, except that a person is not considered the beneficial owner of shares tendered pursuant to a tender or exchange offer made by that person or any of that person's affiliates or associates until the tendered shares are accepted for purchase or exchange; or

(b) Vote shares pursuant to any agreement, arrangement or understanding, whether or not in writing, except that a person is not considered the beneficial owner of any shares under this division if the agreement, arrangement or understanding to vote shares arises solely from a revocable proxy given in response to a proxy solicitation made in accordance with the applicable rules and regulations under the Exchange Act, and is not then reportable on a Schedule 13D under the Exchange Act, or any comparable or successor report; or

(3) Has any agreement, arrangement or understanding, whether or not in writing, for the purpose of acquiring, holding, voting, except voting pursuant to a revocable proxy as described in subparagraph (2), or disposing of shares with another person who beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, the shares. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

E. "Business combination," when used in reference to any domestic corporation and any interested shareholder of that domestic corporation, means:

(1) Any merger or share exchange of that domestic corporation or any subsidiary of that domestic corporation with that interested shareholder, any other corporation, whether or not it is an interested shareholder of that domestic corporation, that is, or after a merger or share exchange would be, an affiliate or associate of that interested shareholder, or any other corporation if the merger or share exchange is caused by that interested shareholder and as a result of that merger or share exchange this section is not applicable to the surviving corporation;

(1-A) Any conversion or domestication proposed by an interested shareholder or for which an interested shareholder votes, as a result of which this section is not applicable to the resulting entity;

(2) Any sale, lease, exchange, mortgage, pledge, transfer or other disposition, in one transaction or a series of transactions, of assets of that domestic corporation or any subsidiary of that domestic corporation having an aggregate market value equal to 10% or more of the aggregate market value, or book value determined in accordance with good accounting practices, of all the assets, determined on a consolidated basis, of that domestic corporation, having an aggregate market value equal to 10% or more of the aggregate market value of all the outstanding shares of that domestic corporation, or representing 10% or more of the earning power or income, determined on a consolidated basis, of that domestic corporation proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with that interested shareholder or any affiliate or associate of that interested shareholder;

(3) The issuance or transfer by that domestic corporation or any subsidiary of that domestic corporation, in one transaction or a series of transactions, of any shares of that domestic corporation or any subsidiary of that domestic corporation that has an aggregate market value equal to 5% or more of the aggregate market value of all the outstanding shares of that domestic corporation to that interested shareholder or any affiliate or associate of that interested shareholder, except pursuant to the exercise of warrants or rights to purchase shares offered, or a dividend or distribution paid or made, pro rata to all shareholders of that domestic corporation;

(4) The adoption of any plan or proposal for the liquidation or dissolution of that domestic corporation proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with that interested shareholder or any affiliate or associate of that interested shareholder;

(5) Any reclassification of securities, including, without limitation, any share split, share dividend or other distribution of shares, or any reverse share split, or recapitalization of that domestic corporation, or any merger or consolidation of that domestic corporation, with any subsidiary of that domestic corporation, or any other transaction, whether or not with, or into, or otherwise involving that interested shareholder, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with that interested shareholder or any affiliate or associate of that interested shareholder, any of which has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of voting shares or securities convertible into voting shares of that domestic corporation or any subsidiary of that domestic corporation that is directly or indirectly owned by that interested shareholder or any affiliate or associate of that interested shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(6) Any receipt by that interested shareholder or any affiliate or associate of that interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the domestic corporation, of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through that domestic corporation. [2003, c. 344, Pt. B, §104 (AMD).]

F. "Control," including the terms "controlling," "controlled by" and "under common control with," means 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 shares, by contract or otherwise. A person's beneficial ownership of 10% or more of the outstanding voting shares of a corporation creates a presumption that that person has control of that corporation. Notwithstanding this paragraph, a person is not considered to have control of a corporation if that person holds voting power, in good faith and not for the purpose of circumventing this paragraph, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of that corporation. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

G. "Exchange Act" means the United States Securities Exchange Act of 1934 as that Act has been or may be amended from time to time. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

H. "Interested shareholder," when used in reference to any domestic corporation, means any person, other than that domestic corporation or any subsidiary of that domestic corporation, that:

(1) Is the beneficial owner, directly or indirectly, of 25% or more of the outstanding voting shares of that domestic corporation; or

(2) Is an affiliate or associate of that domestic corporation and at any time within the 5-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of 25% or more of the outstanding voting shares of that domestic corporation. For the purpose of determining whether a person is an interested shareholder pursuant to this paragraph, the number of shares of voting shares of that domestic corporation considered to be outstanding must include shares considered to be beneficially owned by the person through application of paragraph D, but does not include any other unissued voting shares of that domestic corporation that may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise. The term "interested shareholder" does not include any person whose ownership of voting shares in excess of the 25% limitation set forth in this paragraph is the result of action taken solely by the corporation and not caused directly or indirectly by that person; however, that person is an interested shareholder if thereafter that person acquires additional voting shares of

the corporation, except as a result of further corporate action not caused, directly or indirectly, by that person. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

I. "Market value," when used in reference to property of any domestic corporation, means:

(1) In the case of shares, the highest closing sale price during the 30-day period immediately preceding the date in question of a share on the composite tape for New York Stock Exchange listed stocks; or, if that share is not quoted on that composite tape or, if that share is not listed on that exchange, then on the principal United States Securities Exchange registered under the Exchange Act on which that share is listed, or, if that share is not listed on any such exchange, the highest closing bid quotation with respect to the share during the 30-day period preceding the date in question on the National Association of Securities Dealers Automated Quotations System, or any system then in use, or, if no such quotations are available, the fair market value on the date in question of the share as determined in good faith by the board of directors of that corporation; and

(2) In the case of property other than cash or shares, the fair market value of that property on the date in question as determined in good faith by the board of directors of that domestic corporation. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

J. "Share" means:

(1) Any share or similar security, any certificate of interest, any participation in any profit-sharing agreement, any voting trust certificate or any certificate of deposit for shares; and

(2) Any security convertible, with or without consideration, into shares or any warrant, call or other option or privilege of buying shares without being bound to do so, or any other security carrying any right to acquire, subscribe to or purchase shares. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

K. "Share acquisition date," with respect to any person and any domestic corporation, means the date that the person first becomes an interested shareholder of that domestic corporation. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

L. "Subsidiary" of any domestic corporation means any other corporation of which voting shares having 50% or more of the votes entitled to be cast is owned, directly or indirectly, by that domestic corporation. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

M. "Voting shares" means shares of a corporation entitled to vote generally in the election of directors. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2003, c. 344, Pt. B, §104 (AMD) .]

2. Business combination. Notwithstanding anything to the contrary in this Act, except subsection 3, a domestic corporation may not engage in any business combination for a period of 5 years following an interested shareholder's share acquisition date unless that business combination is:

A. Approved by the board of directors of that domestic corporation prior to that interested shareholder's share acquisition date; or [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. Approved, subsequent to that interested shareholder's share acquisition date, by the board of directors of that domestic corporation and authorized by the affirmative vote, at a meeting called for that purpose, of at least a majority of the outstanding voting shares not beneficially owned by that interested shareholder or any affiliate or associate of that interested shareholder or by persons who are either directors or officers and also employees of that domestic corporation. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

3. **Exemptions.** This section does not apply to business combinations as provided in this subsection.

A. Unless the articles of incorporation of a domestic corporation provide otherwise, this section does not apply to any business combination of that domestic corporation if that domestic corporation did not have a class of voting shares registered or traded on a national securities exchange or registered with the United States Securities and Exchange Commission pursuant to 15 United States Code, Section 78 l(g) on that interested shareholder's share acquisition date. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. Unless the articles of incorporation of that domestic corporation provide otherwise, this section does not apply to any business combination involving a domestic corporation that does not have any interested shareholders other than an interested shareholder who was an interested shareholder immediately prior to the effective date of this section unless, subsequent to the effective date of this section, that interested shareholder increased its proportion of that domestic corporation's outstanding voting shares to a proportion in excess of the proportion of voting shares that interested shareholder held immediately prior to the effective date of this section. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. This section does not apply to any business combination involving a domestic corporation that does not have an interested shareholder other than an interested shareholder of that domestic corporation that became an interested shareholder inadvertently if that interested shareholder:

(1) As soon as practicable divests itself of a sufficient amount of the voting shares of that domestic corporation so that the interested shareholder no longer is the beneficial owner, directly or indirectly, of 25% or more of the outstanding voting shares of that domestic corporation; and

(2) Has not been at any time within the 5-year period preceding the announcement date with respect to that business combination, an interested shareholder of that domestic corporation but for that inadvertent acquisition. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. This section does not apply to any business combination involving a domestic corporation that, in its original articles of incorporation, has expressly elected not to be governed by this section. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

E. This section does not apply to any business combination involving a domestic corporation that, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws expressly electing not to be governed by this section; however, in addition to any other vote required by law, the amendment to the articles of incorporation or bylaws must be approved by the affirmative vote of at least 66 2/3% of the shares entitled to vote. An amendment adopted pursuant to this paragraph is effective immediately. A bylaw amendment adopted pursuant to this paragraph may not be further amended or repealed by the board of directors. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

The requirements of this section are in addition to the requirements of applicable law, including this Act, and any additional requirements contained in the articles of incorporation or bylaws of a domestic corporation with respect to business combinations as defined in this section. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF). 2003, c. 344, §B104 (AMD).

§1110. RIGHT OF SHAREHOLDERS TO RECEIVE PAYMENT FOR SHARES FOLLOWING CONTROL TRANSACTION

1. **Shareholders entitled to rights; exceptions.** A holder of the voting shares of a corporation that becomes the subject of a control transaction described in subsection 2 is entitled to the rights and remedies provided in this section, unless the articles of incorporation provide that this section is not applicable to the corporation.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

2. **Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Controlling person" means:

(1) A person who has, or a group of persons acting in concert that has, voting power over voting shares of the corporation that entitle the holders of those shares to cast at least 25% of the votes that all shareholders are entitled to cast in an election of the directors of the corporation; or

(2) A person who has, or a group of persons acting in concert that has, voting power over at least 25% of the shares in any class of shares entitled to elect all the directors, or any specified number of them.

Notwithstanding this paragraph, a person or group of persons that would otherwise be a controlling person within the meaning of this subsection is not considered a controlling person unless, subsequent to the effective date of this section, that person or group increases the percentage of outstanding voting shares of the corporation over which that person or group has voting power to a percentage in excess of the percentage of outstanding voting shares of the corporation over which that person or group had voting power on the effective date of this section, and to at least the amount specified in this paragraph.

For the purposes of this section, a person is not a controlling person if that person holds voting power, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee or trustee for one or more beneficial owners who do not individually or, if they are a group acting in concert, as a group have the voting power specified in this paragraph or who are not considered a controlling person under this paragraph. A person has voting power over a voting share if that person has or shares, directly or indirectly, through any option, contract, arrangement, understanding, voting trust, conversion right or relationship, or by acting jointly or in concert or otherwise, the power to vote, or to direct the voting of, that voting share.

A person engaged in business as an underwriter or group consisting of persons engaged in business as underwriters is not a controlling person under this paragraph if that person or group holds voting power specified in this paragraph, in good faith and not for the purpose of circumventing this section, over shares of the corporation acquired through participation in good faith in a firm commitment underwriting of an offering of shares registered under the United States Securities Act of 1933. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. "Control transaction" means the acquisition by a person or group of the status of a controlling person. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. "Control transaction date" means the date on which a controlling person becomes a controlling person. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. "Demanding shareholder" means a shareholder who has made a demand for payment pursuant to subsection 4. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

3. **Notice of control transaction to be given to shareholders.** Within 15 days of the control transaction date, notice that a control transaction has occurred must be given by the controlling person to each shareholder of the corporation holding voting shares. If the controlling person so requests, the corporation shall, at the option of the corporation and at the expense of the controlling person, either furnish a list of all shareholders holding voting shares to the person or group or mail the notice to those shareholders. A copy of this section of law must be included in, or enclosed with, the notice. Any list provided by the corporation to a controlling person pursuant to this subsection may be used only for the purpose of giving the notice required by this subsection.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

4. **Shareholder demand for payment.** After the control transaction date, any holder of voting shares of the corporation, prior to or within 30 days after the notice required by subsection 3 is given, which time period must be specified in the notice, may make written demand on the controlling person for payment of the amount provided in subsection 5 with respect to the voting shares of the corporation held by the shareholder, and the controlling person shall pay that amount to the shareholder. The demand of the shareholder must state the number and class or series, if any, of the shares owned by the shareholder with respect to which the demand is made.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

5. **Shareholder entitled to receive payment for shares.** A shareholder making written demand under subsection 4 is entitled to receive cash for each of the shareholder's shares in an amount equal to the fair value of each voting share as of the day prior to the control transaction date, taking into account all relevant factors, including an increment representing a proportion of any value payable for acquisition of control of the corporation.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

6. **Submission of certificates; notation.** At the time the shareholder files demand for payment for shares pursuant to subsection 4, or within 20 days after filing the demand, each shareholder demanding payment with respect to certificated shares shall submit the certificate or certificates representing the shareholder's shares to the corporation or the corporation's transfer agent for notation on the certificate that the demand has been made; the certificates must be returned promptly after entry of the notation. A shareholder's failure to submit the certificates terminates, at the option of the controlling person, the shareholder's rights under this section, unless a court of competent jurisdiction, for good and sufficient cause shown, otherwise directs. If shares represented by a certificate on which notation has been so made are transferred, each new certificate issued for those shares must bear a similar notation, together with the name of the original holder of the shares who made the written demand, and a transferee of the shares does not acquire by the transfer any rights in the corporation other than those that the original demanding shareholder had after making demand for payment of the fair value of the shares.

Following a demand for payment with respect to shares without certificates, a notation that a demand for payment pursuant to subsection 4, together with the name of the original holder of the shares who made the written demand, must be included in the information statement required by section 627, subsection 2. A transferee of shares without certificates as to which a notation is included in the information statement required by section 627, subsection 2 does not acquire by the transfer any rights in the corporation other than those that the original demanding shareholder had after making demand for payment of the fair value of the shares.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

7. **Written offer; balance sheet.** Within 10 days after the expiration of the period provided in subsection 4 for making demand, the controlling person shall make a written offer to each demanding shareholder to pay for those shares at a specified price determined by the controlling person to be the fair

value of those shares. The offer must be made at the same price per share to all demanding shareholders of the same class. The notice and offer must be accompanied by a balance sheet of the corporation as of the latest available date and not more than 12 months prior to the making of the offer and a profit and loss statement of the corporation for the 12-month period ending on the date of the balance sheet.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

8. **Agreement on fair value; payment.** If, within 30 days after the expiration of the period provided in subsection 4 for making demand, the fair value of the shares is agreed upon between any demanding shareholder and the controlling person, payment for those shares must be made within 90 days after the date on which the written offer required by subsection 7 is made, upon surrender of the certificate or certificates representing those shares, if certificated. Upon payment of the agreed value, the demanding shareholder ceases to have any interest in the shares.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

9. **Failure to reach agreement on fair value of shares.** If, within the additional 30-day period prescribed by subsection 8, one or more demanding shareholders and the controlling person have failed to agree as to the fair value of shares:

A. The controlling person may, or shall, if the controlling person receives a demand as provided in subparagraph (1), bring an action in the Superior Court in the county in this State where the registered office of the corporation is located asking that the fair value of those shares be found and determined. This action:

(1) Must be brought by the controlling person, if the controlling person receives a written demand for suit from any demanding shareholder, which demand is made within 60 days after the date on which the written offer required by subsection 7 was made. The controlling person shall bring the action within 30 days after receipt of the written demand; or

(2) In the absence of a demand for suit, may be brought by the controlling person at that controlling person's election at any time from the expiration of the additional 30-day period prescribed by subsection 8 until the expiration of 60 days after the date on which the written offer required by subsection 7 was made; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. If the controlling person fails to institute the action within the period specified in paragraph A, a demanding shareholder may bring the action in the name of the controlling person; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. An action may not be brought, either by the controlling person or by a demanding shareholder, more than 6 months after the date on which the written offer required by subsection 7 was made; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. In any action, whether initiated by the controlling person or by a demanding shareholder, all demanding shareholders, wherever residing, except those who have agreed with the controlling person upon the price to pay for their shares, must be made parties to the proceeding as an action against their shares quasi in rem. A copy of the complaint must be served on each demanding shareholder who is a resident of this State as in other civil actions and must be served by registered or certified mail or by personal service outside the State on each demanding shareholder who is a nonresident. The jurisdiction of the court is plenary and exclusive; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

E. For each demanding shareholder for whom the controlling person has brought an action for the determination of the value of the shares, the court shall determine whether that demanding shareholder has satisfied the requirements of this section and is entitled to receive payment for the demanding shareholder's shares; the burden is on that shareholder to prove that the shareholder is entitled to receive payment. The court shall then proceed to fix the fair value of the shares. The court may appoint one or

more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers have the power and authority specified in the order of their appointment or an amendment to the order of appointment; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

F. All shareholders who are parties to the proceedings are entitled to judgment against the controlling person for the amount of the fair value of their shares, except for any shareholder whom the court has determined is not entitled to receive payment for the shareholder's shares. The judgment may be payable only upon and concurrently with the surrender to the controlling person of the certificate or certificates representing those shares, if certificated. Upon payment of the judgment, the demanding shareholder ceases to have any interest in those shares; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

G. The judgment must include an allowance for interest at a rate the court finds fair and equitable in all the circumstances, from the control transaction date to the date of payment. If the court finds that the refusal of any shareholder to accept the controlling person's offer of payment for that shareholder's shares was arbitrary, vexatious or not in good faith, the court may in its discretion refuse to allow interest to that shareholder; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

H. The costs and expenses of a proceeding must be determined by the court and assessed against the controlling person, but all or part of those costs and expenses may be apportioned and assessed as the court determines equitable against any or all of the demanding shareholders who are parties to the proceeding to whom the controlling person has made an offer to pay for the shares if the court finds that the action of those shareholders in failing to accept that offer was arbitrary, vexatious or not in good faith. Those expenses must include reasonable compensation for and reasonable expenses of the appraisers, but exclude the fees and expenses of counsel for any party and must exclude the fees and expenses of experts employed by any party, unless the court otherwise orders for good cause. The court shall award each shareholder who is a party to the proceeding reasonable compensation for any expert employed by the shareholder in the proceeding and the shareholder's reasonable attorney's fees and expenses, if:

(1) No offer was made; or

(2) The fair value of the shares as determined materially exceeds the amount that the controlling person offered to pay for the shares; and [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

I. At all times during the pendency of any proceeding, the court may make any order that is necessary to protect the corporation, the controlling person or the demanding shareholders, or that is otherwise just and equitable. Those orders may include, without limitation, orders:

(1) Requiring the controlling person to pay the court, or post security for, the amount of the judgment or its estimated amount, either before final judgment or pending appeal;

(2) Requiring the deposit with the court of certificates representing certificated shares held by the demanding shareholders;

(3) Imposing a lien on the property of the controlling person to secure the payment of the judgment, which lien may be given priority over liens and incumbrances contracted by the controlling person after the control transaction date; and

(4) Staying the action pending the determination of any similar action pending in another court having jurisdiction. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

10. **Holding and disposal of shares acquired by payment.** Shares acquired by a controlling person pursuant to payment of the agreed value for the shares or to payment of the judgment entered, as provided in this section, may be held and disposed of as authorized and issued shares.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

11. **Minors.** In the case of a shareholder who is a minor or otherwise legally incapacitated, the demand required by subsection 4 may be made either by the shareholder, notwithstanding the shareholder's legal incapacity, by the shareholder's guardian or by any person acting for the shareholder as next friend. The shareholder is bound by the time limitations set forth in this section, notwithstanding the shareholder's legal incapacity.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

12. **Appeals.** Appeals from judgments in actions brought under this section are permitted as in other civil actions in which equitable relief is sought.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

13. **Compliance; shareholder rights.** If a person or group of persons proposing to engage in a control transaction complies with the requirements of this section in connection with the control transaction, the effectiveness of the rights afforded in this section to shareholders may be conditioned upon the consummation of the control transaction.

The person or group of persons shall give prompt written notice of the satisfaction of any condition under this subsection to each shareholder who has made demand as provided in this section.

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

14. **Application.** This section does not apply to:

A. Any corporation that is the subject of a control transaction and that does not have a class of voting shares:

(1) Registered or traded on a national securities exchange; or

(2) Registered with the Securities and Exchange Commission pursuant to the Act of Congress known as the Securities Exchange Act of 1934, as that Act has been or may be amended; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

B. A person or group that inadvertently becomes a controlling person if that controlling person divests itself of a sufficient amount of its voting shares so that it is no longer a controlling person, as soon as practicable, but in no event more than 30 days after that person or group receives notice from the corporation that it has become a controlling person, or to any corporation that is the subject of a control transaction and that on the effective date of this section was a subsidiary of any other corporation. For purposes of this paragraph, "subsidiary" means any corporation as to which any other corporation has acquired or has the right to acquire, directly or indirectly, through the exercise of warrants, options and rights and the conversion of all convertible securities, whether issued or granted by the subsidiary or otherwise, voting power over voting shares of the subsidiary that would entitle the holders of those shares to cast in excess of 50% of the votes that all shareholders are entitled to cast in the election of directors of that subsidiary; except that a subsidiary does not cease to be a subsidiary as long as the corporation remains a controlling person within the meaning of subsection 2; [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

C. Any person or group that becomes a controlling person solely as a result of the corporation's purchase or redemption of its own voting shares; or [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

D. Any corporation incorporated prior to the effective date of this section that was not subject to former Title 13-A, section 910 as it existed immediately prior to the effective date of this section because that corporation had adopted the provision in its bylaws described in former section 910, subsection 1, paragraph A or had adopted the provision in its articles of incorporation described in former section 910, subsection 1, paragraph B, if in either case that provision is not subsequently rescinded by an amendment to the articles of incorporation. [2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF).]

[2001, c. 640, Pt. A, §2 (NEW); 2001, c. 640, Pt. B, §7 (AFF) .]

SECTION HISTORY
2001, c. 640, §A2 (NEW). 2001, c. 640, §B7 (AFF).

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