

1 **UTAH REVISED BUSINESS CORPORATION ACT**

2 **MODIFICATIONS**

3 2017 GENERAL SESSION

4 STATE OF UTAH

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6 **LONG TITLE**

7 **General Description:**

8 This bill modifies provisions regulating business corporations.

9 **Highlighted Provisions:**

10 This bill:

- 11 ▶ amends the provision addressing general standards of conduct for directors and
- 12 officers;
- 13 ▶ enacts provisions related to business combinations; and
- 14 ▶ makes technical changes.

15 **Money Appropriated in this Bill:**

16 None

17 **Other Special Clauses:**

18 None

19 **Utah Code Sections Affected:**

20 AMENDS:

21 **16-10a-840**, as last amended by Laws of Utah 1993, Chapter 266

22 ENACTS:

23 **16-10a-1801**, Utah Code Annotated 1953

24 **16-10a-1802**, Utah Code Annotated 1953

25 **16-10a-1803**, Utah Code Annotated 1953

26 **16-10a-1804**, Utah Code Annotated 1953

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

29 Section 1. Section **16-10a-840** is amended to read:

30 **16-10a-840. General standards of conduct for directors and officers.**

31 (1) Each director shall discharge ~~[his]~~ the director's duties as a director, including

32 duties as a member of a committee, and each officer with discretionary authority shall  
33 discharge [his] the officer's duties under that authority:

34 (a) in good faith;

35 (b) with the care an ordinarily prudent person in a like position would exercise under  
36 similar circumstances; and

37 (c) in a manner the director or officer reasonably believes to be in the best interests of  
38 the corporation.

39 (2) In discharging [his] the director's or officer's duties, a director or officer is entitled  
40 to rely on information, opinions, reports, or statements, including financial statements and  
41 other financial data, if prepared or presented by:

42 (a) one or more officers or employees of the corporation, or of any other corporation of  
43 which at least 50% of the outstanding shares of stock entitling the holder of the shares to vote  
44 in the election of directors is owned directly or indirectly by the corporation, whom the director  
45 or officer reasonably believes to be reliable and competent in the matters presented;

46 (b) legal counsel, public accountants, or other persons as to matters the director or  
47 officer reasonably believes are within the person's professional or expert competence; or

48 (c) in the case of a director, a committee of the board of directors of which ~~he~~ the  
49 director is not a member[-];

50 (i) if the committee is designated in accordance with the articles of incorporation or the  
51 bylaws;

52 (ii) if the information, opinion, report, or statement is within the committee's  
53 designated authority;

54 (iii) if the director reasonably believes the committee merits confidence[-]; and

55 (iv) subject to Subsection (3), so long as in so relying the director is acting in good  
56 faith with the degree of care contemplated by Subsection (1)(b).

57 (3) A director or officer is not acting in good faith if ~~he~~ the director or officer has  
58 knowledge concerning the matter in question that makes reliance otherwise permitted by  
59 Subsection (2) unwarranted.

60 (4) A director or officer is not liable to the corporation, its shareholders, or any  
61 conservator or receiver, or any assignee or successor-in-interest thereof, for any action taken, or  
62 any failure to take any action, as an officer or director, as the case may be, unless:

63 (a) the director or officer has breached or failed to perform the duties of the office in  
64 compliance with this section; and

65 (b) the breach or failure to perform constitutes gross negligence, willful misconduct, or  
66 intentional infliction of harm on the corporation or the shareholders.

67 (5) (a) For purposes of this Subsection (5) and notwithstanding Section 16-10a-102,  
68 "control" means the possession, directly or indirectly, of the power to direct or cause the  
69 direction of the management and policies of the corporation whether through the ownership of  
70 voting stock, by contract, or otherwise.

71 (b) In taking action, including action that may involve or relate to a change or potential  
72 change in the control of the corporation, the director is entitled to consider:

73 (i) both the long-term and the short-term interests of the corporation and the  
74 corporation's shareholders; and

75 (ii) the effects that the corporation's actions may have in the long-term or short-term on  
76 any of the following:

77 (A) the prospects for potential growth, development, productivity, and profitability of  
78 the corporation;

79 (B) the corporation's current employees;

80 (C) the corporation's retired employees and other beneficiaries receiving or entitled to  
81 receive retirement, welfare, or similar benefits from or pursuant to any plan sponsored, or  
82 agreement entered into, by the corporation;

83 (D) the corporation's customers and creditors; and

84 (E) the ability of the corporation to provide, as a going concern, goods, services,  
85 employment opportunities, employment benefits, and otherwise contribute to the communities  
86 in which the corporation does business.

87 (c) This Subsection (5) does not create any duty owed by a director to any person to  
88 consider or afford any particular weight to any factor listed in Subsection (5)(b) or abrogate any  
89 duty of the director, either statutory or recognized by common law or court decisions.

90 Section 2. Section **16-10a-1801** is enacted to read:

91 **Part 18. Business Combinations**

92 **16-10a-1801. Title.**

93 This part is known as "Business Combinations."

94 Section 3. Section **16-10a-1802** is enacted to read:

95 **16-10a-1802. Definitions.**

96 As used in this part:

97 (1) "Affiliate" means the same as that term is defined in Section 16-10a-102.

98 (2) "Announcement date," when used in reference to a business combination, means  
99 the date of the first public announcement of the final, definitive proposal for the business  
100 combination.

101 (3) "Associate," when used to indicate a relationship with a person, means:

102 (a) a corporation or organization of which the person is an officer or partner or is,  
103 directly or indirectly, the beneficial owner of 10% or more of any class of voting stock;

104 (b) a trust or other estate in which the person has a substantial beneficial interest or as  
105 to which the person serves as trustee or in a similar fiduciary capacity; and

106 (c) a relative or spouse of the person, or any relative of the spouse, who has the same  
107 home as the person.

108 (4) "Beneficial owner," when used with respect to stock, means a person:

109 (a) that, individually or with or through any of its affiliates or associates, beneficially  
110 owns the stock, directly or indirectly;

111 (b) that, individually or with or through any of its affiliates or associates, has:

112 (i) the right to acquire the stock:

113 (A) whether the right is exercisable immediately or only after the passage of time,  
114 pursuant to an agreement, arrangement, or understanding, whether or not in writing; or

115 (B) upon the exercise of conversion rights, exchange rights, warrants, or options, or  
116 otherwise, except that a person may not be considered the beneficial owner of stock tendered  
117 pursuant to a tender or exchange offer made by the person or an affiliate or associate of the  
118 person until the tendered stock is accepted for purchase or exchange; or

119 (ii) the right to vote the stock pursuant to an agreement, arrangement, or understanding,  
120 whether or not in writing, except that a person may not be considered the beneficial owner of  
121 any stock under this Subsection (4)(b)(ii) if the agreement, arrangement, or understanding to  
122 vote the stock arises solely from a revocable proxy or consent given in response to a proxy or  
123 consent solicitation made in accordance with the applicable regulations under the Exchange  
124 Act and is not then reportable on a Schedule 13D under the Exchange Act, or any comparable

125 or successor report; or

126 (c) that has an agreement, arrangement, or understanding, whether or not in writing, for  
127 the purpose of acquiring, holding, voting, except voting pursuant to a revocable proxy or  
128 consent as described in Subsection (4)(b)(ii), or disposing of the stock with any other person  
129 that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly,  
130 the stock.

131 (5) "Business combination," when used in reference to any domestic corporation and  
132 an interested shareholder of the corporation, means:

133 (a) a merger or consolidation of the corporation or any subsidiary of the corporation  
134 with:

135 (i) the interested shareholder; or

136 (ii) any other corporation, whether or not that corporation is an interested shareholder  
137 of the corporation, that is, or after the merger or consolidation would be, an affiliate or  
138 associate of the interested shareholder;

139 (b) any sale, lease, exchange, mortgage, pledge, transfer, or other disposition, in one  
140 transaction or a series of transactions, to or with the interested shareholder or any affiliate or  
141 associate of the interested shareholder of assets of the corporation or any subsidiary of the  
142 corporation:

143 (i) having an aggregate market value equal to 10% or more of the aggregate market  
144 value of all the assets, determined on a consolidated basis, of the corporation;

145 (ii) having an aggregate market value equal to 10% or more of the aggregate market  
146 value of all the outstanding stock of the corporation; or

147 (iii) representing 10% or more of the earning power or net income, determined on a  
148 consolidated basis, of the corporation;

149 (c) the issuance or transfer by the corporation or any subsidiary of the corporation, in  
150 one transaction or a series of transactions, of any stock of the corporation or any subsidiary of  
151 the corporation that has an aggregate market value equal to 5% or more of the aggregate market  
152 value of all the outstanding stock of the corporation to the interested shareholder or any  
153 affiliate or associate of the interested shareholder except pursuant to the exercise of warrants or  
154 rights to purchase stock offered, or a dividend or distribution paid or made, pro rata to all  
155 shareholders of the corporation;

156 (d) the adoption of any plan or proposal for the liquidation or dissolution of the  
157 corporation proposed by, or pursuant to any agreement, arrangement, or understanding,  
158 whether or not in writing, with, the interested shareholder or any affiliate or associate of the  
159 interested shareholder;

160 (e) any reclassification of securities, including a stock split, stock dividend, or other  
161 distribution of stock in respect of stock, or any reverse stock split, or recapitalization of the  
162 corporation, or any merger or consolidation of the corporation with any subsidiary of the  
163 corporation, or any other transaction, whether or not with, into, or otherwise involving the  
164 interested shareholder;

165 (i) proposed by, or pursuant to any agreement, arrangement, or understanding, whether  
166 or not in writing, with, the interested shareholder or any affiliate or associate of the interested  
167 shareholder; and

168 (ii) that has the effect, directly or indirectly, of increasing the proportionate share of the  
169 outstanding shares of any class or series of voting stock or securities convertible into voting  
170 stock of the corporation or any subsidiary of the corporation that is directly or indirectly owned  
171 by the interested shareholder or any affiliate or associate of the interested shareholder, except  
172 as a result of immaterial changes due to fractional share adjustments; or

173 (f) a receipt by the interested shareholder or an affiliate or associate of the interested  
174 shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the  
175 corporation, of a loan, advance, guarantee, pledge, or other financial assistance or any tax credit  
176 or other tax advantage provided by or through the corporation.

177 (6) "Common stock" means stock other than preferred stock.

178 (7) "Consummation date," with respect to a business combination, means:

179 (a) the date of consummation of the business combination; or

180 (b) in the case of a business combination as to which a shareholder vote is taken, the  
181 later of:

182 (i) the business day before the vote; or

183 (ii) 20 days before the date of consummation of the business combination.

184 (8) (a) "Control," including the terms "controlling," "controlled by," and "under  
185 common control with," means the same as that term is defined in Section 16-10a-102.

186 (b) A person's beneficial ownership of 10% or more of a corporation's outstanding

187 voting stock creates a presumption that the person has control of the corporation.

188 (c) Notwithstanding the other provisions of this Subsection (8), a person may not be  
189 considered to have control of a corporation if the person holds voting stock, in good faith and  
190 not for the purpose of circumventing this part, as an agent, bank, broker, nominee, custodian, or  
191 trustee for one or more beneficial owners that do not individually or as a group have control of  
192 the corporation.

193 (9) "Exchange Act" means the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78a et  
194 seq. as amended.

195 (10) (a) "Interested shareholder," when used in reference to a domestic corporation,  
196 means a person, other than the corporation or a subsidiary of the corporation, that:

197 (i) is the beneficial owner, directly or indirectly, of 20% or more of the outstanding  
198 voting stock of the corporation; or

199 (ii) is an affiliate or associate of the corporation and at any time within the five-year  
200 period immediately before the date in question was the beneficial owner, directly or indirectly,  
201 of 20% or more of the then outstanding voting stock of the corporation.

202 (b) For the purpose of determining whether a person is an interested shareholder, the  
203 number of shares of voting stock of the corporation considered to be outstanding shall include  
204 shares considered to be beneficially owned by the person through application of Subsection (4),  
205 but may not include any other unissued shares of voting stock of the corporation that may be  
206 issuable pursuant to any agreement, arrangement, or understanding, or upon exercise of  
207 conversion rights, warrants, or options, or otherwise.

208 (11) "Market value," when used in reference to stock or property of a domestic  
209 corporation, means:

210 (a) in the case of stock:

211 (i) the highest closing sale price during the 30-day period immediately preceding the  
212 date in question of a share of the stock on the composite tape for New York stock  
213 exchange-listed stocks;

214 (ii) if the stock is not quoted on the composite tape or listed on the exchange described  
215 in Subsection (11)(a)(i), the highest closing sale price during the 30-day period immediately  
216 preceding the date in question on the principal United States securities exchange registered  
217 under the Exchange Act on which the stock is listed;

218 (iii) if the stock is not quoted on the composite tape or listed on the exchange described  
219 in Subsection (11)(a)(i) and is not listed on an exchange described in Subsection (11)(a)(ii), the  
220 highest closing bid quotation with respect to a share of the stock during the 30-day period  
221 preceding the date in question on the National Association of Securities Dealers, Inc.,  
222 Automated Quotations System, or any system then in use; or

223 (iv) if no quotation is available under Subsections (11)(a)(i) through (iii), the fair  
224 market value on the date in question of a share of the stock as determined by the board of  
225 directors of the corporation in good faith; and

226 (b) in the case of property other than cash or stock, the fair market value of the property  
227 on the date in question as determined by the board of directors of the corporation in good faith.

228 (12) "Preferred stock" means a class or series of stock of a domestic corporation that  
229 under the bylaws or articles of incorporation of the corporation:

230 (a) is entitled to receive payment of dividends before any payment of dividends on  
231 some other class or series of stock; or

232 (b) is entitled in the event of a voluntary liquidation, dissolution, or winding up of the  
233 corporation to receive payment or distribution of a preferential amount before a payment or  
234 distribution is received by some other class or series of stock.

235 (13) "Stock" means:

236 (a) a stock or similar security, a certificate of interest, any participation in a profit  
237 sharing agreement, a voting trust certificate, or a certificate of deposit for stock;

238 (b) a security convertible, with or without consideration, into stock;

239 (c) a warrant, call, or other option or privilege of buying stock without being bound to  
240 do so; or

241 (d) any other security carrying a right to acquire, subscribe to, or purchase stock.

242 (14) "Stock acquisition date," with respect to a person and a domestic corporation,  
243 means the date that the person first becomes an interested shareholder of the corporation.

244 (15) "Subsidiary" of a person means any other corporation of which a majority of the  
245 voting stock is owned, directly or indirectly, by the person.

246 (16) "Voting stock" means shares of capital stock of a corporation entitled to vote  
247 generally in the election of directors.

248 Section 4. Section **16-10a-1803** is enacted to read:

249 **16-10a-1803. Business combinations.**

250 (1) Notwithstanding anything to the contrary in this chapter, except Section  
251 16-10a-1804, a domestic corporation may not engage in a business combination with an  
252 interested shareholder of the corporation for a period of five years following the interested  
253 shareholder's stock acquisition date unless the business combination or the purchase of stock  
254 made by the interested shareholder on the interested shareholder's stock acquisition date is  
255 approved by the board of directors of the corporation before the interested shareholder's stock  
256 acquisition date.

257 (2) (a) If a good faith proposal is made in writing to the board of directors of the  
258 corporation regarding a business combination, the board of directors shall respond in writing,  
259 within 30 days or such shorter period, if any, as may be required by the Exchange Act, setting  
260 forth the board of directors' reasons for the board of directors' decision regarding the proposal.

261 (b) If a good faith proposal to purchase stock is made in writing to the board of  
262 directors of the corporation, unless the board of directors responds affirmatively in writing  
263 within 30 days or such shorter period, if any, as may be required by the Exchange Act, the  
264 board of directors is considered to have disapproved the proposal.

265 (3) Notwithstanding anything to the contrary in this chapter, except Subsection (2) and  
266 Section 16-10a-1804, a domestic corporation may not engage at any time in any business  
267 combination with an interested shareholder of the corporation other than a business  
268 combination specified in Subsection (4), (5), or (6).

269 (4) A domestic corporation may engage in a business combination with an interested  
270 shareholder of the corporation if:

271 (a) the business combination is approved by the board of directors of the corporation  
272 before the interested shareholder's stock acquisition date; or

273 (b) the purchase of stock made by the interested shareholder on the interested  
274 shareholder's stock acquisition date is approved by the board of directors of the corporation  
275 before the interested shareholder's stock acquisition date.

276 (5) A domestic corporation may engage in a business combination with an interested  
277 shareholder of the corporation if the business combination is approved by the affirmative vote  
278 of the holders of a majority of the outstanding voting stock not beneficially owned by the  
279 interested shareholder or an affiliate or associate of the interested shareholder at a meeting

280 called for that purpose no earlier than five years after the interested shareholder's stock  
281 acquisition date.

282 (6) A domestic corporation may engage in a business combination with an interested  
283 shareholder of the corporation if the business combination meets all of the following  
284 conditions:

285 (a) the aggregate amount of the cash and the market value as of the consummation date  
286 of consideration, other than cash to be received per share by holders of outstanding shares of  
287 common stock of the corporation in the business combination, is at least equal to the higher of  
288 the following:

289 (i) the sum of:

290 (A) the highest per share price paid by the interested shareholder at a time when the  
291 interested shareholder was the beneficial owner, directly or indirectly, of 5% or more of the  
292 outstanding voting stock of the corporation, for any shares of common stock of the same class  
293 or series acquired by the interested shareholder within the five-year period immediately before  
294 the announcement date with respect to the business combination, or within the five-year period  
295 immediately before, or in, the transaction in which the interested shareholder became an  
296 interested shareholder, whichever is higher; and

297 (B) interest compounded annually from the earliest date on which the highest per share  
298 acquisition price was paid through the consummation date at the rate for one-year United States  
299 treasury obligations from time to time in effect, less the aggregate amount of any cash  
300 dividends paid, and the market value of any dividends paid other than in cash, per share of  
301 common stock since the earliest date, up to the amount of the interest; and

302 (ii) the sum of:

303 (A) the higher of the market value per share of common stock on the announcement  
304 date with respect to the business combination or on the interested shareholder's stock  
305 acquisition date; and

306 (B) interest compounded annually from the acquisition date through the consummation  
307 date at the rate for one-year United States treasury obligations from time to time in effect, less  
308 the aggregate amount of any cash dividends paid, and the market value of any dividends paid  
309 other than in cash, per share of common stock since the acquisition date, up to the amount of  
310 the interest;

311 (b) the aggregate amount of the cash and the market value as of the consummation date  
312 of consideration other than cash to be received per share by holders of outstanding shares of  
313 any class or series of stock, other than common stock, of the corporation is at least equal to the  
314 highest of the following, whether or not the interested shareholder has previously acquired any  
315 shares of the class or series of stock:

316 (i) the sum of:

317 (A) the higher of the highest per share price paid by the interested shareholder at a time  
318 when the interested shareholder was the beneficial owner, directly or indirectly, of 5% or more  
319 of the outstanding voting stock of the corporation, for any shares of the class or series of stock  
320 acquired by the interested shareholder within the five-year period immediately before the  
321 announcement date with respect to the business combination, or within the five-year period  
322 immediately before, or in, the transaction in which the interested shareholder became an  
323 interested shareholder, whichever is higher; and

324 (B) interest compounded annually from the earliest date on which the highest per share  
325 acquisition price was paid through the consummation date at the rate for one-year United States  
326 treasury obligations from time to time in effect, less the aggregate amount of any cash  
327 dividends paid, and the market value of any dividends paid other than in cash, per share of the  
328 class or series of stock since the earliest date, up to the amount of the interest;

329 (ii) the sum of:

330 (A) the highest preferential amount per share to which the holders of shares of the class  
331 or series of stock are entitled in the event of a voluntary liquidation, dissolution, or winding up  
332 of the corporation; and

333 (B) the aggregate amount of any dividends declared or due as to which the holders are  
334 entitled before payment of dividends on some other class or series of stock, unless the  
335 aggregate amount of the dividends is included in the preferential amount; and

336 (iii) the sum of:

337 (A) the market value per share of the class or series of stock on the announcement date  
338 with respect to the business combination or on the interested shareholder's stock acquisition  
339 date, whichever is higher; and

340 (B) interest compounded annually from the acquisition date through the consummation  
341 date at the rate for one-year United States treasury obligations from time to time in effect, less

342 the aggregate amount of any cash dividends paid, and the market value of any dividends paid  
343 other than in cash, per share of the class or series of stock since the acquisition date, up to the  
344 amount of the interest;

345 (c) the consideration to be received by holders of a particular class or series of  
346 outstanding stock, including common stock of the corporation, in the business combination is  
347 in cash or in the same form as the interested shareholder has used to acquire the largest number  
348 of shares of the class or series of stock previously acquired by the interested shareholder, and  
349 the consideration shall be distributed promptly;

350 (d) the holders of all outstanding shares of stock of the corporation not beneficially  
351 owned by the interested shareholder immediately before the consummation of the business  
352 combination are entitled to receive in the business combination cash or other consideration for  
353 the shares in compliance with Subsections (6)(a), (b), and (c); and

354 (e) after the interested shareholder's stock acquisition date and before the  
355 consummation date with respect to the business combination, the interested shareholder has not  
356 become the beneficial owner of any additional shares of voting stock of the corporation except:

357 (i) as part of the transaction that resulted in the interested shareholder becoming an  
358 interested shareholder;

359 (ii) by virtue of proportionate stock splits, stock dividends, or other distributions of  
360 stock in respect of stock not constituting a business combination under Subsection  
361 16-10a-1802(5)(e);

362 (iii) through a business combination meeting the conditions of Subsection (5); or

363 (iv) through purchase by the interested shareholder at any price that, if the price is paid  
364 in an otherwise permissible business combination the announcement date and consummation  
365 date of which were the date of the purchase, would have satisfied the requirements of  
366 Subsections (4) and (5) and this Subsection (6).

367 Section 5. Section **16-10a-1804** is enacted to read:

368 **16-10a-1804. Scope of part.**

369 This part does not apply to:

370 (1) a business combination of a domestic corporation that does not have a class of  
371 voting stock registered with the Securities and Exchange Commission pursuant to Exchange  
372 Act, Sec. 12, 15 U.S.C. Sec. 78l, unless the articles of incorporation provide otherwise;

373 (2) a business combination of a domestic corporation whose articles of incorporation  
374 are amended to provide that the domestic corporation is subject to this part that:

375 (a) did not have a class of voting stock registered with the Securities and Exchange  
376 Commission pursuant to Exchange Act, Sec. 12, 15 U.S.C. Sec. 78l, on the effective date of the  
377 amendment; and

378 (b) is a business combination with an interested shareholder whose stock acquisition  
379 date is before the effective date of the amendment;

380 (3) a business combination of a domestic corporation:

381 (a) the original articles of incorporation of which contain a provision expressly electing  
382 not to be governed by this part;

383 (b) that adopts an amendment to the corporation's bylaws before May 9, 2017,  
384 expressly electing not to be governed by this part; or

385 (c) that adopts an amendment to the corporation's bylaws, approved by the affirmative  
386 vote of a majority of votes of the outstanding voting stock of the corporation, excluding the  
387 voting stock of interested shareholders and the interested shareholders' affiliates and associates,  
388 expressly electing not to be governed by this part, provided that the amendment to the bylaws:

389 (i) may not be effective until 18 months after the vote of the corporation's shareholders;  
390 and

391 (ii) may not apply to a business combination of the corporation with an interested  
392 shareholder whose stock acquisition date is on or before the effective date of the amendment;

393 (4) any business combination of a domestic corporation with an interested shareholder  
394 of the corporation that became an interested shareholder inadvertently, if the interested  
395 shareholder:

396 (a) as soon as practicable, divests itself of a sufficient amount of the voting stock of the  
397 corporation so that it no longer is the beneficial owner, directly or indirectly, of 20% or more of  
398 the outstanding voting stock of the corporation; and

399 (b) would not at any time within the five-year period preceding the announcement date  
400 with respect to the business combination have been an interested shareholder but for the  
401 inadvertent acquisition; or

402 (5) any business combination with an interested shareholder who was the beneficial  
403 owner, directly or indirectly, of 5% or more of the outstanding voting stock of the corporation

404 on May 9, 2017, and remained so to the interested shareholder's stock acquisition date.