

Effective 5/9/2017

Part 18
Business Combinations

16-10a-1801 Title.

This part is known as "Business Combinations."

Enacted by Chapter 439, 2017 General Session

16-10a-1802 Definitions.

As used in this part:

- (1) "Affiliate" means the same as that term is defined in Section 16-10a-102.
- (2) "Announcement date," when used in reference to a business combination, means the date of the first public announcement of the final, definitive proposal for the business combination.
- (3) "Associate," when used to indicate a relationship with a person, means:
 - (a) a corporation or organization of which the person is an officer or partner or is, directly or indirectly, the beneficial owner of 10% or more of any class of voting stock;
 - (b) a trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity; and
 - (c) a relative or spouse of the person, or any relative of the spouse, who has the same home as the person.
- (4) "Beneficial owner," when used with respect to stock, means a person:
 - (a) that, individually or with or through any of its affiliates or associates, beneficially owns the stock, directly or indirectly;
 - (b) that, individually or with or through any of its affiliates or associates, has:
 - (i) the right to acquire the stock:
 - (A) whether the right is exercisable immediately or only after the passage of time, pursuant to an agreement, arrangement, or understanding, whether or not in writing; or
 - (B) upon the exercise of conversion rights, exchange rights, warrants, or options, or otherwise, except that a person may not be considered the beneficial owner of stock tendered pursuant to a tender or exchange offer made by the person or an affiliate or associate of the person until the tendered stock is accepted for purchase or exchange; or
 - (ii) the right to vote the stock pursuant to an agreement, arrangement, or understanding, whether or not in writing, except that a person may not be considered the beneficial owner of any stock under this Subsection (4)(b)(ii) if the agreement, arrangement, or understanding to vote the stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable 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
 - (c) that has an agreement, arrangement, or understanding, whether or not in writing, for the purpose of acquiring, holding, voting, except voting pursuant to a revocable proxy or consent as described in Subsection (4)(b)(ii), or disposing of the stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, the stock.
- (5) "Business combination," when used in reference to any domestic corporation and an interested shareholder of the corporation, means:
 - (a) a merger or consolidation of the corporation or any subsidiary of the corporation with:

- (i) the interested shareholder; or
- (ii) any other corporation, whether or not that corporation is an interested shareholder of the corporation, that is, or after the merger or consolidation would be, an affiliate or associate of the interested shareholder;
- (b) any sale, lease, exchange, mortgage, pledge, transfer, or other disposition, in one transaction or a series of transactions, to or with the interested shareholder or any affiliate or associate of the interested shareholder of assets of the corporation or any subsidiary of the corporation:
 - (i) having an aggregate market value equal to 10% or more of the aggregate market value of all the assets, determined on a consolidated basis, of the corporation;
 - (ii) having an aggregate market value equal to 10% or more of the aggregate market value of all the outstanding stock of the corporation; or
 - (iii) representing 10% or more of the earning power or net income, determined on a consolidated basis, of the corporation;
- (c) the issuance or transfer by the corporation or any subsidiary of the corporation, in one transaction or a series of transactions, of any stock of the corporation or any subsidiary of the corporation that has an aggregate market value equal to 5% or more of the aggregate market value of all the outstanding stock of the corporation to the interested shareholder or any affiliate or associate of the interested shareholder except pursuant to the exercise of warrants or rights to purchase stock offered, or a dividend or distribution paid or made, pro rata to all shareholders of the corporation;
- (d) the adoption of any plan or proposal for the liquidation or dissolution of the corporation proposed by, or pursuant to any agreement, arrangement, or understanding, whether or not in writing, with, the interested shareholder or any affiliate or associate of the interested shareholder;
- (e) any reclassification of securities, including a stock split, stock dividend, or other distribution of stock in respect of stock, or any reverse stock split, or recapitalization of the corporation, or any merger or consolidation of the corporation with any subsidiary of the corporation, or any other transaction, whether or not with, into, or otherwise involving the interested shareholder:
 - (i) proposed by, or pursuant to any agreement, arrangement, or understanding, whether or not in writing, with, the interested shareholder or any affiliate or associate of the interested shareholder; and
 - (ii) that has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of voting stock or securities convertible into voting stock of the corporation or any subsidiary of the corporation that is directly or indirectly owned by the interested shareholder or any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments;or
- (f) a receipt by the interested shareholder or an affiliate or associate of the interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the corporation, of a loan, advance, guarantee, pledge, or other financial assistance or any tax credit or other tax advantage provided by or through the corporation.
- (6) "Common stock" means stock other than preferred stock.
- (7) "Consummation date," with respect to a business combination, means:
 - (a) the date of consummation of the business combination; or
 - (b) in the case of a business combination as to which a shareholder vote is taken, the later of:
 - (i) the business day before the vote; or
 - (ii) 20 days before the date of consummation of the business combination.
- (8)

- (a) "Control," including the terms "controlling," "controlled by," and "under common control with," means the same as that term is defined in Section 16-10a-102.
 - (b) A person's beneficial ownership of 10% or more of a corporation's outstanding voting stock creates a presumption that the person has control of the corporation.
 - (c) Notwithstanding the other provisions of this Subsection (8), a person may not be considered to have control of a corporation if the person holds voting stock, in good faith and not for the purpose of circumventing this part, as an agent, bank, broker, nominee, custodian, or trustee for one or more beneficial owners that do not individually or as a group have control of the corporation.
- (9) "Exchange Act" means the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78a et seq. as amended.
- (10)
- (a) "Interested shareholder," when used in reference to a domestic corporation, means a person, other than the corporation or a subsidiary of the corporation, that:
 - (i) is the beneficial owner, directly or indirectly, of 20% or more of the outstanding voting stock of the corporation; or
 - (ii) is an affiliate or associate of the corporation and at any time within the five-year period immediately before the date in question was the beneficial owner, directly or indirectly, of 20% or more of the then outstanding voting stock of the corporation.
 - (b) For the purpose of determining whether a person is an interested shareholder, the number of shares of voting stock of the corporation considered to be outstanding shall include shares considered to be beneficially owned by the person through application of Subsection (4), but may not include any other unissued shares of voting stock of the corporation that may be issuable pursuant to any agreement, arrangement, or understanding, or upon exercise of conversion rights, warrants, or options, or otherwise.
- (11) "Market value," when used in reference to stock or property of a domestic corporation, means:
- (a) in the case of stock:
 - (i) the highest closing sale price during the 30-day period immediately preceding the date in question of a share of the stock on the composite tape for New York stock exchange-listed stocks;
 - (ii) if the stock is not quoted on the composite tape or listed on the exchange described in Subsection (11)(a)(i), the highest closing sale price during the 30-day period immediately preceding the date in question on the principal United States securities exchange registered under the Exchange Act on which the stock is listed; or
 - (iii) if no quotation is available under Subsection (11)(a)(i) or (ii), the fair market value on the date in question of a share of the stock as determined by the board of directors of the corporation in good faith; and
 - (b) in the case of property other than cash or stock, the fair market value of the property on the date in question as determined by the board of directors of the corporation in good faith.
- (12) "Preferred stock" means a class or series of stock of a domestic corporation that under the bylaws or articles of incorporation of the corporation:
- (a) is entitled to receive payment of dividends before any payment of dividends on some other class or series of stock; or
 - (b) is entitled in the event of a voluntary liquidation, dissolution, or winding up of the corporation to receive payment or distribution of a preferential amount before a payment or distribution is received by some other class or series of stock.
- (13) "Stock" means:

- (a) a stock or similar security, a certificate of interest, any participation in a profit sharing agreement, a voting trust certificate, or a certificate of deposit for stock;
 - (b) a security convertible, with or without consideration, into stock;
 - (c) a warrant, call, or other option or privilege of buying stock without being bound to do so; or
 - (d) any other security carrying a right to acquire, subscribe to, or purchase stock.
- (14) "Stock acquisition date," with respect to a person and a domestic corporation, means the date that the person first becomes an interested shareholder of the corporation.
- (15) "Subsidiary" of a person means any other corporation of which a majority of the voting stock is owned, directly or indirectly, by the person.
- (16) "Voting stock" means shares of capital stock of a corporation entitled to vote generally in the election of directors.

Enacted by Chapter 439, 2017 General Session

16-10a-1803 Business combinations.

- (1) Notwithstanding anything to the contrary in this chapter, except Section 16-10a-1804, a domestic corporation may not engage in a business combination with an interested shareholder of the corporation for a period of five years following the interested shareholder's stock acquisition date unless the business combination or the purchase of stock made by the interested shareholder on the interested shareholder's stock acquisition date is approved by the board of directors of the corporation before the interested shareholder's stock acquisition date.
- (2)
- (a) If a good faith proposal is made in writing to the board of directors of the corporation regarding a business combination, the board of directors shall respond in writing, within 30 days or such shorter period, if any, as may be required by the Exchange Act, setting forth the board of directors' reasons for the board of directors' decision regarding the proposal.
 - (b) If a good faith proposal to purchase stock is made in writing to the board of directors of the corporation, unless the board of directors responds affirmatively in writing within 30 days or such shorter period, if any, as may be required by the Exchange Act, the board of directors is considered to have disapproved the proposal.
- (3) Notwithstanding anything to the contrary in this chapter, except Subsection (2) and Section 16-10a-1804, a domestic corporation may not engage at any time in any business combination with an interested shareholder of the corporation other than a business combination specified in Subsection (4), (5), or (6).
- (4) A domestic corporation may engage in a business combination with an interested shareholder of the corporation if:
- (a) the business combination is approved by the board of directors of the corporation before the interested shareholder's stock acquisition date; or
 - (b) the purchase of stock made by the interested shareholder on the interested shareholder's stock acquisition date is approved by the board of directors of the corporation before the interested shareholder's stock acquisition date.
- (5) A domestic corporation may engage in a business combination with an interested shareholder of the corporation if the business combination is approved by the affirmative vote of the holders of a majority of the outstanding voting stock not beneficially owned by the interested shareholder or an affiliate or associate of the interested shareholder at a meeting called for that purpose no earlier than five years after the interested shareholder's stock acquisition date.
- (6) A domestic corporation may engage in a business combination with an interested shareholder of the corporation if the business combination meets all of the following conditions:

- (a) the aggregate amount of the cash and the market value as of the consummation date of consideration, other than cash to be received per share by holders of outstanding shares of common stock of the corporation in the business combination, is at least equal to the higher of the following:
 - (i) the sum of:
 - (A) the highest per share price paid by the interested shareholder at a time when the interested shareholder was the beneficial owner, directly or indirectly, of 5% or more of the outstanding voting stock of the corporation, for any shares of common stock of the same class or series acquired by the interested shareholder within the five-year period immediately before the announcement date with respect to the business combination, or within the five-year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher; and
 - (B) interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect, less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since the earliest date, up to the amount of the interest; and
 - (ii) the sum of:
 - (A) the higher of the market value per share of common stock on the announcement date with respect to the business combination or on the interested shareholder's stock acquisition date; and
 - (B) interest compounded annually from the acquisition date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect, less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since the acquisition date, up to the amount of the interest;
- (b) the aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of stock, other than common stock, of the corporation is at least equal to the highest of the following, whether or not the interested shareholder has previously acquired any shares of the class or series of stock:
 - (i) the sum of:
 - (A) the higher of the highest per share price paid by the interested shareholder at a time when the interested shareholder was the beneficial owner, directly or indirectly, of 5% or more of the outstanding voting stock of the corporation, for any shares of the class or series of stock acquired by the interested shareholder within the five-year period immediately before the announcement date with respect to the business combination, or within the five-year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher; and
 - (B) interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect, less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the class or series of stock since the earliest date, up to the amount of the interest;
 - (ii) the sum of:

- (A) the highest preferential amount per share to which the holders of shares of the class or series of stock are entitled in the event of a voluntary liquidation, dissolution, or winding up of the corporation; and
- (B) the aggregate amount of any dividends declared or due as to which the holders are entitled before payment of dividends on some other class or series of stock, unless the aggregate amount of the dividends is included in the preferential amount; and
- (iii) the sum of:
 - (A) the market value per share of the class or series of stock on the announcement date with respect to the business combination or on the interested shareholder's stock acquisition date, whichever is higher; and
 - (B) interest compounded annually from the acquisition date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect, less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the class or series of stock since the acquisition date, up to the amount of the interest;
- (c) the consideration to be received by holders of a particular class or series of outstanding stock, including common stock of the corporation, in the business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of the class or series of stock previously acquired by the interested shareholder, and the consideration shall be distributed promptly;
- (d) the holders of all outstanding shares of stock of the corporation not beneficially owned by the interested shareholder immediately before the consummation of the business combination are entitled to receive in the business combination cash or other consideration for the shares in compliance with Subsections (6)(a), (b), and (c); and
- (e) after the interested shareholder's stock acquisition date and before the consummation date with respect to the business combination, the interested shareholder has not become the beneficial owner of any additional shares of voting stock of the corporation except:
 - (i) as part of the transaction that resulted in the interested shareholder becoming an interested shareholder;
 - (ii) by virtue of proportionate stock splits, stock dividends, or other distributions of stock in respect of stock not constituting a business combination under Subsection 16-10a-1802(5) (e);
 - (iii) through a business combination meeting the conditions of Subsection (5); or
 - (iv) through purchase by the interested shareholder at any price that, if the price is paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of the purchase, would have satisfied the requirements of Subsections (4) and (5) and this Subsection (6).

Enacted by Chapter 439, 2017 General Session

16-10a-1804 Scope of part.

This part does not apply to:

- (1) a business combination of a domestic corporation that does not have a class of voting stock registered with the Securities and Exchange Commission pursuant to Exchange Act, Sec. 12, 15 U.S.C. Sec. 78I, unless the articles of incorporation provide otherwise;
- (2) a business combination of a domestic corporation whose articles of incorporation are amended to provide that the domestic corporation is subject to this part that:

- (a) did not have a class of voting stock registered with the Securities and Exchange Commission pursuant to Exchange Act, Sec. 12, 15 U.S.C. Sec. 78l, on the effective date of the amendment; and
- (b) is a business combination with an interested shareholder whose stock acquisition date is before the effective date of the amendment;
- (3) a business combination of a domestic corporation:
 - (a) the original articles of incorporation of which contain a provision expressly electing not to be governed by this part;
 - (b) that adopts an amendment to the corporation's bylaws before December 31, 2017, expressly electing not to be governed by this part; or
 - (c) that adopts an amendment to the corporation's bylaws, approved by the affirmative vote of a majority of votes of the outstanding voting stock of the corporation, excluding the voting stock of interested shareholders and the interested shareholders' affiliates and associates, expressly electing not to be governed by this part, provided that the amendment to the bylaws:
 - (i) may not be effective until 18 months after the vote of the corporation's shareholders; and
 - (ii) may not apply to a business combination of the corporation with an interested shareholder whose stock acquisition date is on or before the effective date of the amendment;
- (4) a domestic corporation in the mineral extractive industry, including exploration, development, sand and gravel, mining, smelting, or refining of mineral properties;
- (5) any business combination of a domestic corporation with an interested shareholder of the corporation that became an interested shareholder inadvertently, if the interested shareholder:
 - (a) as soon as practicable, divests itself of a sufficient amount of the voting stock of the corporation so that it no longer is the beneficial owner, directly or indirectly, of 20% or more of the outstanding voting stock of the corporation; and
 - (b) would not at any time within the five-year period preceding the announcement date with respect to the business combination have been an interested shareholder but for the inadvertent acquisition; or
- (6) any business combination with an interested shareholder who was the beneficial owner, directly or indirectly, of 5% or more of the outstanding voting stock of the corporation on May 9, 2017, and remained so to the interested shareholder's stock acquisition date.

Enacted by Chapter 439, 2017 General Session

16-10a-1901 Definition.

As used in this part:

- (1) "Oppressive conduct" means a continuing course of conduct, a significant action, or a series of actions that substantially interferes with the interests of a shareholder as a shareholder.
- (2) "Oppressive conduct" may include:
 - (a) termination of a shareholder's employment; or
 - (b) limitations on a shareholder's employment benefits to the extent that the limitations interfere with distributions or other shareholder interests disproportionately as to the affected shareholder.
- (3) "Oppressive conduct" does not include an action allowed by an agreement, the corporation's articles of incorporation, the corporation's bylaws, or a consistently applied written corporate policy or procedure.

Enacted by Chapter 272, 2019 General Session

16-10a-1902 Shareholder cause of action -- Relief.

- (1) A shareholder of a closely held corporation who is injured by oppressive conduct may bring a private cause of action against the closely held corporation.
- (2)
 - (a) If a court finds that oppressive conduct toward the shareholder occurred, the court shall order one or more persons described in Subsection (2)(b) to purchase the injured shareholder's shares in the closely held corporation at fair value.
 - (b) A court may order that any of the following purchase the shares of the shareholder as described in Subsection (2)(a):
 - (i) the closely held corporation;
 - (ii) an officer of the closely held corporation;
 - (iii) a director of the closely held corporation; or
 - (iv) a shareholder of the closely held corporation that is responsible for the oppressive conduct.

Enacted by Chapter 272, 2019 General Session