

UTAH REVISED BUSINESS CORPORATION ACT

MODIFICATIONS

2017 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Val L. Peterson

Senate Sponsor: Curtis S. Bramble

LONG TITLE

Committee Note:

The Business and Labor Interim Committee recommended this bill.

General Description:

This bill modifies provisions regulating business corporations.

Highlighted Provisions:

This bill:

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

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

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

ENACTS:

16-10a-1801, Utah Code Annotated 1953



- 28 **16-10a-1802**, Utah Code Annotated 1953
- 29 **16-10a-1803**, Utah Code Annotated 1953
- 30 **16-10a-1804**, Utah Code Annotated 1953

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

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

34 **16-10a-840. General standards of conduct for directors and officers.**

35 (1) Each director shall discharge [his] the director's duties as a director, including
36 duties as a member of a committee, and each officer with discretionary authority shall
37 discharge [his] the officer's duties under that authority:

38 (a) in good faith;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

71 (5) (a) For purposes of this Subsection (5) and notwithstanding Section [16-10a-102](#),
72 "control" means the possession, directly or indirectly, of the power to direct or cause the
73 direction of the management and policies of the corporation whether through the ownership of
74 voting stock, by contract, or otherwise.

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

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

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

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

83 (B) the corporation's current employees;

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

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

88 (E) the ability of the corporation to provide, as a going concern, goods, services,
89 employment opportunities, employment benefits, and otherwise contribute to the communities

90 in which the corporation does business.

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

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

95 **Part 18. Business Combinations**

96 **16-10a-1801. Title.**

97 This part is known as "Business Combinations."

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

99 **16-10a-1802. Definitions.**

100 As used in this part:

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

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

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

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

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

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

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

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

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

116 (i) the right to acquire the stock:

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

119 (B) upon the exercise of conversion rights, exchange rights, warrants, or options, or
120 otherwise, except that a person may not be considered the beneficial owner of stock tendered

121 pursuant to a tender or exchange offer made by the person or an affiliate or associate of the
122 person until the tendered stock is accepted for purchase or exchange; or

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

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

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

137 (a) a merger or consolidation of the corporation or any subsidiary of the corporation
138 with:

139 (i) the interested shareholder; or

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

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

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

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

151 (iii) representing 10% or more of the earning power or net income, determined on a

152 consolidated basis, of the corporation;

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

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

164 (e) any reclassification of securities, including a stock split, stock dividend, or other
165 distribution of stock in respect of stock, or any reverse stock split, or recapitalization of the
166 corporation, or any merger or consolidation of the corporation with any subsidiary of the
167 corporation, or any other transaction, whether or not with, into, or otherwise involving the
168 interested shareholder:

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

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

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

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

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

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

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

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

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

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

190 (b) A person's beneficial ownership of 10% or more of a corporation's outstanding
191 voting stock creates a presumption that the person has control of the corporation.

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

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

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

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

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

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

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

214 (a) in the case of stock:

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

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

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

227 ~~[(iv) (iii) ~~it~~ if no quotation is available under Subsections (11)(a)(i) ~~it~~ **through (iii)**~~
 227a ~~or (ii) ~~it~~ , the fair~~
 228 market value on the date in question of a share of the stock as determined by the board of
 229 directors of the corporation in good faith; and

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

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

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

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

239 (13) "Stock" means:

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

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

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

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

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

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

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

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

253 **16-10a-1803. Business combinations.**

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

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

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

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

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

275 (a) the business combination is approved by the board of directors of the corporation

276 before the interested shareholder's stock acquisition date; or

277 (b) the purchase of stock made by the interested shareholder on the interested
278 shareholder's stock acquisition date is approved by the board of directors of the corporation
279 before the interested shareholder's stock acquisition date.

280 (5) A domestic corporation may engage in a business combination with an interested
281 shareholder of the corporation if the business combination is approved by the affirmative vote
282 of the holders of a majority of the outstanding voting stock not beneficially owned by the
283 interested shareholder or an affiliate or associate of the interested shareholder at a meeting
284 called for that purpose no earlier than five years after the interested shareholder's stock
285 acquisition date.

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

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

293 (i) the sum of:

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

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

306 (ii) the sum of:

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

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

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

320 (i) the sum of:

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

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

333 (ii) the sum of:

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

337 (B) the aggregate amount of any dividends declared or due as to which the holders are

338 entitled before payment of dividends on some other class or series of stock, unless the
339 aggregate amount of the dividends is included in the preferential amount; and
340 (iii) the sum of:
341 (A) the market value per share of the class or series of stock on the announcement date
342 with respect to the business combination or on the interested shareholder's stock acquisition
343 date, whichever is higher; and
344 (B) interest compounded annually from the acquisition date through the consummation
345 date at the rate for one-year United States treasury obligations from time to time in effect, less
346 the aggregate amount of any cash dividends paid, and the market value of any dividends paid
347 other than in cash, per share of the class or series of stock since the acquisition date, up to the
348 amount of the interest;
349 (c) the consideration to be received by holders of a particular class or series of
350 outstanding stock, including common stock of the corporation, in the business combination is
351 in cash or in the same form as the interested shareholder has used to acquire the largest number
352 of shares of the class or series of stock previously acquired by the interested shareholder, and
353 the consideration shall be distributed promptly;
354 (d) the holders of all outstanding shares of stock of the corporation not beneficially
355 owned by the interested shareholder immediately before the consummation of the business
356 combination are entitled to receive in the business combination cash or other consideration for
357 the shares in compliance with Subsections (6)(a), (b), and (c); and
358 (e) after the interested shareholder's stock acquisition date and before the
359 consummation date with respect to the business combination, the interested shareholder has not
360 become the beneficial owner of any additional shares of voting stock of the corporation except:
361 (i) as part of the transaction that resulted in the interested shareholder becoming an
362 interested shareholder;
363 (ii) by virtue of proportionate stock splits, stock dividends, or other distributions of
364 stock in respect of stock not constituting a business combination under Subsection
365 [16-10a-1802\(5\)\(e\)](#);
366 (iii) through a business combination meeting the conditions of Subsection (5); or
367 (iv) through purchase by the interested shareholder at any price that, if the price is paid
368 in an otherwise permissible business combination the announcement date and consummation

369 date of which were the date of the purchase, would have satisfied the requirements of
 370 Subsections (4) and (5) and this Subsection (6).

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

372 **16-10a-1804. Scope of part.**

373 This part does not apply to:

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

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

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

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

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

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

387 (b) that adopts an amendment to the corporation's bylaws before ~~§~~ → [May 9]

387a **December 31** ← ~~§~~ , 2017,

388 expressly electing not to be governed by this part; or

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

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

394 and

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

396a ~~§~~ → **(4) a domestic corporation in the mineral extractive industry, including exploration,**
 396b **development, sand and gravel, mining, smelting, or refining of mineral properties;**

397 ~~[(4)] (5) ← ~~§~~ any business combination of a domestic corporation with an interested~~
 397a shareholder

398 of the corporation that became an interested shareholder inadvertently, if the interested
 399 shareholder:

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

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

406 ~~H→ (5)~~ **(6)** ~~←H~~ any business combination with an interested shareholder who was the
406a beneficial
407 owner, directly or indirectly, of 5% or more of the outstanding voting stock of the corporation
408 on May 9, 2017, and remained so to the interested shareholder's stock acquisition date.

Legislative Review Note
Office of Legislative Research and General Counsel