

1 **UTAH REVISED BUSINESS CORPORATION ACT**

2 **MODIFICATIONS**

3 2017 GENERAL SESSION

4 STATE OF UTAH

5 **Chief Sponsor: Val L. Peterson**

6 Senate Sponsor: Curtis S. Bramble

8 **LONG TITLE**

9 **General Description:**

10 This bill modifies provisions regulating business corporations.

11 **Highlighted Provisions:**

12 This bill:

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

17 **Money Appropriated in this Bill:**

18 None

19 **Other Special Clauses:**

20 None

21 **Utah Code Sections Affected:**

22 AMENDS:

23 **16-10a-840**, as last amended by Laws of Utah 1993, Chapter 266

24 ENACTS:

25 **16-10a-1801**, Utah Code Annotated 1953

26 **16-10a-1802**, Utah Code Annotated 1953

27 **16-10a-1803**, Utah Code Annotated 1953

28 **16-10a-1804**, Utah Code Annotated 1953

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

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

32 **16-10a-840. General standards of conduct for directors and officers.**

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

36 (a) in good faith;

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

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

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

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

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

50 (c) in the case of a director, a committee of the board of directors of which [~~he~~] the
51 director is not a member[;]:

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

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

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

57 (iv) subject to Subsection (3), so long as in so relying the director is acting in good

58 faith with the degree of care contemplated by Subsection (1)(b).

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

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

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

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

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

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

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

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

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

81 (B) the corporation's current employees;

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

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

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

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

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

93 **Part 18. Business Combinations**

94 **16-10a-1801. Title.**

95 This part is known as "Business Combinations."

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

97 **16-10a-1802. Definitions.**

98 As used in this part:

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

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

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

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

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

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

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

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

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

- 114 (i) the right to acquire the stock:
- 115 (A) whether the right is exercisable immediately or only after the passage of time,
- 116 pursuant to an agreement, arrangement, or understanding, whether or not in writing; or
- 117 (B) upon the exercise of conversion rights, exchange rights, warrants, or options, or
- 118 otherwise, except that a person may not be considered the beneficial owner of stock tendered
- 119 pursuant to a tender or exchange offer made by the person or an affiliate or associate of the
- 120 person until the tendered stock is accepted for purchase or exchange; or
- 121 (ii) the right to vote the stock pursuant to an agreement, arrangement, or understanding,
- 122 whether or not in writing, except that a person may not be considered the beneficial owner of
- 123 any stock under this Subsection (4)(b)(ii) if the agreement, arrangement, or understanding to
- 124 vote the stock arises solely from a revocable proxy or consent given in response to a proxy or
- 125 consent solicitation made in accordance with the applicable regulations under the Exchange
- 126 Act and is not then reportable on a Schedule 13D under the Exchange Act, or any comparable
- 127 or successor report; or
- 128 (c) that has an agreement, arrangement, or understanding, whether or not in writing, for
- 129 the purpose of acquiring, holding, voting, except voting pursuant to a revocable proxy or
- 130 consent as described in Subsection (4)(b)(ii), or disposing of the stock with any other person
- 131 that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly,
- 132 the stock.
- 133 (5) "Business combination," when used in reference to any domestic corporation and
- 134 an interested shareholder of the corporation, means:
- 135 (a) a merger or consolidation of the corporation or any subsidiary of the corporation
- 136 with:
- 137 (i) the interested shareholder; or
- 138 (ii) any other corporation, whether or not that corporation is an interested shareholder
- 139 of the corporation, that is, or after the merger or consolidation would be, an affiliate or
- 140 associate of the interested shareholder;
- 141 (b) any sale, lease, exchange, mortgage, pledge, transfer, or other disposition, in one

142 transaction or a series of transactions, to or with the interested shareholder or any affiliate or
143 associate of the interested shareholder of assets of the corporation or any subsidiary of the
144 corporation:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

197 (10) (a) "Interested shareholder," when used in reference to a domestic corporation,

198 means a person, other than the corporation or a subsidiary of the corporation, that:

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

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

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

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

212 (a) in the case of stock:

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

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

220 (iii) if no quotation is available under Subsection (11)(a)(i) or (ii), the fair market value
221 on the date in question of a share of the stock as determined by the board of directors of the
222 corporation in good faith; and

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

225 (12) "Preferred stock" means a class or series of stock of a domestic corporation that

226 under the bylaws or articles of incorporation of the corporation:

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

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

232 (13) "Stock" means:

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

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

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

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

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

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

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

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

246 **16-10a-1803. Business combinations.**

247 (1) Notwithstanding anything to the contrary in this chapter, except Section
248 [16-10a-1804](#), a domestic corporation may not engage in a business combination with an
249 interested shareholder of the corporation for a period of five years following the interested
250 shareholder's stock acquisition date unless the business combination or the purchase of stock
251 made by the interested shareholder on the interested shareholder's stock acquisition date is
252 approved by the board of directors of the corporation before the interested shareholder's stock
253 acquisition date.

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

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

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

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

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

270 (b) the purchase of stock made by the interested shareholder on the interested
271 shareholder's stock acquisition date is approved by the board of directors of the corporation
272 before the interested shareholder's stock acquisition date.

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

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

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

286 (i) the sum of:

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

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

299 (ii) the sum of:

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

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

308 (b) the aggregate amount of the cash and the market value as of the consummation date
309 of consideration other than cash to be received per share by holders of outstanding shares of

310 any class or series of stock, other than common stock, of the corporation is at least equal to the
311 highest of the following, whether or not the interested shareholder has previously acquired any
312 shares of the class or series of stock:

313 (i) the sum of:

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

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

326 (ii) the sum of:

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

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

333 (iii) the sum of:

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

337 (B) interest compounded annually from the acquisition date through the consummation

338 date at the rate for one-year United States treasury obligations from time to time in effect, less
339 the aggregate amount of any cash dividends paid, and the market value of any dividends paid
340 other than in cash, per share of the class or series of stock since the acquisition date, up to the
341 amount of the interest;

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

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

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

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

356 (ii) by virtue of proportionate stock splits, stock dividends, or other distributions of
357 stock in respect of stock not constituting a business combination under Subsection
358 16-10a-1802(5)(e);

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

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

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

365 **16-10a-1804. Scope of part.**

366 This part does not apply to:

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

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

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

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

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

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

380 (b) that adopts an amendment to the corporation's bylaws before December 31, 2017,
381 expressly electing not to be governed by this part; or

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

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

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

390 (4) a domestic corporation in the mineral extractive industry, including exploration,
391 development, sand and gravel, mining, smelting, or refining of mineral properties;

392 (5) any business combination of a domestic corporation with an interested shareholder
393 of the corporation that became an interested shareholder inadvertently, if the interested

394 shareholder:

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

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

401 (6) any business combination with an interested shareholder who was the beneficial
402 owner, directly or indirectly, of 5% or more of the outstanding voting stock of the corporation
403 on May 9, 2017, and remained so to the interested shareholder's stock acquisition date.