

CHAPTER 9-MERGER OR CONSOLIDATION; GUARANTEE; DISPOSITION OF ASSETS

901. POWER OF MERGER OR CONSOLIDATION

(a) Two or more domestic corporations may, as provided in this chapter:

- (1) Merge into a single corporation which shall be one of the constituent corporations; or
- (2) Consolidate into a single corporation which shall be a new corporation to be formed pursuant to the consolidation.

(b) Whenever used in this chapter:

- (1) "Merger" means a procedure of the character described in subparagraph (a)(1).
- (2) "Consolidation" means an procedure of the character described in subparagraph (a)(2).
- (3) "Constituent corporation" means an existing corporation that is participating in the merger or consolidation with one or more other corporations.
- (4) "Surviving corporation" means the constituent corporation into which one or more other constituent corporations are merged.
- (5) "Consolidated corporation" means the new corporation into which two or more constituent corporations are consolidated.

902. PLAN OF MERGER OR CONSOLIDATION

(a) The board of each corporation proposing to participate in a merger or consolidation under section 901 (Power of merger or consolidation) shall adopt a plan of merger or consolidation, setting forth:

- (1) The name of each constituent corporation and, if the name of any of them has been changed, the name under which it was formed; and the name of the surviving corporation, or the name, or the method of determining it, of the consolidated corporation.
- (2) As to each constituent corporation, the designation and number of outstanding shares of each class and series, specifying the classes and series entitled to vote and further specifying each class and series, if any, entitled to vote as a class; and, if the number of any such shares is subject to change prior to the effective date of the merger or consolidation, the manner in which such change may occur.

- (3) The terms and conditions of the proposed merger or consolidation, including the manner and basis of converting the shares of each constituent corporation into shares, bonds or other securities of the surviving or consolidated corporation, or the cash or other consideration to be paid or delivered in exchange for shares of each constituent corporation, or a combination thereof.
- (4) In case of merger, a statement of any amendments or changes in the certificate of incorporation of the surviving corporation to be effected by such merger; in case of consolidation, all statements required to be included in a certificate of incorporation for a corporation formed under this chapter, except statements as to facts not available at the time the plan of consolidation is adopted by the board.
- (5) Such other provisions with respect to the proposed merger or consolidation as the board considers necessary or desirable.

903. AUTHORIZATION BY SHAREHOLDERS

(a) The board of each constituent corporation, upon adopting such plan of merger or consolidation, shall submit such plan to a vote of shareholders in accordance with the following:

- (1) Notice of meeting shall be given to each shareholder of record, as of the record date fixed pursuant to section 604 (Fixing record date), whether or not entitled to vote. A copy of the plan of merger or consolidation or an outline of the material features of the plan shall accompany such notice.
- (2) The plan of merger or consolidation shall be adopted at a meeting of shareholders by vote of the holders of two-thirds of all outstanding shares entitled to vote thereon. Notwithstanding any provision in the certificate of incorporation, the holders of shares of a class or series shall be entitled to vote and to vote as a class if the plan of merger or consolidation contains any provision which, if contained in an amendment to the certificate of incorporation, would entitle the holders of shares of such class or series to vote and to vote as a class thereon. In such case, in addition to the authorization of the merger or consolidation by vote of the holders of two-thirds of all outstanding shares entitled to vote thereon, the merger or consolidation shall be authorized by vote of the holders of a majority of all outstanding shares of each such class or series.

(b) Notwithstanding shareholder authorization and at any time prior to the filing of the certificate of merger or consolidation, the plan of merger or consolidation may be abandoned pursuant to a provision for such abandonment, if any, contained in the plan of merger or consolidation.

904. CERTIFICATE OF MERGER OR CONSOLIDATION; CONTENTS

(a) After adoption of the plan of merger or consolidation by the board and shareholders of each constituent corporation, unless the merger or consolidation is abandoned in accordance with paragraph (b) of section 903 (Authorization by shareholders), a certificate of merger or consolidation, entitled "Certificate of merger (or consolidation) of and into (names of corporations) under section 904 of the Business Corporation Code", shall be signed and verified on behalf of each constituent corporation and delivered to the Nation Clerk. It shall set forth:

- (1) The statements required by subparagraphs (a)(1), (2) and (4) of section 902 (Plan of merger or consolidation).
- (2) The effective date of the merger or consolidation if other than the date of filing of the certificate of merger or consolidation by the Nation Clerk.
- (3) In the case of consolidation, any statement required to be included in a certificate of incorporation for a corporation formed under this chapter but which was omitted under subparagraph (a)(4) of section 902.
- (4) The date when the certificate of incorporation of each constituent corporation was filed by the Nation Clerk.
- (5) The manner in which the merger or consolidation was authorized with respect to each constituent corporation.

905. MERGER OF PARENT AND SUBSIDIARY CORPORATION

(a) Any domestic corporation owning at least ninety percent of the outstanding shares of each class of another domestic corporation or corporations may either merge such other corporation or corporations into itself without the authorization of the shareholders of any such corporation or merge itself and one or more of such other corporations into one of such other corporations with the authorization of the parent corporation's shareholders in accordance with paragraph (a) of section 903 (Authorization by shareholders). In either case the board of such parent corporation shall adopt a plan of merger, setting forth:

- (1) The name of each corporation to be merged and the name of the surviving corporation, and if the name of any of them has been changed, the name under which it was formed.
- (2) The designation and number of outstanding shares of each class of each corporation to be merged and the number of such shares of each class, if any, owned by the surviving corporation; and if the number of any such shares is subject to change prior to the effective date of the merger, the manner in which such change may occur.

- (3) The terms and conditions of the proposed merger, including the manner and basis of converting the shares of each subsidiary corporation to be merged not owned by the parent corporation into shares, bonds or other securities of the surviving corporation, or the cash or other consideration to be paid or delivered in exchange for shares of each such subsidiary corporation, or a combination thereof.
- (4) If the parent corporation is not the surviving corporation, provision for the pro rata issuance of shares of the surviving corporation to the shareholders of the parent corporation on surrender of any certificates therefore.
- (5) If the parent corporation is not the surviving corporation, a statement of any amendments or changes in the certificate of incorporation of the surviving corporation to be effected by the merger.
- (6) Such other provisions with respect to the proposed merger as the board considers necessary or desirable.

(b) If the surviving corporation is the parent corporation, a copy of such plan of merger or an outline of the material features thereof shall be given, personally or by mail, to all holders of shares of each subsidiary corporation to be merged not owned by the parent corporation, unless the giving of such copy or outline has been waived by such holders.

(c) A certificate of merger, entitled "Certificate of merger of into (names of corporations) under section 905 of the Business Corporation Code", shall be signed, verified and delivered to the Nation Clerk by the surviving corporation. If the surviving corporation is the parent corporation and such corporation does not own all shares of each subsidiary corporation to be merged, such certificate shall be delivered not less than thirty days after the giving of a copy or outline of the material features of the plan of merger to shareholders of each such subsidiary corporation, or at any time after the waiving thereof by the holders of all of the outstanding shares of each such subsidiary corporation not owned by the surviving corporation. The certificate shall set forth:

- (1) The statements required by subparagraphs (a)(1), (2), (4) and (5) of this section.
- (2) The effective date of the merger if other than the date of filing of the certificate of merger by the Nation Clerk.
- (3) The date when the certificate of incorporation of each constituent corporation was filed by the Nation Clerk.
- (4) A statement that the plan of merger was adopted by the board of directors of the parent corporation.
- (5) If the surviving corporation is the parent corporation and such corporation does not own

all the shares of each subsidiary corporation to be merged, either the date of the giving to holders of shares of each subsidiary corporation not owned by the surviving corporation of a copy of the plan of merger or an outline of the material features thereof, or a statement that the giving of such copy or outline has been waived, if such is the case.

(6) If the parent corporation is not the surviving corporation, a statement that the proposed merger has been approved by the shareholders of the parent corporation in accordance with paragraph (a) of section 903 (Authorization by shareholders).

(d) The surviving corporation shall thereafter cause a copy of such certificate, to be filed in the office of the Nation Clerk

(e) Paragraph (b) of section 903 (Authorization by shareholders) shall apply to a merger under this section.

(f) The right of merger granted by this section to certain corporations shall not preclude the exercise by such corporations of any other right of merger or consolidation under this chapter.

906. EFFECT OF MERGER OR CONSOLIDATION

(a) Upon the filing of the certificate of merger or consolidation by the Nation Clerk or on such date subsequent thereto, not to exceed thirty days, as shall be set forth in such certificate, the merger or consolidation shall be effected.

(b) When such merger or consolidation has been effected:

(1) Such surviving or consolidated corporation shall thereafter, consistently with its certificate of incorporation as altered or established by the merger or consolidation, possess all the rights, privileges, immunities, powers and purposes of each of the constituent corporations.

(2) All the property, real and personal, including subscriptions to shares, causes of action and every other asset of each of the constituent corporations, shall vest in such surviving or consolidated corporation without further act or deed.

(3) The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent corporations. No liability or obligation due or to become due, claim or demand for any cause existing against any such corporation, or any shareholder, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent corporation, or any shareholder, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be enforced, prosecuted, settled or compromised as if such

merger or consolidation had not occurred, or such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent corporation.

- (4) In the case of a merger, the certificate of incorporation of the surviving corporation shall be automatically amended to the extent, if any, that changes in its certificate of incorporation are set forth in the plan of merger; and, in the case of a consolidation, the statements set forth in the certificate of consolidation and which are required or permitted to be set forth in a certificate of incorporation of a corporation formed under this chapter shall be its certificate of incorporation.

907.MERGER OR CONSOLIDATION OF DOMESTIC AND FOREIGN CORPORATIONS

(a) One or more foreign corporations and one or more domestic corporations may be merged or consolidated into a corporation, if such merger or consolidation is permitted by the laws of the jurisdiction under which each such foreign corporation is incorporated. With respect to such merger or consolidation, any reference in paragraph (b) of section 901 (Power of merger or consolidation) to a corporation shall, unless the context otherwise requires, include both domestic and foreign corporations.

(b) With respect to procedure, including the requirement of shareholder authorization, each domestic corporation shall comply with the provisions of this chapter relating to merger or consolidation of domestic corporations, and each foreign corporation shall comply with the applicable provisions of the law of the jurisdiction under which it is incorporated.

(c) The procedure for the merger of a subsidiary corporation or corporations under section 905 (Merger of parent and subsidiary corporations) shall be available where either a subsidiary corporation or the corporation owning at least ninety percent of the outstanding shares of each class of a subsidiary is a foreign corporation, and such merger is permitted by the laws of the jurisdiction under which such foreign corporation is incorporated.

(d) If the surviving or consolidated corporation is, or is to be, a domestic corporation, a certificate of merger or consolidation shall be signed, verified and delivered to the Nation Clerk as provided in section 904 (Certificate of merger or consolidation; contents) or 905 (Merger of parent and subsidiary corporations), as the case may be. In addition to the matters specified in such sections, the certificate shall set forth as to each constituent foreign corporation the jurisdiction and date of its incorporation and the date when its application for authority to do business within the territorial jurisdiction of the Nation was filed by the Nation Clerk, and its fictitious name used in this Nation pursuant to chapter thirteen of this chapter, if applicable, or, if no such application has been filed, a statement to such effect.

(e) If the surviving or consolidated corporation is, or is to be, formed under the law of any jurisdiction other than the Nation:

- (1) It shall comply with the provisions of this chapter relating to foreign corporations if it is to do business within the territorial jurisdiction of the Nation.
- (2) It shall deliver to the Nation Clerk a certificate, entitled "Certificate of merger (or consolidation) of and into (names of corporations) under section 907 of the Business Corporation Code", which shall be signed and verified on behalf of each constituent domestic and foreign corporation. It shall set forth:
 - (A) If the procedure for the merger or consolidation of a constituent domestic corporation was effected in compliance with sections 902 (Plan of merger or consolidation) and 903 (Authorization by shareholders), the following:
 - (i) The statements required by subparagraphs (a)(1) and (2) of section 902.
 - (ii) The effective date of the merger or consolidation if other than the date of filing of the certificate of merger or consolidation by the Nation Clerk.
 - (iii) The manner in which the merger or consolidation was authorized with respect to each constituent domestic corporation and that the merger or consolidation is permitted by the laws of the jurisdiction of each constituent foreign corporation and is in compliance therewith.
 - (B) If the procedure for the merger of a subsidiary corporation was effected in compliance with section 905, the following:
 - (i) The statements required by subparagraphs (a)(1), (2), (4) and (5) of section 905.
 - (ii) The effective date of the merger if other than the date of filing of the certificate of merger by the Nation Clerk.
 - (iii) If the surviving foreign corporation does not own all the shares of a subsidiary domestic corporation being merged, either the date of the giving to holders of shares of each subsidiary domestic corporation not owned by the surviving foreign corporation of a copy of the plan of merger or an outline of the material features thereof, or a statement that the giving of such copy or outline has been waived, if such is the case.

(iv) That the merger is permitted by the laws of the jurisdiction of each constituent foreign corporation and is in compliance therewith.

(v) If the parent domestic corporation is not the surviving corporation, a statement that the proposed merger has been approved by the shareholders of the parent domestic corporation in accordance with paragraph (a) of section 903 (Authorization by shareholders).

- (C) The jurisdiction and date of incorporation of the surviving or consolidated foreign corporation, the date when its application for authority to do business within the territorial jurisdiction of the Nation was filed by the Nation Clerk, and its fictitious name used within the territorial jurisdiction of the Nation pursuant to chapter thirteen of this chapter, if applicable, or, if no such application has been filed, a statement to such effect and that it is not to do business within the territorial jurisdiction of the Nation until an application for such authority shall have been filed by such department.
- (D) The date when the certificate of incorporation of each constituent domestic corporation was filed by the Nation Clerk and the jurisdiction and date of incorporation of each constituent foreign corporation, other than the surviving or consolidated foreign corporation, and, in the case of each such corporation authorized to do business within the territorial jurisdiction of the Nation, the date when its application for authority was filed by the secretary of state.
- (E) An agreement that the surviving or consolidated foreign corporation may be served with process within the territorial jurisdiction of the Nation in any action or special proceeding for the enforcement of any liability or obligation of any domestic corporation or of any foreign corporation, previously amenable to suit within the territorial jurisdiction of the Nation, which is a constituent corporation in such merger or consolidation, and for the enforcement, as provided in this chapter, of the right of shareholders of any constituent domestic corporation to receive payment for their shares against the surviving or consolidated corporation.
- (F) An agreement that, subject to the provisions of section 623 (Procedure to enforce shareholder's right to receive payment for shares), the surviving or consolidated foreign corporation will promptly pay to the shareholders of each constituent domestic corporation the amount, if any, to which they shall be entitled under the provisions of this chapter relating to the right of shareholders to receive payment for their shares.

(G) A designation of the Nation Clerk as its agent upon whom process against it may be served in the manner set forth in paragraph (b) of section 306 (Service of process), in any action or special proceeding, and a post office address, to which the Nation Clerk shall mail a copy of any process against it served upon him. Such post office address shall supersede any prior address designated as the address to which process shall be mailed.

(f) Upon the filing of the certificate of merger or consolidation by the Nation Clerk or on such date subsequent thereto, not to exceed ninety days, as shall be set forth in such certificate, the merger or consolidation shall be effected.

(g) The surviving or consolidated domestic or foreign corporation shall thereafter cause a copy of such certificate, to be filed in the office of the Nation Clerk

(h) If the surviving or consolidated corporation is, or is to be, formed under the law of the Nation, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations under section 906 (Effect of merger or consolidation). If the surviving or consolidated corporation is, or is to be, incorporated under the law of any jurisdiction other than the Nation, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, except in so far as the law of such other jurisdiction provides otherwise.

908. GUARANTEE AUTHORIZED BY SHAREHOLDERS

A guarantee may be given by a corporation, although not in furtherance of its corporate purposes, when authorized at a meeting of shareholders by vote of the holders of two-thirds of all outstanding shares entitled to vote thereon. If authorized by a like vote, such guarantee may be secured by a mortgage or pledge of, or the creation of a security interest in, all or any part of the corporate property, or any interest therein, wherever situated.

909. SALE, LEASE, EXCHANGE OR OTHER DISPOSITION OF ASSETS

(a) A sale, lease, exchange or other disposition of all or substantially all the assets of a corporation, if not made in the usual or regular course of the business actually conducted by such corporation, shall be authorized only in accordance with the following procedure:

- (1) The board shall authorize the proposed sale, lease, exchange or other disposition and direct its submission to a vote of shareholders.
- (2) Notice of meeting shall be given to each shareholder of record, whether or not entitled to vote.
- (3) The shareholders shall approve such sale, lease, exchange or other disposition and may fix, or may authorize the board to fix, any of the terms and conditions thereof and the

consideration to be received by the corporation therefore, which may consist in whole or in part of cash or other property, real or personal, including shares, bonds or other securities of any other domestic or foreign corporation or corporations, by vote at a meeting of shareholders of the holders of two-thirds of all outstanding shares entitled to vote thereon.

(b) A recital in a deed, lease or other instrument of conveyance executed by a corporation to the effect that the property described therein does not constitute all or substantially all of the assets of the corporation, or that the disposition of the property affected by said instrument was made in the usual or regular course of business of the corporation, or that the shareholders have duly authorized such disposition, shall be presumptive evidence of the fact so recited.

(c) An action to set aside a deed, lease or other instrument of conveyance executed by a corporation affecting real property or real and personal property may not be maintained for failure to comply with the requirements of paragraph (a) unless the action is commenced and a notice of pendency of action is filed within one year after such conveyance, lease or other instrument is recorded.

(d) Whenever a transaction of the character described in paragraph (a) involves a sale, lease, exchange or other disposition of all or substantially all the assets of the corporation, including its name, to a new corporation formed under the same name as the existing corporation, upon the expiration of thirty days from the filing of the certificate of incorporation of the new corporation, the existing corporation shall be automatically dissolved, unless, before the end of such thirty-day period, such corporation has changed its name. The adjustment and winding up of the affairs of such dissolved corporation shall proceed in accordance with the provisions of chapter 10 (Non-judicial dissolution).

(e) The certificate of incorporation of a corporation formed under the authority of paragraph (d) shall set forth the name of the existing corporation, the date when its certificate of incorporation was filed by the Nation Clerk, and that the shareholders of such corporation have authorized the sale, lease, exchange or other disposition of all or substantially all the assets of such corporation, including its name, to the new corporation to be formed under the same name as the existing corporation.

(f) Notwithstanding shareholder approval, the board may abandon the proposed sale, lease, exchange or other disposition without further action by the shareholders, subject to the rights, if any, of third parties under any contract relating thereto.

910. RIGHT OF SHAREHOLDER TO RECEIVE PAYMENT FOR SHARES UPON MERGER OR CONSOLIDATION, OR SALE, LEASE, EXCHANGE OR OTHER DISPOSITION OF ASSETS, OR SHARE EXCHANGE

(a) A shareholder of a domestic corporation shall, subject to and by complying with section 623 (Procedure to enforce shareholder's right to receive payment for shares), have the right to receive payment of the fair value of his shares and the other rights and benefits provided by such section, in the following cases:

(1) Any shareholder entitled to vote who does not assent to the taking of an action specified in subparagraphs (A), (B) and (C).

(A) Any plan of merger or consolidation to which the corporation is a party; except that the right to receive payment of the fair value of his shares shall not be available:

(i) To a shareholder of the parent corporation in a merger authorized by section 905 (Merger of parent and subsidiary corporations), or paragraph (c) of section 907 (Merger or consolidation of domestic and foreign corporations); and

(ii) To a shareholder of the surviving corporation in a merger authorized by this chapter, other than a merger specified in subparagraph (i), unless such merger effects one or more of the changes specified in subparagraph (b)(6) of section 806 (Provisions as to certain proceedings) in the rights of the shares held by such shareholder.

(B) Any sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation which requires shareholder approval under section 909 (Sale, lease, exchange or other disposition of assets) other than a transaction wholly for cash where the shareholders' approval thereof is conditioned upon the dissolution of the corporation and the distribution of substantially all of its net assets to the shareholders in accordance with their respective interests within one year after the date of such transaction.

(C) Any share exchange authorized by section 913 in which the corporation is participating as a subject corporation; except that the right to receive payment of the fair value of his shares shall not be available to a shareholder whose shares have not been acquired in the exchange.

(2) Any shareholder of the subsidiary corporation in a merger authorized by section 905 or

paragraph (c) of section 907, or in a share exchange authorized by paragraph (g) of section 913, who files with the corporation a written notice of election to dissent as provided in paragraph (c) of section 623.

911.MORTGAGE OR PLEDGE OF, OR SECURITY INTEREST IN, CORPORATE PROPERTY

The board may authorize any mortgage or pledge of, or the creation of a security interest in, all or any part of the corporate property, or any interest therein, wherever situated. Unless the certificate of incorporation provides otherwise, no vote or consent of shareholders shall be required to approve such action by the board.

912. REQUIREMENTS RELATING TO CERTAIN BUSINESS COMBINATIONS

(a) For the purpose of this section:

- (1) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified person.
- (2) "Announcement date", when used in reference to any business combination, means the date of the first public announcement of the final, definitive proposal for such business combination.
- (3) "Associate", when used to indicate a relationship with any person, means (A) any corporation or organization of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent or more of any class of voting stock, (B) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (C) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person.
- (4) "Beneficial owner", when used with respect to any stock, means a person:
 - (A) that, individually or with or through any of its affiliates or associates, beneficially owns such stock, directly or indirectly; or
 - (B) that, individually or with or through any of its affiliates or associates, has (i) the right to acquire such stock (whether such right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the beneficial owner of stock tendered pursuant to a tender or exchange offer made by such person or any of such

person's affiliates or associates until such tendered stock is accepted for purchase or exchange; or (ii) the right to vote such stock pursuant to any agreement, arrangement or understanding (whether or not in writing); provided, however, that a person shall not be deemed the beneficial owner of any stock under this item if the agreement, arrangement or understanding vote such stock (X) arises solely from a revocable proxy in accordance with the applicable rules and regulations under the United States Exchange Act and (Y) is not then reportable on Schedule 13D under the United States Exchange Act (or any comparable or successor report); or

(C) that has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in item (ii) of clause (B) of the subparagraph), or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

(5) "Business combination", when used in reference to any resident domestic corporation and any interested shareholder of such resident domestic corporation, means:

(A) any merger or consolidation of such resident domestic corporation or any subsidiary of such resident domestic corporation with (i) such interested shareholder or (ii) any other corporation (whether or not itself an interested shareholder of such resident domestic corporation) which is, or after such merger or consolidation would be, an affiliate or associate of such interested shareholder;

(B) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with such interested shareholder or any affiliate or associate of such interested shareholder of assets of such resident domestic corporation or any subsidiary of such resident domestic corporation (i) having an aggregate market value equal to ten percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of such resident domestic corporation, (ii) having an aggregate market value equal to ten percent or more of the aggregate market value of all the outstanding stock of such resident domestic corporation, or (iii) representing ten percent or more of the earning power or net income, determined on a consolidated basis, of such resident domestic corporation;

(C) the issuance or transfer by such resident domestic corporation or any subsidiary of such resident domestic corporation (in one transaction or a series of transactions) of any stock of such resident domestic corporation or any subsidiary of such resident domestic corporation which has an aggregate market value equal to five percent or more of the aggregate market value of all the

outstanding stock of such resident domestic corporation to such interested shareholder or any affiliate or associate of such 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 such resident domestic corporation;

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

(E) any reclassification of securities (including, without limitation, any stock split, stock dividend, or other distribution of stock in respect of stock, or any reverse stock split), or recapitalization of such resident domestic corporation, or any merger or consolidation of such resident domestic corporation with any subsidiary of such resident domestic corporation, or any other transaction (whether or not with or into or otherwise involving such interested shareholder), proposed by, or pursuant to any agreement, arrangement or understanding (whether or not in writing) with, such interested shareholder or any affiliate or associate of such interested shareholder, which 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 such resident domestic corporation or any subsidiary of such resident domestic corporation which is directly or indirectly owned by such interested shareholder or any affiliate or associate of such interested shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(F) any receipt by such interested shareholder or any affiliate or associate of such interested shareholder of the benefit, directly or indirectly (except proportionately as a shareholder of such resident domestic corporation) of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through such resident domestic corporation.

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

(7) "Consummation date", with respect to any business combination, means the date of consummation of such business combination, or, in the case of a business combination as to which a shareholder vote is taken, the later of the business day prior to the vote or twenty days prior to the date of consummation of such business combination.

(8) "Control", including the terms "controlling", "controlled by" and "under common control with", means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the

ownership of voting stock, by contract, or otherwise. A person's beneficial ownership of ten percent or more of a corporation's outstanding voting stock shall create a presumption that such person has control of such corporation. Notwithstanding the foregoing, a person shall not be deemed to have control of a corporation if such person holds voting stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of such corporation.

(9) "Exchange Act" means the United States law known as the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time.

(10) "Interested shareholder", when used in reference to any resident domestic corporation, means any person (other than such resident domestic corporation or any subsidiary of such resident domestic corporation) that

(A) (i) is the beneficial owner, directly or indirectly, of twenty percent or more of the outstanding voting stock of such resident domestic corporation; or

(ii) is an affiliate or associate of such resident domestic corporation and at any time within the five-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of twenty percent or more of the then outstanding voting stock of such resident domestic corporation; provided that

(B) for the purpose of determining whether a person is an interested shareholder, the number of shares of voting stock of such resident domestic corporation deemed to be outstanding shall include shares deemed to be beneficially owned by the person through application of subparagraph four of the paragraph but shall not include any other unissued shares of voting stock of such resident domestic corporation which 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 any resident domestic corporation, means:

(A) in the case of stock, the highest closing sale price during the thirty-day period immediately preceding the date in question of a share of such stock on the composite tape for New York stock exchange-listed stocks, or, if such stock is not quoted on such composite tape or if such stock is not listed on such exchange, on the principal United States securities exchange registered under

the Exchange Act on which such stock is listed, or, if such stock is not listed on any such exchange, the highest closing bid quotation with respect to a share of such stock during the thirty-day period preceding the date in question on the National Association of Securities Dealers, Inc. Automated Quotations System or any system then in use, or if no such quotations are available, the fair market value on the date in question of a share of such stock as determined by the board of directors of such resident domestic corporation in good faith; and

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

(12) "Preferred stock" means any class or series of stock of a resident domestic corporation which under the by-laws or certificate of incorporation of such resident domestic corporation is entitled to receive payment of dividends prior to any payment of dividends on some other class or series of stock, or is entitled in the event of any voluntary liquidation, dissolution or winding up of the resident domestic corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of stock.

(13) "Resident domestic corporation" means an issuer of voting stock which:

(A) is organized under the laws of the Nation;

(B) either (i) has its principal executive offices and significant business operations located within the territorial jurisdiction of the Nation; and

(C) has at least ten percent of its voting stock owned beneficially by persons residing within the territorial jurisdiction of the Nation. For purposes of this section, the residence of a partnership, unincorporated association, trust or similar organization shall be the principal office of such organization.

No resident domestic corporation, which is organized under the laws of the Nation, shall cease to be a resident domestic corporation by reason of events occurring or actions taken while such resident domestic corporation is subject to the provisions of this section.

(14) "Stock" means:

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

(B) any security convertible, with or without consideration, into stock, or any warrant, call or other option or privilege of buying stock without being bound

to do so, or any other security carrying any right to acquire, subscribe to or purchase stock.

- (15) "Stock acquisition date", with respect to any person and any resident domestic corporation, means the date that such person first becomes an interested shareholder of such resident domestic corporation.
- (16) "Subsidiary" of any person means any other corporation of which a majority of the voting stock is owned, directly or indirectly, by such person.
- (17) "Voting stock" means shares of capital stock of a corporation entitled to vote generally in the election of directors.

(b) Notwithstanding anything to the contrary contained in the chapter (except the provisions of paragraph (d) of this section), no resident domestic corporation shall engage in any business combination with any interested shareholder of such resident domestic corporation for a period of five years following such interested shareholder's stock acquisition date unless such business combination or the purchase of stock made by such interested shareholder on such interested shareholder's stock acquisition date is approved by the board of directors of such resident domestic corporation prior to such interested shareholder's stock acquisition date. If a good faith proposal is made in writing to the board of directors of such resident domestic corporation regarding a business combination, the board of directors shall respond, in writing, within thirty days or such shorter period, if any, as may be required by the United States Exchange Act, setting forth its reasons for its decision regarding such proposal. If a good faith proposal to purchase stock is made in writing to the board of directors of such resident domestic corporation, the board of directors, unless it responds affirmatively in writing thirty days or such shorter period, if any, as may be required by the United States Exchange Act, shall be deemed to have disapproved such stock purchase.

(c) Notwithstanding anything to the contrary contained in the chapter (except the provisions of paragraphs (b) and (d) of this section), no resident domestic corporation shall engage at any time in any business combination with any interested shareholder of such resident domestic corporation other than a business combination specified in any one of subparagraph (1), (2) or (3):

- (1) A business combination approved by the board of directors of such resident domestic corporation prior to such interested shareholder's stock acquisition date, or where the purchase of stock made by such interested shareholder on such interested shareholder's stock acquisition date had been approved by the board of directors of such resident domestic corporation prior to such interested shareholder's stock acquisition date.
- (2) A business combination approved by the affirmative vote of the holders of a majority of the outstanding voting stock not beneficially owned by such interested shareholder or any affiliate or associate of such interested shareholder at a meeting called for such purpose no earlier than five years after such interested shareholder's stock acquisition date.

(3) A business combination that 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 such resident domestic corporation in such business combination is at least equal to the higher of the following:

(i) the highest per share price paid by such interested shareholder at a time when he was the beneficial owner, directly or indirectly, of five percent or more of the outstanding voting stock of such resident domestic corporation, for any shares of common stock of the same class or series acquired by it (X) within the five-year period immediately prior to the announcement date with respect to such business combination, or (Y) within the five-year period immediately prior to, or in, the transaction in which such interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earlier date on which such 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 such earliest date, up to the amount of such interest; and

(ii) the market value per share of common stock on the announcement date with respect to such business combination or on such interested shareholder's stock acquisition date, whichever is higher; plus interest compounded annually from such 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 such date, up to the amount of such 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 such resident domestic corporation is at least equal to the highest of the following (whether or not such interested shareholder has previously acquired any shares of such class or series of stock):

(i) the highest per share price paid by such interested shareholder at a time when he was the beneficial owner, directly or indirectly, of five percent or more of the outstanding voting stock of such resident domestic corporation, for any shares of such class or series of stock acquired by it (X) within the five-year period immediately prior to the announcement date with respect to such business combination, or (Y) within the five-year period immediately prior to, or in, the transaction in which such interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which such 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 such class or series of stock since such earliest date, up to the amount of such interest;

(ii) the highest preferential amount per share to which the holders of shares of such class or series of stock are entitled in the event of any voluntary liquidation, dissolution or winding up of such resident domestic corporation, plus the aggregate amount of any dividends declared or due as to which such holders are entitled prior to payment of dividends on some other class or series of stock (unless the aggregate amount of such dividends is included in such preferential amount); and

(iii) the market value per share of such class or series of stock on the announcement date with respect to such business combination or on such interested shareholder's stock acquisition date, whichever is higher; plus interest compounded annually from such 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 such class or series of stock since such date, up to the amount of such interest.

- (C) The consideration to be received by holders of a particular class or series of outstanding stock (including common stock) of such resident domestic corporation in such business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of such class or series of stock previously acquired by it, and such consideration shall be distributed promptly.
- (D) The holders of all outstanding shares of stock of such resident domestic corporation not beneficially owned by such interested shareholder immediately prior to the consummation of such business combination are entitled to receive in such business combination cash or other consideration for such shares in compliance with clauses (A), (B) and (C) of this subparagraph.
- (E) After such interested shareholder's stock acquisition date and prior to the consummation date with respect to such business combination, such interested shareholder has not become the beneficial owner of any additional shares of voting stock of such resident domestic corporation except:
 - (i) as part of the transaction which resulted in such 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 clause (E) of subparagraph five of paragraph (a) of this section;
 - (iii) through a business combination meeting all of the conditions of paragraph (b) of this section and this paragraph; or
 - (iv) through purchase by such interested shareholder at any price which, if such price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of such purchase, would have satisfied

the requirements of clauses (A), (B) and (C) of this subparagraph.

(d) The provisions of this section shall not apply:

(1) to any business combination of a resident domestic corporation that does not have a class of voting stock registered with the United States Securities and Exchange Commission pursuant to section twelve of the United States Exchange Act, unless the certificate of incorporation provides otherwise; or

(2) to any business combination of a resident domestic corporation whose certificate of incorporation has been amended to provided that such resident domestic corporation shall be subject to the provisions of this section, which did not have a class of voting stock registered with the United States Securities and Exchange Commission pursuant to section twelve of the United States Exchange Act on the effective date of such amendment, and which is a business combination with an interested shareholder whose stock acquisition date is prior to the effective date of such amendment; or

(3) to any business combination of a resident domestic corporation (i) the original certificate of incorporation of which contains a provision expressly electing not to be governed by this section, or (ii) which adopts an amendment to such resident domestic corporation's by-laws, approved by the affirmative vote of the holders, other than interested shareholders and their affiliates and associates, of a majority of the outstanding voting stock of such resident domestic corporation, excluding the voting stock of interested shareholders and their affiliates and associates, expressly electing not to be governed by this section, provided that such amendment to the by-laws shall not be effective until eighteen months after such vote of such resident domestic corporation's shareholders and shall not apply to any business combination of such resident domestic corporation with an interested shareholder whose stock acquisition date is on or prior to the effective date of such amendment; or

(4) to any business combination of a resident domestic corporation with an interested shareholder of such resident domestic corporation which became an interested shareholder inadvertently, if such interested shareholder (i) as soon as practicable, divests itself of a sufficient amount of the voting stock of such resident domestic corporation so that it no longer is the beneficial owner, directly or indirectly, of twenty percent or more of the outstanding voting stock of such resident domestic corporation, an (ii) would not at any time within the five-year period preceding the announcement date with respect to such business combination have been an interested shareholder but for such inadvertent acquisition.

913. SHARE EXCHANGES

(a) (1) Two domestic corporations may, as provided in this section, participate in the consummation of a plan for binding share exchanges.

(2) Whenever used in this chapter:

(A) "Acquiring corporation" means a corporation that is participating in a procedure pursuant to which such corporation is acquiring all of the outstanding shares of one or more classes of a subject corporation.

(B) "Subject corporation" means a corporation that is participating in a procedure pursuant to which all of the outstanding shares of one or more classes of such corporation are being acquired by an acquiring corporation.

(b) The board of the acquiring corporation and the board of the subject corporation shall adopt a plan of exchange, setting forth:

(1) The name of the acquiring corporation and the name of the subject corporation, and, if the name of either of them has been changed, the name under which it was formed;

(2) As to the acquiring corporation and the subject corporation, the designation and number of outstanding shares of each class and series, specifying the classes and series entitled to vote and further specifying each class and series, if any, entitled to vote as a class; and, if the number of any such shares is subject to change prior to the effective date of the exchange, the manner in which such change may occur;

(3) The terms and conditions of the proposed exchange, including the manner and basis of exchanging the shares to be acquired for shares, bonds or other securities of the acquiring corporation, or the cash or other consideration to be paid or delivered in exchange for such shares to be acquired, or a combination thereof; and

(4) Such other provisions with respect to the proposed exchange as the board considers necessary or desirable.

(c) The board of the subject corporation, upon adopting the plan of exchange, shall submit such plan, except as provided in paragraph (g) of this section, to a vote of shareholders in accordance with the following:

(1) Notice of meeting shall be given to each shareholder of record, as of the record date fixed pursuant to section 604 (Fixing record date), whether or not entitled to vote. A copy of the plan of exchange or an outline of the material features of the plan shall accompany such notice.

- (2) The plan of exchange shall be adopted at a meeting of shareholders by vote of the holders of two-thirds of all outstanding shares entitled to vote thereon. Notwithstanding any provision in the certificate of incorporation, the holders of shares of a class or series shall be entitled to vote and to vote as a class if the plan of exchange contains any provision which, if contained in an amendment to the certificate of incorporation, would entitle the holders of shares of such class or series to vote as a class thereon, or if the shares of such class or series are to be exchanged pursuant to the plan of exchange. In such case, in addition to the authorization of the exchange by vote of the holders of two-thirds of all outstanding shares entitled to vote thereon, the exchange shall be authorized by vote of the holders of a majority of all outstanding shares of each such class or series. Notwithstanding shareholder authorization and at any time prior to the filing of the certificate of exchange, the plan of exchange may be abandoned pursuant to a provision for such abandonment, if any, contained in the plan of exchange.

(d) After adoption of the plan of exchange by the board of the acquiring corporation and the board of the subject corporation and by the shareholders of the subject corporation entitled to vote thereon, unless the exchange is abandoned in accordance with paragraph (c), a certificate of exchange, entitled "Certificate of exchange of shares of, subject corporation, for shares of, acquiring corporation, or other consideration, under section 913 of the Business Corporation Code", shall be signed and verified on behalf of each corporation and delivered to the Nation Clerk. It shall set forth:

- (1) the statements required by subparagraphs (1) and (2) of paragraph (b) of this section;
- (2) the effective date of the exchange if other than the date of filing of the certificate of exchange by the Nation Clerk;
- (3) the date when the certificate of incorporation of each corporation was filed by the Nation Clerk;
- (4) the designation of the shares to be acquired by the acquiring corporation and a statement of the consideration for such shares; and
- (5) the manner in which the exchange was authorized with respect to each corporation.

(e) Upon the filing of the certificate of exchange by the Nation Clerk or on such date subsequent thereto, not to exceed thirty days, as shall be set forth in such certificate, the exchange shall be effected. When such exchange has been effected, ownership of the shares to be acquired pursuant to the plan of exchange shall vest in the acquiring corporation, whether or not the certificates for such shares have been surrendered for exchange, and the acquiring corporation shall be entitled to have new certificates registered in its name or at its direction. Shareholders whose shares have been so acquired shall become entitled to the shares, bonds or other securities of the acquiring corporation, or the cash or other consideration, required to be paid or delivered in exchange for such

shares pursuant to the plan. Subject to any terms of the plan regarding surrender of certificates thereto evidencing the shares so acquired and regarding whether such certificates shall thereafter evidence securities of the acquiring corporation, such certificates shall thereafter evidence only the right to receive the consideration required to be paid or delivered in exchange for such shares pursuant to the plan, or, in the case of dissenting shareholders, their rights under section 910 (Right of shareholder to receive payment for shares upon merger or consolidation, or sale, lease, exchange or other disposition of assets, or share exchange) and section 623 (Procedure to enforce shareholder's right to receive payment for shares).

- (f)
 - (1) a foreign corporation and a domestic corporation may participate in a share exchange, but, if the subject corporation is a foreign corporation, only if such exchange is permitted by the laws of the jurisdiction under which such foreign corporation is incorporated. With respect to such exchange, any reference in subparagraph (2) of paragraph (a) of this section to a corporation shall, unless the context otherwise requires, include both domestic and foreign corporations, and the provisions of paragraphs (b), (c), (d) and (e) of this section shall apply, except to the extent otherwise provided in this paragraph.
 - (2) With respect to procedure, including the requirement of shareholder authorization, a domestic corporation shall comply with the provisions of this chapter relating to share exchanges in which domestic corporations are participating, and a foreign corporation shall comply with the applicable provisions of the law of the jurisdiction under which it is incorporated.
 - (3) If the subject corporation is a foreign corporation, the certificate of exchange shall set forth, in addition to the matters specified in paragraph (d), the jurisdiction and date of incorporation of such corporation and a statement that the exchange is permitted by the laws of the jurisdiction of such corporation and is in compliance therewith.
- (g)
 - (1) Any corporation owning at least ninety percent of the outstanding common shares, having full voting rights, of another corporation may acquire by exchange the remainder of such outstanding common shares, without the authorization of the shareholders of any such corporation and with the effect provided for in paragraph (e) of this section. The board of the acquiring corporation shall adopt a plan of exchange, setting forth the matters specified in paragraph (b) of this section. A copy of such plan of exchange or an outline of the material features thereof shall be given, personally or by mail, to all holders of shares of the subject corporation that are not owned by the acquiring corporation, unless the giving of such copy or outline has been waived by such holders.
 - (2) A certificate of exchange, entitled "Certificate of exchange of shares of, subject corporation, for shares of, acquiring corporation, or other consideration, under paragraph (g) of section 913 of the Business Corporation Code" and complying with the provisions of paragraph (d) and, if applicable, subparagraph (3) of paragraph (f)

shall be signed, verified and delivered to the Nation Clerk by the acquiring corporation, but not less than thirty days after the giving of a copy or outline of the material features of the plan of exchange to shareholders of the subject corporation, or at any time after the waiving thereof by the holders of all the outstanding shares of the subject corporation not owned by the acquiring corporation.

- (3) The right of exchange of shares granted by this paragraph to certain corporations shall not preclude the exercise by such corporations of any other right of exchange under this chapter.
 - (4) The procedure for the exchange of shares of a subject corporation under this paragraph (g) of this section shall be available where either the subject corporation or the acquiring corporation is a foreign corporation, and, in case the subject corporation is a foreign corporation, where such exchange is permitted by the laws of the jurisdiction under which such foreign corporation is incorporated.
- (h) This section does not limit the power of a domestic or foreign corporation to acquire all or part of the shares of one or more classes of another domestic or foreign corporation by means of a voluntary exchange or otherwise.
- (i) (1) A binding share exchange pursuant to this section shall constitute a "business combination" pursuant to section nine hundred twelve of this chapter (Requirements relating to certain business combinations) if the subject corporation is a "resident domestic corporation" and the acquiring corporation is an "interested shareholder" of the subject corporation, as such terms are defined in section nine hundred twelve of this chapter.
- (2) With respect to convertible securities and other securities evidencing a right to acquire shares of a subject corporation, a binding share exchange pursuant to this section shall have the same effect on the rights of the holders of such securities as a merger of the subject corporation.