

**§1109. Required vote of shareholders in certain business combinations**

**1. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

- A. "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with a specified person. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]
- B. "Announcement date," when used in reference to any business combination, means the date of the first public announcement of the final, definitive proposal for that business combination. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]
- C. "Associate," when used to indicate a relationship with a person, means:
- (1) Any corporation or organization of which that person is a director, officer or partner or is, directly or indirectly, the beneficial owner of 10% or more of any class of voting shares;
  - (2) Any trust or other estate in which that person has a substantial beneficial interest or to which that person serves as trustee or in a similar fiduciary capacity; and
  - (3) Any relative or spouse of that person, or any relative of that spouse, who has the same home as that person. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]
- D. "Beneficial owner," when used with respect to shares, means a person that:
- (1) Individually or with or through any affiliate or associate, beneficially owns shares, directly or indirectly;
  - (2) Individually or with or through any affiliate or associate, has the right to:
    - (a) Acquire shares, whether that 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, except that a person is not considered the beneficial owner of shares tendered pursuant to a tender or exchange offer made by that person or any of that person's affiliates or associates until the tendered shares are accepted for purchase or exchange; or
    - (b) Vote shares pursuant to any agreement, arrangement or understanding, whether or not in writing, except that a person is not considered the beneficial owner of any shares under this division if the agreement, arrangement or understanding to vote shares arises solely from a revocable proxy given in response to a proxy solicitation made in accordance with the applicable rules and regulations under the Exchange Act, and is not then reportable on a Schedule 13D under the Exchange Act, or any comparable or successor report; or
  - (3) 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 as described in subparagraph (2), or disposing of shares with another person who beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, the shares. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]
- E. "Business combination," when used in reference to any domestic corporation and any interested shareholder of that domestic corporation, means:
- (1) Any merger or share exchange of that domestic corporation or any subsidiary of that domestic corporation with that interested shareholder, any other corporation, whether or not it is an interested shareholder of that domestic corporation, that is, or after a merger or share exchange would be, an affiliate or associate of that interested shareholder, or any other

corporation if the merger or share exchange is caused by that interested shareholder and as a result of that merger or share exchange this section is not applicable to the surviving corporation;

(1-A) Any conversion or domestication proposed by an interested shareholder or for which an interested shareholder votes, as a result of which this section is not applicable to the resulting entity;

(2) Any sale, lease, exchange, mortgage, pledge, transfer or other disposition, in one transaction or a series of transactions, of assets of that domestic corporation or any subsidiary of that domestic corporation having an aggregate market value equal to 10% or more of the aggregate market value, or book value determined in accordance with good accounting practices, of all the assets, determined on a consolidated basis, of that domestic corporation, having an aggregate market value equal to 10% or more of the aggregate market value of all the outstanding shares of that domestic corporation, or representing 10% or more of the earning power or income, determined on a consolidated basis, of that domestic corporation proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with that interested shareholder or any affiliate or associate of that interested shareholder;

(3) The issuance or transfer by that domestic corporation or any subsidiary of that domestic corporation, in one transaction or a series of transactions, of any shares of that domestic corporation or any subsidiary of that domestic corporation that has an aggregate market value equal to 5% or more of the aggregate market value of all the outstanding shares of that domestic corporation to that interested shareholder or any affiliate or associate of that interested shareholder, except pursuant to the exercise of warrants or rights to purchase shares offered, or a dividend or distribution paid or made, pro rata to all shareholders of that domestic corporation;

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

(5) Any reclassification of securities, including, without limitation, any share split, share dividend or other distribution of shares, or any reverse share split, or recapitalization of that domestic corporation, or any merger or consolidation of that domestic corporation, with any subsidiary of that domestic corporation, or any other transaction, whether or not with, or into, or otherwise involving that interested shareholder, proposed by, on behalf of or pursuant to any agreement, arrangement or understanding, whether or not in writing, with that interested shareholder or any affiliate or associate of that interested shareholder, any of which has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of voting shares or securities convertible into voting shares of that domestic corporation or any subsidiary of that domestic corporation that is directly or indirectly owned by that interested shareholder or any affiliate or associate of that interested shareholder, except as a result of immaterial changes due to fractional share adjustments; or

(6) Any receipt by that interested shareholder or any affiliate or associate of that interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the domestic corporation, of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through that domestic corporation. [PL 2003, c. 344, Pt. B, §104 (AMD).]

F. "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 shares, by contract or otherwise. A person's beneficial ownership of 10% or more of the outstanding voting shares of a corporation creates a presumption that that person has control of that corporation. Notwithstanding this paragraph, a person is not considered to have control of a corporation if that person holds voting power, in good faith and not for the purpose of circumventing this paragraph, 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 that corporation. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

G. "Exchange Act" means the United States Securities Exchange Act of 1934 as that Act has been or may be amended from time to time. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

H. "Interested shareholder," when used in reference to any domestic corporation, means any person, other than that domestic corporation or any subsidiary of that domestic corporation, that:

(1) Is the beneficial owner, directly or indirectly, of 25% or more of the outstanding voting shares of that domestic corporation; or

(2) Is an affiliate or associate of that domestic corporation and at any time within the 5-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of 25% or more of the outstanding voting shares of that domestic corporation. For the purpose of determining whether a person is an interested shareholder pursuant to this paragraph, the number of shares of voting shares of that domestic corporation considered to be outstanding must include shares considered to be beneficially owned by the person through application of paragraph D, but does not include any other unissued voting shares of that domestic corporation that may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise. The term "interested shareholder" does not include any person whose ownership of voting shares in excess of the 25% limitation set forth in this paragraph is the result of action taken solely by the corporation and not caused directly or indirectly by that person; however, that person is an interested shareholder if thereafter that person acquires additional voting shares of the corporation, except as a result of further corporate action not caused, directly or indirectly, by that person. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

I. "Market value," when used in reference to property of any domestic corporation, means:

(1) In the case of shares, the highest closing sale price during the 30-day period immediately preceding the date in question of a share on the composite tape for New York Stock Exchange listed stocks; or, if that share is not quoted on that composite tape or, if that share is not listed on that exchange, then on the principal United States Securities Exchange registered under the Exchange Act on which that share is listed, or, if that share is not listed on any such exchange, the highest closing bid quotation with respect to the share during the 30-day period preceding the date in question on the National Association of Securities Dealers 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 the share as determined in good faith by the board of directors of that corporation; and

(2) In the case of property other than cash or shares, the fair market value of that property on the date in question as determined in good faith by the board of directors of that domestic corporation. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

J. "Share" means:

(1) Any share or similar security, any certificate of interest, any participation in any profit-sharing agreement, any voting trust certificate or any certificate of deposit for shares; and

(2) Any security convertible, with or without consideration, into shares or any warrant, call or other option or privilege of buying shares without being bound to do so, or any other security carrying any right to acquire, subscribe to or purchase shares. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

K. "Share acquisition date," with respect to any person and any domestic corporation, means the date that the person first becomes an interested shareholder of that domestic corporation. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

L. "Subsidiary" of any domestic corporation means any other corporation of which voting shares having 50% or more of the votes entitled to be cast is owned, directly or indirectly, by that domestic corporation. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

M. "Voting shares" means shares of a corporation entitled to vote generally in the election of directors. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]  
[PL 2003, c. 344, Pt. B, §104 (AMD).]

**2. Business combination.** Notwithstanding anything to the contrary in this Act, except subsection 3, a domestic corporation may not engage in any business combination for a period of 5 years following an interested shareholder's share acquisition date unless that business combination is:

A. Approved by the board of directors of that domestic corporation prior to that interested shareholder's share acquisition date; or [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

B. Approved, subsequent to that interested shareholder's share acquisition date, by the board of directors of that domestic corporation and authorized by the affirmative vote, at a meeting called for that purpose, of at least a majority of the outstanding voting shares not beneficially owned by that interested shareholder or any affiliate or associate of that interested shareholder or by persons who are either directors or officers and also employees of that domestic corporation. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]  
[PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

**3. Exemptions.** This section does not apply to business combinations as provided in this subsection.

A. Unless the articles of incorporation of a domestic corporation provide otherwise, this section does not apply to any business combination of that domestic corporation if that domestic corporation did not have a class of voting shares registered or traded on a national securities exchange or registered with the United States Securities and Exchange Commission pursuant to 15 United States Code, Section 78 l(g) on that interested shareholder's share acquisition date. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

B. Unless the articles of incorporation of that domestic corporation provide otherwise, this section does not apply to any business combination involving a domestic corporation that does not have any interested shareholders other than an interested shareholder who was an interested shareholder immediately prior to the effective date of this section unless, subsequent to the effective date of this section, that interested shareholder increased its proportion of that domestic corporation's outstanding voting shares to a proportion in excess of the proportion of voting shares that interested shareholder held immediately prior to the effective date of this section. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

C. This section does not apply to any business combination involving a domestic corporation that does not have an interested shareholder other than an interested shareholder of that domestic corporation that became an interested shareholder inadvertently if that interested shareholder:

(1) As soon as practicable divests itself of a sufficient amount of the voting shares of that domestic corporation so that the interested shareholder no longer is the beneficial owner, directly or indirectly, of 25% or more of the outstanding voting shares of that domestic corporation; and

(2) Has not been at any time within the 5-year period preceding the announcement date with respect to that business combination, an interested shareholder of that domestic corporation but for that inadvertent acquisition. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

D. This section does not apply to any business combination involving a domestic corporation that, in its original articles of incorporation, has expressly elected not to be governed by this section. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

E. This section does not apply to any business combination involving a domestic corporation that, by action of its shareholders, adopts an amendment to its articles of incorporation or bylaws expressly electing not to be governed by this section; however, in addition to any other vote required by law, the amendment to the articles of incorporation or bylaws must be approved by the affirmative vote of at least 66 2/3% of the shares entitled to vote. An amendment adopted pursuant to this paragraph is effective immediately. A bylaw amendment adopted pursuant to this paragraph may not be further amended or repealed by the board of directors. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

[PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

The requirements of this section are in addition to the requirements of applicable law, including this Act, and any additional requirements contained in the articles of incorporation or bylaws of a domestic corporation with respect to business combinations as defined in this section. [PL 2001, c. 640, Pt. A, §2 (NEW); PL 2001, c. 640, Pt. B, §7 (AFF).]

#### SECTION HISTORY

PL 2001, c. 640, §A2 (NEW). PL 2001, c. 640, §B7 (AFF). PL 2003, c. 344, §B104 (AMD).

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