

ASSEMBLY, No. 3049

STATE OF NEW JERSEY 215th LEGISLATURE

INTRODUCED JUNE 7, 2012

Sponsored by:

Assemblyman PATRICK J. DIEGNAN, JR.

District 18 (Middlesex)

Assemblyman JOHN J. BURZICHELLI

District 3 (Cumberland, Gloucester and Salem)

Co-Sponsored by:

Assemblyman Chivukula and Senator Gill

SYNOPSIS

Allows certain business combinations between resident domestic corporations and interested stockholders.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 2/8/2013)

1 AN ACT concerning resident domestic corporations and amending
2 P.L.1986, c.74.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. Section 3 of P.L.1986, c.74 (C.14A:10A-3) is amended to
8 read as follows:

9 3. As used in this act:

10 a. "Affiliate" means a person that directly, or indirectly through
11 one or more intermediaries, controls, or is controlled by, or is under
12 common control with, a specified person.

13 b. "Announcement date," when used in reference to any
14 business combination, means the date of the first public
15 announcement of the final, definitive proposal for that business
16 combination.

17 c. "Associate," when used to indicate a relationship with any
18 person, means (1) any corporation or organization of which that
19 person is an officer or partner or is, directly or indirectly, the
20 beneficial owner of 10% or more of any class of voting stock, (2)
21 any trust or other estate in which that person has a substantial
22 beneficial interest or as to which that person serves as trustee or in a
23 similar fiduciary capacity, or (3) any relative or spouse of that
24 person, or any relative of that spouse, who has the same home as
25 that person.

26 d. "Beneficial owner," when used with respect to any stock,
27 means a person:

28 (1) that, individually or with or through any of its affiliates or
29 associates, beneficially owns that stock, directly or indirectly;

30 (2) that, individually or with or through any of its affiliates or
31 associates, has (a) the right to acquire that stock (whether that right
32 is exercisable immediately or only after the passage of time),
33 pursuant to any agreement, arrangement or understanding (whether
34 or not in writing), or upon the exercise of conversion rights,
35 exchange rights, warrants or options, or otherwise; provided,
36 however, that a person shall not be deemed the beneficial owner of
37 stock tendered pursuant to a tender or exchange offer made by that
38 person or any of that person's affiliates or associates until that
39 tendered stock is accepted for purchase or exchange; or (b) the right
40 to vote that stock pursuant to any agreement, arrangement or
41 understanding (whether or not in writing); provided, however, that a
42 person shall not be deemed the beneficial owner of any stock under
43 this subparagraph if the agreement, arrangement or understanding to
44 vote that stock (i) arises solely from a revocable proxy or consent

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 given in response to a proxy or consent solicitation made in
2 accordance with the applicable rules and regulations under the
3 Exchange Act, and (ii) is not then reportable on a Schedule 13D
4 under the Exchange Act (or any comparable or successor report); or

5 (3) that has any agreement, arrangement or understanding
6 (whether or not in writing), for the purpose of acquiring, holding,
7 voting (except voting pursuant to a revocable proxy or consent as
8 described in subparagraph (b) of paragraph (2) of this subsection),
9 or disposing of that stock with any other person that beneficially
10 owns, or whose affiliates or associates beneficially own, directly or
11 indirectly, that stock.

12 e. "Business combination," when used in reference to any
13 resident domestic corporation and any interested stockholder of that
14 resident domestic corporation, means:

15 (1) any merger or consolidation of that resident domestic
16 corporation or any subsidiary of that resident domestic corporation
17 with (a) that interested stockholder or (b) any other corporation
18 (whether or not it is an interested stockholder of that resident
19 domestic corporation) which is, or after a merger or consolidation
20 would be, an affiliate or associate of that interested stockholder;

21 (2) any sale, lease, exchange, mortgage, pledge, transfer or other
22 disposition (in one transaction or a series of transactions) to or with
23 that interested stockholder or any affiliate or associate of that
24 interested stockholder of assets of that resident domestic
25 corporation or any subsidiary of that resident domestic corporation
26 (a) having an aggregate market value equal to 10% or more of the
27 aggregate market value of all the assets, determined on a
28 consolidated basis, of that resident domestic corporation, (b) having
29 an aggregate market value equal to 10% or more of the aggregate
30 market value of all the outstanding stock of that resident domestic
31 corporation, or (c) representing 10% or more of the earning power
32 or income, determined on a consolidated basis, of that resident
33 domestic corporation;

34 (3) the issuance or transfer by that resident domestic corporation
35 or any subsidiary of that resident domestic corporation (in one
36 transaction or a series of transactions) of any stock of that resident
37 domestic corporation or any subsidiary of that resident domestic
38 corporation which has an aggregate market value equal to 5% or
39 more of the aggregate market value of all the outstanding stock of
40 that resident domestic corporation to that interested stockholder or
41 any affiliate or associate of that interested stockholder, except
42 pursuant to the exercise of warrants or rights to purchase stock
43 offered, or a dividend or distribution paid or made, pro rata to all
44 stockholders of that resident domestic corporation;

45 (4) the adoption of any plan or proposal for the liquidation or
46 dissolution of that resident domestic corporation proposed by, on
47 behalf of or pursuant to any agreement, arrangement or
48 understanding (whether or not in writing) with that interested

1 stockholder or any affiliate or associate of that interested
2 stockholder;

3 (5) any reclassification of securities (including, without
4 limitation, any stock split, stock dividend, or other distribution of
5 stock in respect of stock, or any reverse stock split), or
6 recapitalization of that resident domestic corporation, or any merger
7 or consolidation of that resident domestic corporation with any
8 subsidiary of that resident domestic corporation, or any other
9 transaction (whether or not with, or into, or otherwise involving that
10 interested stockholder), proposed by, on behalf of or pursuant to
11 any agreement, arrangement or understanding (whether or not in
12 writing) with that interested stockholder or any affiliate or associate
13 of that interested stockholder, which has the effect, directly or
14 indirectly, of increasing the proportionate share of the outstanding
15 shares of any class or series of stock or securities convertible into
16 voting stock of that resident domestic corporation or any subsidiary
17 of that resident domestic corporation which is directly or indirectly
18 owned by that interested stockholder or any affiliate or associate of
19 that interested stockholder, except as a result of immaterial changes
20 due to fractional share adjustments; or

21 (6) any receipt by that interested stockholder or any affiliate or
22 associate of that interested stockholder of the benefit, directly or
23 indirectly (except proportionately as a stockholder of that resident
24 domestic corporation), of any loans, advances, guarantees, pledges
25 or other financial assistance or any tax credits or other tax
26 advantages provided by or through that corporation; provided,
27 however, that the term "business combination" shall not be deemed
28 to include the receipt of any of the foregoing benefits by that
29 resident domestic corporation or any of that corporation's affiliates
30 arising from transactions (such as intercompany loans or tax sharing
31 arrangements) between that resident domestic corporation and its
32 affiliates in the ordinary course of business.

33 f. "Common stock" means any stock other than preferred
34 stock.

35 g. "Consummation date," with respect to any business
36 combination, means the date of consummation of that business
37 combination.

38 h. "Control," including the terms "controlling," "controlled by"
39 and "under common control with," means the possession, directly or
40 indirectly, of the power to direct or cause the direction of the
41 management and policies of a person, whether through the
42 ownership of voting stock, by contract, or otherwise. A person's
43 beneficial ownership of 10% or more of the voting power of a
44 corporation's outstanding voting stock shall create a presumption
45 that that person has control of that corporation. Notwithstanding
46 the foregoing in this subsection, a person shall not be deemed to
47 have control of a corporation if that person holds voting power, in
48 good faith and not for the purpose of circumventing this section, as

1 an agent, bank, broker, nominee, custodian or trustee for one or
2 more beneficial owners who do not individually or as a group have
3 control of that corporation.

4 i. "Exchange Act" means the "Securities Exchange Act of
5 1934," 48 Stat. 881 (15 U.S.C. s. 78a et seq.) as the same has been
6 or hereafter may be amended from time to time.

7 j. "Interested stockholder," when used in reference to any
8 resident domestic corporation, means any person (other than that
9 resident domestic corporation or any subsidiary of that resident
10 domestic corporation) that:

11 (1) is the beneficial owner, directly or indirectly, of 10% or
12 more of the voting power of the outstanding voting stock of that
13 resident domestic corporation; or

14 (2) is an affiliate or associate of that resident domestic
15 corporation and at any time within the five-year period immediately
16 prior to the date in question was the beneficial owner, directly or
17 indirectly, of 10% or more of the voting power of the then
18 outstanding stock of that resident domestic corporation. For the
19 purpose of determining whether a person is an interested
20 stockholder pursuant to this subsection, the number of shares of
21 voting stock of that resident domestic corporation deemed to be
22 outstanding shall include shares deemed to be beneficially owned
23 by the person through application of subsection d. of this section
24 but shall not include any other unissued shares of voting stock of
25 that resident domestic corporation which may be issuable pursuant
26 to any agreement, arrangement or understanding, or upon exercise
27 of conversion rights, warrants or options, or otherwise.

28 k. "Market value," when used in reference to property of any
29 resident domestic corporation, means:

30 (1) in the case of stock, the highest closing sale price during the
31 30-day period immediately preceding the date in question of a share
32 of that stock on the composite tape for New York Stock Exchange-
33 listed stocks, or, if that stock is not quoted on that composite tape or
34 if that stock is not listed on that exchange, on the principal United
35 States securities exchange registered under the Exchange Act on
36 which that stock is listed, or, if that stock is not listed on any such
37 exchange, the highest closing bid quotation with respect to a share
38 of that stock during the 30-day period preceding the date in
39 question on the National Association of Securities Dealers, Inc.
40 Automated Quotations System, or any system then in use, or if no
41 such quotations are available, the fair market value on the date in
42 question of a share of that resident domestic stock as determined by
43 the board of directors of that corporation in good faith; and

44 (2) in the case of property other than cash or stock, the fair
45 market value of that property on the date in question as determined
46 by the board of directors of that resident domestic corporation in
47 good faith.

1 l. "Preferred stock" means any class or series of stock of a
2 resident domestic corporation which under the bylaws or certificate
3 of incorporation of that resident domestic corporation is entitled to
4 receive payment of dividends prior to any payment of dividends on
5 some other class or series of stock, or is entitled in the event of any
6 voluntary liquidation, dissolution or winding up of the resident
7 domestic corporation to receive payment or distribution of a
8 preferential amount before any payments or distributions are
9 received by some other class or series of stock.

10 m. "Resident domestic corporation" means an issuer of voting
11 stock which is organized under the laws of this State [and, as of the
12 stock acquisition date in question, has its principal executive offices
13 located in this State or significant business operations located in
14 this State] , provided, however, that an issuer which did not have its
15 principal executive offices located in this State and did not have
16 significant business operations in this State on the date of enactment
17 of P.L. _____, c. (pending before the Legislature as this bill), may
18 elect not to be a resident domestic corporation and not be governed
19 by P.L.1986, c.74 (C.14A:10A-1 et seq.), by its board of directors
20 adopting an amendment to its bylaws to that effect within 90 days
21 of the date of enactment of P.L. _____, c. (pending before the
22 Legislature as this bill), and which amendment shall not be further
23 amended by the board of directors.

24 n. "Stock" means:

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

28 (2) any security convertible, with or without consideration, into
29 stock, or any warrant, call or other option or privilege of buying
30 stock without being bound to do so, or any other security carrying
31 any right to acquire, subscribe to or purchase stock.

32 o. "Stock acquisition date," with respect to any person and any
33 resident domestic corporation, means the date that person first
34 becomes an interested stockholder of that resident domestic
35 corporation.

36 p. "Subsidiary" of any resident domestic corporation means any
37 other corporation of which voting stock having a majority of the
38 votes entitled to be cast is owned, directly or indirectly, by that
39 resident domestic corporation.

40 q. "Voting stock" means shares of capital stock of a
41 corporation entitled to vote generally in the election of directors.

42 (cf: P.L.1989, c.106, s.2)

43
44 2. Section 4 of P.L.1986, c.74 (C.14A:10A-4) is amended to
45 read as follows:

46 4. Notwithstanding anything to the contrary contained in this
47 act (except section 6 of this act), no resident domestic corporation
48 shall engage in any business combination with any interested

1 stockholder of that resident domestic corporation for a period of
2 five years following that interested stockholder's stock acquisition
3 date unless:

4 a. that business combination is approved by the board of
5 directors of that resident domestic corporation prior to that
6 interested stockholder's stock acquisition date; or

7 b. the transaction or series of related transactions which caused
8 the person to become an interested stockholder was approved by the
9 board of directors of that resident domestic corporation prior to that
10 interested stockholder's stock acquisition date and any subsequent
11 business combinations with that interested stockholder are approved
12 by the board of directors of that resident domestic corporation,
13 provided that any such subsequent business combination is
14 approved by (1) the board of directors, or a committee of that board,
15 consisting solely of persons who are not employees, officers,
16 directors, stockholders, affiliates or associates of that interested
17 stockholder, and (2) the affirmative vote of the holders of a majority
18 of the voting stock not beneficially owned by such interested
19 stockholder at a meeting called for such purpose.

20 (cf: P.L.1986, c.74, s.4)

21

22 3. Section 5 of P.L.1986, c.74 (C.14A:10A-5) is amended to
23 read as follows:

24 5. In addition to the restriction contained in section 4 of this
25 act, and except as provided in section 6 of this act, no resident
26 domestic corporation shall engage at any time in any business
27 combination with any interested stockholder of that resident
28 domestic corporation other than a business combination specified in
29 any one of subsection a., b. **[or]**, c. or d. of this section (the
30 satisfaction of any one subsection being sufficient):

31 a. a business combination approved by the board of directors of
32 that resident domestic corporation prior to that interested
33 stockholder's stock acquisition date.

34 b. a business combination approved by the affirmative vote of
35 the holders of two-thirds of the voting stock not beneficially owned
36 by that interested stockholder at a meeting called for such purpose.

37 c. a business combination that meets all of the following
38 conditions:

39 (1) the aggregate amount of the cash and the market value, as of
40 the consummation date, of consideration other than cash to be
41 received per share by holders of outstanding shares of common
42 stock of that resident domestic corporation in that business
43 combination is at least equal to the higher of the following:

44 (a) the highest per share price (including any brokerage
45 commissions, transfer taxes and soliciting dealers' fees) paid by that
46 interested stockholder for any shares of common stock of the same
47 class or series acquired by it (i) within the five-year period
48 immediately prior to the announcement date with respect to that

1 business combination, or (ii) within the five-year period
2 immediately prior to, or in, the transaction in which that interested
3 stockholder became an interested stockholder, whichever is higher;
4 plus, in either case, interest compounded annually from the earliest
5 date on which that highest per share acquisition price was paid
6 through the consummation date at the rate for one-year United
7 States Treasury obligations from time to time in effect; less the
8 aggregate amount of any cash dividends paid, and the market value
9 of any dividends paid other than in cash, per share of common stock
10 since that earliest date, up to the amount of that interest; and

11 (b) the market value per share of common stock on the
12 announcement date with respect to that business combination or on
13 that interested stockholder's stock acquisition date, whichever is
14 higher; plus interest compounded annually from that date through
15 the consummation date at the rate for one-year United States
16 Treasury obligations from time to time in effect; less the aggregate
17 amount of any cash dividends paid, and the market value of any
18 dividends paid other than in cash, per share of common stock since
19 that date, up to the amount of that interest;

20 (2) the aggregate amount of the cash and the market value as of
21 the consummation date of consideration other than cash to be
22 received per share by holders of outstanding shares of any class or
23 series of stock, other than common stock, of that resident domestic
24 corporation is at least equal to the highest of the following (whether
25 or not that interested stockholder has previously acquired any
26 shares of that class or series of stock):

27 (a) the highest per share price (including any brokerage
28 commissions, transfer taxes and soliciting dealers' fees) paid by that
29 interested stockholder for any shares of that class or series of stock
30 acquired by it (i) within the five-year period immediately prior to
31 the announcement date with respect to that business combination, or
32 (ii) within the five-year period immediately prior to, or in, the
33 transaction in which that interested stockholder became an
34 interested stockholder, whichever is higher; plus, in either case,
35 interest compounded annually from the earliest date on which that
36 highest per share acquisition price was paid through the
37 consummation date at the rate for one-year United States Treasury
38 obligations from time to time in effect; less the aggregate amount of
39 any cash dividends paid, and the market value of any dividends paid
40 other than in cash, per share of that class or series of stock since
41 that earliest date, up to the amount of that interest;

42 (b) the highest preferential amount per share to which the
43 holders of shares of that class or series of stock are entitled in the
44 event of any liquidation, dissolution or winding up of that resident
45 domestic corporation, plus the aggregate amount of any dividends
46 declared or due as to which those holders are entitled prior to
47 payment of dividends on some other class or series of stock (unless

1 the aggregate amount of those dividends is included in that
2 preferential amount); and

3 (c) the market value per share of that class or series of stock on
4 the announcement date with respect to that business combination or
5 on that interested stockholder's stock acquisition date, whichever is
6 higher; plus interest compounded annually from that date through
7 the consummation date at the rate for one-year United States
8 Treasury obligations from time to time in effect; less the aggregate
9 amount of any cash dividends paid, and the market value of any
10 dividends paid other than in cash, per share of that class or series of
11 stock since that date, up to the amount of that interest;

12 (3) the consideration to be received by holders of a particular
13 class or series of outstanding stock (including common stock) of
14 that resident domestic corporation in that business combination is in
15 cash or in the same form as the interested stockholder has used to
16 acquire the largest number of shares of that class or series of stock
17 previously acquired by it;

18 (4) the holders of all outstanding shares of stock of that resident
19 domestic corporation not beneficially owned by that interested
20 stockholder immediately prior to the consummation of that business
21 combination are entitled to receive in that business combination
22 cash or other consideration for those shares in compliance with
23 paragraphs (1), (2) and (3) of this subsection; and

24 (5) after that interested stockholder's stock acquisition date and
25 prior to the consummation date with respect to that business
26 combination, that interested stockholder has not become the
27 beneficial owner of any additional shares of stock of that resident
28 domestic corporation, except:

29 (a) as part of the transaction which resulted in that interested
30 stockholder becoming an interested stockholder;

31 (b) by virtue of proportionate stock splits, stock dividends or
32 other distributions of stock in respect of stock not constituting a
33 business combination under paragraph (5) of subsection e. of
34 section 2 of this act;

35 (c) through a business combination meeting all of the conditions
36 of paragraph (3) and this paragraph; or

37 (d) through purchase by that interested stockholder at any price
38 which, if that price had been paid in an otherwise permissible
39 business combination, the announcement date and consummation
40 date of which were the date of that purchase, would have satisfied
41 the requirements of paragraphs (1), (2) and (3) of this subsection.

42 d. a business combination approved by (1) the board of
43 directors, or a committee of the board of directors, of that resident
44 domestic corporation consisting solely of persons who are not
45 employees, officers, directors, stockholders, affiliates or associates
46 of that interested stockholder prior to the consummation of the
47 business combination; and (2) the affirmative vote of the holders of
48 a majority of the voting stock not beneficially owned by such

1 interested stockholder at a meeting called for such purpose if the
2 transaction or series of related transactions with the interested
3 stockholder which caused the person to become an interested
4 stockholder was approved by the board of directors of the resident
5 domestic corporation prior to the consummation of such transaction
6 or series of related transactions.

7 (cf: P.L.1987, c.380, s.2)

8

9 4. Section 6 of P.L.1986, c.74 (C.14A:10A-6) is amended to
10 read as follows:

11 6. a. Unless the certificate of incorporation provides otherwise,
12 the provisions of this act shall not apply to any business
13 combination of a resident domestic corporation with an interested
14 stockholder if the resident domestic corporation did not have a class
15 of voting stock registered or traded on a national securities
16 exchange or registered with the Securities and Exchange
17 Commission pursuant to section 12(g) of the Exchange Act, 48 Stat.
18 892 (15 U.S.C. [s.781] s.781) on that interested stockholder's stock
19 acquisition date.

20 b. Unless the certificate of incorporation provides otherwise,
21 the provisions of this act shall not apply to any business
22 combination with an interested stockholder who was an interested
23 stockholder prior to the effective date of this act unless subsequent
24 thereto that interested stockholder increased his or its interested
25 stockholder's proportion of the voting power of the resident
26 domestic corporation's outstanding voting stock to a proportion in
27 excess of the proportion of voting power that interested stockholder
28 held prior to the effective date of this act.

29 c. (Deleted by amendment, P.L.1987, c.380.)

30 d. The provisions of this act shall not apply to any business
31 combination of a resident domestic corporation with an interested
32 stockholder of that corporation which became an interested
33 stockholder inadvertently, if such interested stockholder (1) as soon
34 as practicable divests itself or himself of a sufficient amount of the
35 voting stock of that resident domestic corporation so that he or it no
36 longer is the beneficial owner, directly or indirectly, of 10% or
37 more of the voting power of the outstanding voting stock of that
38 corporation, or a subsidiary of that resident domestic corporation,
39 and (2) would not at any time within the five-year period preceding
40 the announcement date with respect to that business combination
41 have been an interested stockholder but for that inadvertent
42 acquisition.

43 e. (Deleted by amendment, P.L.1989, c.106.)

44 f. The provisions of this act shall not apply to any business
45 combination of a resident domestic corporation with an interested
46 stockholder of that corporation which, prior to August 5, 1986,
47 became the beneficial owner of more than 50% of the voting power
48 of the outstanding voting stock of that resident domestic

1 corporation by reason of a purchase of voting stock directly from
2 that resident domestic corporation in a transaction approved by the
3 board of directors of that resident domestic corporation, provided
4 that, at the time of the approval, none of the directors of the resident
5 domestic corporation was an employee, officer, director,
6 shareholder, affiliate or associate of the interested stockholder.

7 g. The provisions of this act shall not apply to any business
8 combination of a resident domestic corporation with an interested
9 stockholder of that corporation which became an interested
10 stockholder on or after August 5, 1986 and before January 1, 1987.

11 h. The provisions of P.L.1989, c.74 (C.14A:10A-1 et seq.) shall
12 not apply to any stockholder who was the beneficial owner of 5% or
13 more of the voting power of the outstanding voting stock of that
14 resident domestic corporation on the effective date of P.L. _____,
15 c. (pending before the Legislature as this bill) if the resident
16 domestic corporation did not, on the effective date of P.L. _____,
17 c. (pending before the Legislature as this bill), have its principal
18 executive offices located in this State or significant business
19 operations located in this State.

20 (cf: P.L.1989, c.106, s.3)

21

22 5. This act shall take effect on the 90th day next following
23 enactment.

24

25

26

STATEMENT

27

28 This bill amends the "New Jersey Shareholders' Protection Act"
29 to allow certain business combinations between resident domestic
30 corporations and interested stockholders.

31 Specifically, the bill amends the definition of "resident domestic
32 corporation" to provide that a resident domestic corporation does
33 not include an issuer of voting stock which is organized under the
34 laws of this State but neither maintains its principal executive
35 offices in this State nor has significant business operations located
36 in this State if that corporation's board of director adopts an
37 amendment to its bylaws electing not to be a resident domestic
38 corporation within 90 days from the effective date of this bill.

39 The bill also allows a resident domestic corporation to engage in
40 a business combination with an interested stockholder if the
41 transaction which caused the person to become an interested
42 stockholder was approved by the resident domestic corporation's
43 board of directors prior to the stock acquisition date. (Generally, an
44 "interested stockholder" is an owner of 10% or more of the
45 outstanding voting stock of the corporation.)

46 The bill further allows a subsequent business combination
47 between a resident domestic corporation and an interested
48 stockholder if the subsequent business combination is approved by:

1 (1) the board of directors, or a committee of that board, consisting
2 solely of persons who are not employees, officers, directors,
3 stockholders, affiliates or associates of that interested stockholder;
4 and (2) the affirmative vote of the holders of a majority of the
5 voting stock not beneficially owned by such interested stockholder
6 at a meeting called for such purpose.

7 The bill also exempts from the provisions of the “New Jersey
8 Shareholders’ Protection Act” any stockholder who was the
9 beneficial owner of five percent or more of the voting power of the
10 outstanding voting stock of that resident domestic corporation on
11 the effective date of this bill if the resident domestic corporation did
12 not, on the effective date of the bill, have its principal executive
13 offices located in this State or significant business operations
14 located in this State.