

ASSEMBLY, No. 2161

STATE OF NEW JERSEY 217th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2016 SESSION

Sponsored by:

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SYNOPSIS

Clarifies that corporation may adopt “force the vote” provision in plan of merger or consolidation; allows directors to amend plan of merger or consolidation prior to effectiveness of plan.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.



(Sponsorship Updated As Of: 1/13/2017)

1 AN ACT concerning corporate mergers and consolidations and
2 amending N.J.S.14A:10-3 and N.J.S.14A:10-4.1.

3

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

6

7 1. N.J.S.14A:10-3 is amended to read as follows:

8 14A:10-3. Approval by shareholders.

9 (1) The board of each corporation, upon approving such plan of
10 merger or plan of consolidation, shall direct that the plan be
11 submitted to a vote at a meeting of shareholders. Written notice
12 shall be given not less than 20 nor more than 60 days before such
13 meeting to each shareholder of record, whether or not entitled to
14 vote at such meeting, in the manner provided in this act for the
15 giving of notice of meetings of shareholders. Such notice shall
16 include, or shall be accompanied by

17 (a) A copy or a summary of the plan of merger or consolidation;
18 and

19 (b) A statement informing shareholders who, under Chapter 11
20 of this act, are entitled to dissent, that they have the right to dissent
21 and to be paid the fair value of their shares and outlining briefly,
22 with particular reference to the time periods within which actions
23 must be taken, the procedures set forth in Chapter 11 of this act
24 with which they must comply in order to assert and enforce such
25 right.

26 (2) At each such meeting, a vote of the shareholders shall be
27 taken on the proposed plan of merger or consolidation. Such plan
28 shall be approved upon receiving the affirmative vote of a majority
29 of the votes cast by the holders of shares of each such corporation
30 entitled to vote thereon, and, in addition, if any class or series is
31 entitled to vote thereon as a class, the affirmative vote of a majority
32 of the votes cast in each class vote; except that, in the case of a
33 corporation organized prior to January 1, 1969, the plan of merger
34 or consolidation shall be approved upon receiving the affirmative
35 vote of two-thirds of the votes so cast. Any class or series of shares
36 of any such corporation shall be entitled to vote as a class if the
37 plan of merger or consolidation, as the case may be, contains any
38 provision which, if contained in a proposed amendment to the
39 certificate of incorporation, would entitle such class or series of
40 shares to vote as a class unless such provision is one which could be
41 adopted by the board without shareholder approval as referred to in
42 subsection 14A:9-2(2). The voting requirements of this section
43 shall be subject to such greater requirements as are provided in this
44 act for specific amendments or as may be provided in the certificate
45 of incorporation.

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 (3) Subject to the provisions of section 14A:5-12, a corporation
2 organized prior to January 1, 1969, may adopt the majority voting
3 requirements prescribed in subsection 14A:10-3(2) by an
4 amendment of its certificate of incorporation adopted by the
5 affirmative vote of two-thirds of the votes cast by the holders of
6 shares entitled to vote thereon.

7 (4) Notwithstanding the provisions set forth in subsections
8 14A:10-3(1) and 14A:10-3(2), the approval of the shareholders of a
9 surviving corporation shall not be required to authorize a merger
10 (unless its certificate of incorporation otherwise provides) if

11 (a) The plan of merger does not make an amendment of the
12 certificate of incorporation of the surviving corporation which is
13 required by the provisions of this act to be approved by the
14 shareholders;

15 (b) Each shareholder of the surviving corporation whose shares
16 were outstanding immediately before the effective date of the
17 merger will hold the same number of shares, with identical
18 designations, preferences, limitations, and rights, immediately after;

19 (c) The number of voting shares outstanding immediately after
20 the merger, plus the number of voting shares issuable on conversion
21 of other securities or on exercise of rights and warrants issued
22 pursuant to the merger, will not exceed by more than 40% the total
23 number of voting shares of the surviving corporation outstanding
24 immediately before the merger; and

25 (d) The number of participating shares outstanding immediately
26 after the merger, plus the number of participating shares issuable on
27 conversion of other securities or on exercise of rights and warrants
28 issued pursuant to the merger, will not exceed by more than 40%
29 the total number of participating shares of the surviving corporation
30 outstanding immediately before the merger.

31 (5) As used in subsection 14A:10-3(4):

32 (a) "Participating shares" means shares that entitle their holders
33 to participate without limitation in distributions.

34 (b) "Voting shares" means shares that entitle their holders to
35 vote unconditionally in elections of directors.

36 (6) Notwithstanding the provisions set forth in subsections
37 14A:10-3(1) and 14A:10-3(2), the approval of the shareholders of a
38 corporation shall not be required to authorize a merger with or into
39 a single indirect wholly-owned subsidiary of that corporation
40 (unless its certificate of incorporation otherwise provides) if:

41 (a) the corporation, the holding company and the indirect
42 wholly-owned subsidiary of the corporation are the only parties to
43 the merger; and

44 (b) each shareholder of the corporation will hold the same
45 number of shares of the holding company, with identical
46 designations, preferences, limitations and rights, immediately after
47 the effective date of the merger; and

- 1 (c) the corporation, the indirect wholly-owned subsidiary and
2 the holding company are domestic corporations; and
- 3 (d) the certificate of incorporation and bylaws of the holding
4 company immediately after the effective date of the merger contain
5 provisions identical to the certificate of incorporation and bylaws of
6 the corporation immediately before the effective date of the merger,
7 other than provisions, if any, regarding the incorporators, the
8 corporate name, the registered office and agent, the initial board of
9 directors, the initial subscribers for shares and the provisions
10 necessary to effect a change, exchange, reclassification or
11 cancellation of shares, if such change, exchange, reclassification or
12 cancellation has become effective prior to the effective date of the
13 merger; and
- 14 (e) the surviving corporation, as a result of the merger, remains
15 or becomes a direct or indirect wholly-owned subsidiary of the
16 holding company; and
- 17 (f) the directors of the corporation remain or become the
18 directors of the holding company upon the effective date of the
19 merger; and
- 20 (g) the certificate of incorporation of the surviving corporation
21 immediately after the effective date of the merger is identical to the
22 certificate of incorporation of the corporation immediately before
23 the effective date of the merger, other than provisions, if any,
24 regarding the incorporators, the corporate name, the registered
25 office and agent, the initial board of directors, the initial subscribers
26 for shares and the provisions necessary to effect a change,
27 exchange, reclassification or cancellation of shares, if such change,
28 exchange, reclassification or cancellation has become effective
29 prior to the effective date of the merger; provided that: (i) the
30 certificate of incorporation of the surviving corporation shall
31 contain a provision requiring that any act or transaction by or
32 involving the surviving corporation that requires for its adoption
33 under N.J.S.14A:1-1 et seq., or its certificate of incorporation,
34 approval by the shareholders of the surviving corporation, other
35 than the election or removal of directors of the surviving
36 corporation, shall require approval by the shareholders of the
37 holding company (or any successor by merger), by the same vote as
38 is required by N.J.S.14A:1-1 et seq. or by the certificate of
39 incorporation of the surviving corporation, until thereafter
40 otherwise amended by approval of the shareholders of the surviving
41 corporation and the holding company; and (ii) the certificate of
42 incorporation of the surviving corporation may be amended to
43 reduce the number of classes and shares of capital stock that the
44 surviving corporation is authorized to issue; and
- 45 (h) the shareholders of the corporation do not recognize a gain
46 or loss for United States federal income tax purposes as determined
47 by the board of directors of the corporation.

1 (7) On and after the effective date of a merger authorized by
2 action of the board of directors of a corporation and without any
3 vote of the shareholders pursuant to subsection (6) of N.J.S.14A:10-
4 3:

5 (a) to the extent that the restrictions of the "New Jersey
6 Shareholders' Protection Act," P.L.1986, c.74 (C.14A:10A-1 et
7 seq.), applied to the corporation and its shareholders at the effective
8 date of the merger, the restrictions shall apply to the holding
9 company and its shareholders immediately after the effective date
10 of the merger in the same manner as if it were the corporation and
11 all shares of the holding company acquired in the merger shall for
12 purposes of the "New Jersey Shareholders' Protection Act,"
13 P.L.1986, c.74 (C.14A:10A-1 et seq.) be deemed to have been
14 acquired at the time that the shares of the corporation converted in
15 the merger were acquired, and provided further that any shareholder
16 who, immediately prior to the effective date of the merger, was not
17 an interested stockholder within the meaning of section 3 of the
18 "New Jersey Shareholders' Protection Act," P.L.1986, c.74
19 (C.14A:10A-3) shall not solely by reason of the merger become an
20 interested stockholder of the holding company; and

21 (b) if the corporate name of the holding company immediately
22 after the effective date of the merger is the same as the corporate
23 name of the corporation immediately prior to the effective date of
24 the merger, the shares of the holding company into which the shares
25 of the corporation are converted in the merger shall be represented
26 by the stock certificates that previously represented shares of the
27 corporation.

28 (8) As used in subsections (6) and (7) of N.J.S.14A:10-3,
29 "holding company" means a corporation which, from its
30 incorporation until consummation of a merger governed by
31 subsections (6) and (7) of N.J.S.14A:10-3, was at all times a direct
32 wholly-owned subsidiary of the corporation and shares of which are
33 issued in the merger; and "indirect wholly-owned subsidiary of the
34 corporation" means a corporation all the shares of which are owned,
35 directly or indirectly, by the holding company.

36 (9) A corporation may agree to submit the plan of merger or
37 consolidation to a vote of its shareholders regardless of whether the
38 board of directors determines at any time subsequent to approving
39 the plan that the plan is no longer advisable and recommends that
40 the shareholders reject or vote against the plan.

41 (10) Any plan of merger or consolidation may contain a
42 provision that the boards of directors of the corporations may
43 amend the plan of merger or consolidation at any time prior to the
44 time that the merger or consolidation contemplated by the plan of
45 merger or consolidation becomes effective, provided that an
46 amendment made subsequent to the adoption of the agreement by
47 the shareholders of any corporation shall not, without further
48 shareholder approval:

- 1 (a) alter or change the amount or kind of shares, securities, cash,
2 property, or rights to be received in exchange for, or on conversion
3 of, all or any of the shares of any class or series thereof of such
4 corporation;
5 (b) alter or change any term of the certificate of incorporation of
6 the surviving corporation to be effected by the merger or
7 consolidation; or
8 (c) unless the plan of merger or consolidation expressly
9 provides otherwise, alter or change any of the terms and conditions
10 of the plan, if that alteration or change would materially and
11 adversely affect the shareholders of either corporation who are or
12 were entitled to vote on the plan. In the event the plan of merger or
13 consolidation is amended after the filing of a certificate of merger
14 or consolidation with the Secretary of State but prior to the time the
15 merger or consolidation has become effective, a certificate of
16 amendment of merger or consolidation shall be filed in accordance
17 with subsection 14A:10-4.1(3).
18 (cf: P.L.2001, c.193, s.1)

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20 2. N.J.S.14A:10-4.1 is amended to read as follow:

21 14A:10-4.1. Certificate of merger or consolidation.

22 (1) After approval of the plan of merger or consolidation, a
23 certificate of merger or a certificate of consolidation shall be
24 executed on behalf of each corporation. The certificate shall set
25 forth

26 (a) The name of the surviving or new corporation or new other
27 business entity and the names of the merging or consolidating
28 corporations or other business entities;

29 (b) The plan of merger or the plan of consolidation;

30 (c) The date or dates of approval by the shareholders of each
31 corporation of the plan of merger or the plan of consolidation;

32 (d) As to each corporation whose shareholders are entitled to
33 vote, the number of shares entitled to vote thereon, and, if the
34 shares of any class or series are entitled to vote thereon as a class,
35 the designation and number of shares entitled to vote thereon of
36 each class or series;

37 (e) As to each corporation whose shareholders are entitled to
38 vote, the number of shares voted for and against the plan,
39 respectively, and, if the shares of any class are entitled to vote as a
40 class, the number of shares of each class or series voted for and
41 against the plan, respectively;

42 (f) In the case of a merger governed by subsection 14A:10-3
43 (4), that the plan of merger was approved by the board of directors
44 of the surviving corporation and that no vote of the shareholders of
45 the surviving corporation was required because of the applicability
46 of that subsection;

47 (g) If, pursuant to subsection 14A:10-4.1(2), the merger is to
48 become effective at a time subsequent to the date of filing with the

1 Secretary of State, the date when the merger is to become effective;
2 and

3 (h) In the case of a merger governed by subsection (6) of
4 N.J.S.14A:10-3, that the plan of merger was approved by the board
5 of directors of the surviving corporation, that no vote of the
6 shareholders of the surviving corporation was required because of
7 the applicability of that subsection, and that the conditions of
8 paragraphs (a) through (h) of that subsection have been satisfied.

9 (2) The executed original and a copy of the certificate shall be
10 filed in the office of the Secretary of State and the merger or
11 consolidation shall become effective upon the date of the filing or at
12 a later time, not to exceed 90 days after the date of filing, as may be
13 set forth in the certificate. The Secretary of State shall, upon filing,
14 forward the copy of the certificate to the Director of the Division of
15 Taxation.

16 (3) Following the filing of a certificate of merger or
17 consolidation with the Secretary of State but prior to the time when
18 the merger or consolidation becomes effective, and upon the
19 amendment of the plan of merger or consolidation in accordance
20 with subsection 14A:10-3(10), a certificate of amendment of merger
21 or consolidation shall be filed in the office of the Secretary of State
22 amending the plan of merger or consolidation. The certificate of
23 amendment shall state that the plan of merger or consolidation has
24 been amended and shall contain the amended plan of merger or
25 consolidation.

26 (cf: P.L.2001, c.193, s.2)

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28 3. This act shall take effect immediately.

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STATEMENT

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33 This bill makes various revisions to the provisions of the “New
34 Jersey Business Corporation Act” concerning the merger and
35 consolidation of corporations. Specifically, the bill allows: (i) a
36 corporation to adopt a “force the vote” provision in a plan of merger
37 or consolidation; and (ii) the directors of a corporation, under
38 certain circumstances, to amend a plan of merger or consolidation
39 after it has been formally approved and adopted by the
40 shareholders.

41 The bill clarifies that a corporation organized under the “New
42 Jersey Business Corporation Act” may adopt a “force the vote”
43 provision in a plan of merger or consolidation. A “force the vote”
44 provision allows the shareholders of a corporation to vote on a plan
45 of merger or consolidation after approval by the corporation’s board
46 of directors, even if the board of directors later determines that the
47 plan is no longer advisable and recommends that the shareholders
48 vote against the plan.

1 The bill allows a board of directors to amend a plan of merger or
2 consolidation at any time prior to the effectiveness of the plan,
3 except if the amendment would alter or change:

4 (i) The amount or kind of consideration to be received by the
5 shareholders;

6 (ii) The terms of the certificate of incorporation of the surviving
7 corporation; or

8 (iii) Any of the terms and conditions of the plan if it would
9 materially and adversely affect the shareholders of either
10 corporation who have voted or are entitled to vote on the plan,
11 provided that the parties to the plan of merger or consolidation may
12 provide otherwise in the plan.

13 The bill also provides that in cases where the board of directors
14 amends the plan of merger or consolidation after the filing of the
15 certificate of merger, the corporation must file a certification of
16 amendment of merger or consolidation with the Secretary of State
17 prior to effectiveness of the merger or consolidation.

18 The provisions of this bill are modeled substantially on
19 provisions of the Delaware Business Corporation Law.