WEST VIRGINIA CODE CHAPTER 31E ARTICLE 11

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§31E-11-1101. Merger.

(a) One or more domestic corporations may merge with a domestic or foreign corporation or other entity pursuant to a plan of merger.

(b) A foreign corporation, or a domestic or foreign other entity, may be a party to the merger, or may be created by the terms of the plan of merger, only if:

(1) The merger is permitted by the laws under which the corporation or other entity is organized or by which it is governed; and

(2) In effecting the merger, the corporation or other entity complies with the laws under which the corporation or other entity is organized or by which it is governed and with its articles of incorporation or organizational documents.

(c) The plan of merger must include:

(1) The name of each corporation or other entity that will merge and the name of the corporation or other entity that will be the survivor of the merger;

(2) The terms and conditions of the merger;

(3) The manner and basis of converting the memberships, if any, of each merging corporation and interests of each merging entity, interests, obligations, cash, other property, or any combination of the foregoing;

(4) The articles of incorporation of any corporation, or the organizational documents of any other entity, to be created by the merger, or if a new corporation or other entity is not to be created by the merger, any amendments to the survivor's articles of incorporation or organizational documents; and

(5) Any other provisions required by the laws under which any party to the merger is organized or by which it is governed, or by the articles of incorporation or organizational documents of any party to the merger.

(d) The terms described in subdivisions (2) and (3), subsection (c) of this section may be made dependent on facts ascertainable outside the plan of merger, provided that those facts are objectively ascertainable. The term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(e) The plan of merger may also include a provision that the plan may be amended prior to filing the articles of merger with the Secretary of State: Provided, That if the members of a domestic corporation that is a party to the merger are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by the members the plan may not be amended to:

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(1) Change the manner and basis of converting the memberships, if any;

(2) Change the articles of incorporation of any corporation, or the organizational documents of any other entity, that will survive or be created as a result of the merger, except for changes permitted by section one thousand five, article ten of this chapter or by comparable provisions of the laws under which the foreign corporation or other entity is organized or governed; or

(3) Change any of the other terms or conditions of the plan if the change would adversely affect the members in any material respect.

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§31E-11-1102. Action on plan of merger.

(a) After adopting a plan of merger, the board of directors of each corporation party to the merger shall submit the plan of merger, except as provided in subsection (h) of this section, for approval by those members who are entitled to vote on a plan of merger, if any.

(b) For a plan of merger to be approved: (1) The board of directors must approve the plan of merger; (2) the board of directors must recommend the plan of merger to the members entitled to vote on the plan of merger, if any, unless the board of directors determines that because of conflicts of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the members entitled to vote on the plan of merger with the submission of the plan; and (3) the members entitled to vote on the plan must approve the plan, either before or after the actions required in subdivisions (1) and (2) of this subsection, as provided in subsection (e) of this section.

(c) The board of directors may condition its submission of the proposed merger on any basis.

(d) The corporation shall notify each member, entitled to vote on the plan, if any, of the proposed members' meeting in accordance with section seven hundred five, article seven of this chapter. The notice is also to state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger and contain or be accompanied by a copy or summary of the plan.

(e) Unless this chapter, the articles of incorporation or the board of directors acting pursuant to subsection (c) of this section requires a greater vote or a vote by class of members, the plan of merger to be adopted must be approved by: (1) If no class of members is entitled to vote separately on the plan as a class, at least two thirds of the votes cast by the members entitled to vote; and (2) if any class of members is entitled to vote on the plan separately as a class, at least two thirds of the votes cast by the members of each class whose members are entitled to vote.

(f) Separate voting by class of members is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate classes of members on the proposed amendment under the articles of incorporation of the corporation.

(g) Approval of the plan of merger by the corporation requires a greater or additional vote if:

(1) In the case of the surviving corporation, a plan of merger contains any provision which, if contained in a proposed amendment to its articles of incorporation would require a greater vote than, or additional vote to, that otherwise required to approve the plan of merger; or

(2) In the case of any terminating corporation, a sale of all or substantially all assets, or dissolution, would under the circumstances require a greater vote than, or additional vote to, that otherwise required to approve the plan of merger.

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(h) Action by the members of the surviving corporation on a plan of merger is not required if:

(1) The articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in section one thousand two, article ten of this chapter from its articles of incorporation before the merger; and

(2) Each member of the surviving corporation immediately before the effective date of the merger will be a member with identical designations, qualifications, privileges and rights immediately after the merger.

(i) After a merger is authorized, and at any time before the articles of merger is filed, the planned merger may be abandoned, subject to any contractual rights, without further member action, in accordance with the procedure set forth in the plan of merger or, if none is set forth, in the manner determined by the board of directors.

(j) If any merging corporation has no members, or no members entitled to vote on the merger, a plan of merger is to be adopted by the board of directors.

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§31E-11-1103. Articles of merger.

(a) After a plan of merger is approved as required by section one thousand one hundred two of this article, the surviving corporation shall deliver to the Secretary of State for filing articles of merger setting forth: (1) The plan of merger; (2) a statement to the effect that the plan of merger was adopted by the board of directors of each corporation party to the merger; (3) if member approval was not required, a statement to that effect; and (4) if approval of members of one or more corporations party to the merger was required: (A) The designation of each class of members entitled to vote separately on the plan as to each corporation; and (B) the total number of votes cast for and against the plan by each class of members entitled to vote separately on the plan as to each corporation and a statement that the number cast for the plan by each class of members was sufficient for approval by that class.

(b) A merger takes effect upon issuance by the Secretary of State of a certificate of merger to the survivor corporation.

(c) The Secretary of State shall withhold the issuance of any certificate of merger in the case where the new or surviving corporation will be a foreign corporation which has not qualified to conduct affairs or do or transact business or hold property in this state until the receipt by the Secretary of State of a notice from the Tax Commissioner and Bureau of Employment Programs to the effect that all taxes due from said corporation under the provisions of chapter eleven of this code, including, but not limited to, taxes withheld under the provisions of section seventy-one, article twenty-one, chapter eleven of this code, all business and occupation taxes, motor carrier and transportation privilege taxes, gasoline taxes, consumer sales taxes and any and all license franchise or other excise taxes and corporate net income taxes, and employment security payments levied or assessed against the corporation seeking to dissolve have been paid or that the payment has been provided for, or until the Secretary of State received a notice from the Tax Commissioner or Bureau of Employment Programs stating that the corporation in question is not subject to payment of any taxes or to the making of any employment security payments or assessments.

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§31E-11-1104. Effect of merger.

When a merger takes effect:

(1) Every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases;

(2) All property owned by, and every contract right possessed by, each corporation or other entity that merges into the survivor is vested in the survivor without reversion or impairment;

(3) All real property located in the state owned by each corporation or other entity that merges into the survivor passes by operation of law and the transfer is evidenced by recording a confirmation deed in each county in which the real property is located. No transfer or excise taxes may be assessed for the recording of the confirmation deeds.

(4) The surviving corporation has all liabilities of each corporation party to the merger;

(5) A proceeding pending against any corporation party to the merger may be continued as if the merger did not occur or the surviving corporation may be substituted in the proceeding for the corporation whose existence ceased;

(6) The articles of incorporation of the surviving corporation is amended to the extent provided in the plan of merger;

(7) The memberships, if any, of each corporation party to the merger that are to be converted into memberships of the surviving corporation are converted, and the former members in the membership classes are entitled only to the designation, qualifications, privileges and rights of the class of members to which they are converted, as provided in the articles of incorporation of the surviving corporation as the articles may be amended by the plan of merger; and

(8) Any devise, bequest, gift or grant, contained in any will or in any other instrument, made before or after the merger, to or for the benefit of any of the merging corporations inures to the benefit of the surviving corporation, and so far as is necessary for that purpose, the existence of each merging corporation is deemed to continue in and through the surviving or new corporation.

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