WEST VIRGINIA CODE CHAPTER 31d ARTICLE 11

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§31D-11-1101. Definitions.

As used in this article:

(a) "Interests" means the proprietary interests in an other entity.

(b) "Merger" means a business combination pursuant to section one thousand one hundred two of this article.

(c) "Organizational documents" means the basic document or documents that create, or determine the internal governance of, an other entity.

(d) "Other entity" means any association or legal entity, other than a domestic or foreign corporation, organized to conduct business, including, but not limited to, limited partnerships, general partnerships, limited liability partnerships, limited liability companies, joint ventures, joint stock companies and business trusts.

(e) "Party to a merger" or "party to a share exchange" means any domestic or foreign corporation or other entity that will either:

(1) Merge under a plan of merger;

(2) Acquire shares or interests of another corporation or an other entity in a share exchange; or

(3) Have all of its shares or interests or all of one or more classes or series of its shares or interests acquired in a share exchange.

(f) "Share exchange" means a business combination pursuant to section one thousand one hundred three of this article.

(g) "Survivor" in a merger means the corporation or other entity into which one or more other corporations or other entities are merged. A survivor of a merger may preexist the merger or be created by the merger.

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§31D-11-1102. 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 shares of each merging corporation and interests of each merging other entity into shares or other securities, interests, obligations, rights to acquire shares or other securities, 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 shareholders 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 shareholders the plan may not be amended to:

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(1) Change the amount or kind of shares or other securities, interests, obligations, rights to acquire shares or other securities, cash or other property to be received by the shareholders of or owners of interests in any party to the merger upon conversion of their shares or interests under the plan;

(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 shareholders in any material respect.

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§31D-11-1103. Share exchange.

(a) Through a share exchange:

(1) A domestic corporation may acquire all of the shares of one or more classes or series of shares of another domestic or foreign corporation, or all of the interests of one or more classes or series of interests of a domestic or foreign other entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property or any combination of the foregoing, pursuant to a plan of share exchange; or

(2) All of the shares of one or more classes or series of shares of a domestic corporation may be acquired by another domestic or foreign corporation or other entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property or any combination of the foregoing, pursuant to a plan of share exchange.

(b) A foreign corporation, or a domestic or foreign other entity, may be a party to the share exchange only if:

(1) The share exchange 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 share exchange, 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 share exchange must include:

(1) The name of each corporation or other entity whose shares or interests will be acquired and the name of the corporation or other entity that will acquire those shares or interests;

(2) The terms and conditions of the share exchange;

(3) The manner and basis of exchanging shares of a corporation or interests in an other entity whose shares or interests will be acquired under the share exchange into shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property or any combination of the foregoing; and

(4) Any other provisions required by the laws under which any party to the share exchange is organized or by the articles of incorporation or organizational documents of any party to the share exchange.

(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 share exchange, 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,

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including the corporation.

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

(1) Change the amount or kind of shares or other securities, interests, obligations, rights to acquire shares or other securities, cash or other property to be issued by the corporation or to be received by the shareholders of or owners of interests in any party to the share exchange in exchange for their shares or interests under the plan; or

(2) Change any of the terms or conditions of the plan if the change would adversely affect the shareholders in any material respect.

(f) This section does not limit the power of a domestic corporation to acquire shares of another corporation or interests in another entity in a transaction other than a share exchange.

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§31D-11-1104. Action on a plan of merger or share exchange.

In the case of a domestic corporation that is a party to a merger or share exchange:

(1) The plan of merger or share exchange must be adopted by the board of directors.

(2) Except as provided in subdivision (7) of this section and in section one thousand one hundred five of this article, after adopting the plan of merger or share exchange the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors determines that because of conflicts of interest or other special circumstances it should not make a recommendation, in which case the board of directors must transmit to the shareholders the basis for that determination.

(3) The board of directors may condition its submission of the plan of merger or share exchange to the shareholders on any basis.

(4) If the plan of merger or share exchange is required to be approved by the shareholders and if the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. If the corporation is to be merged into an existing corporation or other entity, the notice is also to include or be accompanied by a copy or summary of the articles of incorporation or organizational documents of that corporation or other entity. If the corporation is to be merged into a corporation or other entity that is to be created pursuant to the merger, the notice is to include or be accompanied by a copy or a summary of the articles of incorporation or organizational documents of the new corporation or other entity.

(5) Unless the articles of incorporation, or the board of directors acting pursuant to subdivision (3) of this section, requires a greater vote or a greater number of votes to be present, approval of the plan of merger or share exchange requires the approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the plan exists and, if any class or series of shares is entitled to vote as a separate group on the plan of merger or share exchange, the approval of each separate voting group at a meeting at which a quorum of the voting group consisting of at least a majority of the votes entitled to be cast on the merger or share exchange by that voting group is present.

(6) Separate voting by voting groups is required:

(A) On a plan of merger, by each class or series of shares that: (i) Are to be converted, pursuant to the provisions of the plan of merger, into shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property or any combination of the foregoing; or (ii) would have a right to vote as a separate group on a

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provision in the plan that, if contained in a proposed amendment to articles of incorporation, would require action by separate voting groups under section one thousand four, article ten of this chapter;

(B) On a plan of share exchange, by each class or series of shares included in the exchange, with each class or series constituting a separate voting group; and

(C) On a plan of merger or share exchange, if the voting group is entitled under the articles of incorporation to vote as a voting group to approve a plan of merger or share exchange.

(7) Unless the articles of incorporation otherwise provide, approval by the corporation's shareholders of a plan of merger or share exchange is not required if:

(A) The corporation will survive the merger or is the acquiring corporation in a share exchange;

(B) Except for amendments permitted by section one thousand five, article ten of this chapter, its articles of incorporation will not be changed;

(C) Each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger or share exchange will hold the same number of shares, with identical preferences, limitations and relative rights, immediately after the effective date of change; and

(D) The issuance in the merger or share exchange of shares or other securities convertible into or rights exercisable for shares does not require a vote under subsection (f), section six hundred twenty-one, article six of this chapter.

(8) If as a result of a merger or share exchange one or more shareholders of a domestic corporation would become subject to personal liability for the obligations or liabilities of any other person or entity, approval of the plan of merger requires the execution, by each shareholder subject to liability, of a separate written consent to become subject to personal liability.

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§31D-11-1105. Merger between parent and subsidiary or between subsidiaries.

(a) A domestic parent corporation that owns shares of a domestic or foreign subsidiary corporation that carry at least ninety percent of the voting power of each class and series of the outstanding shares of the subsidiary that have voting power may merge the subsidiary into itself or into another subsidiary, or merge itself into the subsidiary, without the approval of the board of directors or shareholders of the subsidiary, unless the articles of incorporation of any of the corporations otherwise provide, and unless, in the case of a foreign subsidiary, approval by the subsidiary's board of directors or shareholders is required by the laws under which the subsidiary is organized.

(b) If under subsection (a) of this section approval of a merger by the subsidiary's shareholders is not required, the parent corporation shall, within ten days after the effective date of the merger, notify each of the subsidiary's shareholders that the merger has become effective.

(c) Except as provided in subsections (a) and (b) of this section, a merger between a parent and a subsidiary is to be governed by the provisions of this article applicable to mergers generally.

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§31D-11-1106. Articles of merger or share exchange.

(a) After a plan of merger or share exchange has been adopted and approved as required by this chapter, articles of merger or share exchange are to be executed on behalf of each party to the merger or share exchange by any officer or other duly authorized representative. The articles are to set forth:

(1) The names of the parties to the merger or share exchange and the date on which the merger or share exchange occurred or is to be effective;

(2) If the articles of incorporation of the survivor of a merger are amended, or if a new corporation is created as a result of a merger, the amendments to the survivor's articles of incorporation or the articles of incorporation of the new corporation;

(3) If the plan of merger or share exchange required approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement that the plan was duly approved by the shareholders and, if voting by any separate voting group was required, by each separate voting group in the manner required by this chapter and the articles of incorporation;

(4) If the plan of merger or share exchange did not require approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement to that effect; and

(5) As to each foreign corporation and each other entity that was a party to the merger or share exchange, a statement that the plan and the performance of its terms were duly authorized by all action required by the laws under which the corporation or other entity is organized, or by which it is governed, and by its articles of incorporation or organizational documents.

(b) Articles of merger or share exchange are to be delivered to the Secretary of State for filing by the survivor of the merger or the acquiring corporation in a share exchange and take 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, consumers 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

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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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§31D-11-1107. Effect of merger or share exchange.

(a) When a merger takes effect:

(1) The corporation or other entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be;

(2) The separate existence of every corporation or other entity that is merged into the survivor ceases;

(3) 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;

(4) 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;

(5) All liabilities of each corporation or other entity that is merged into the survivor are vested in the survivor;

(6) The name of the survivor may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger;

(7) The articles of incorporation or organizational documents of the survivor are amended to the extent provided in the plan of merger;

(8) The articles of incorporation or organizational documents of a survivor that is created by the merger become effective; and

(9) The shares of each corporation that is a party to the merger, and the interests in an other entity that is a party to a merger, that are to be converted under the plan of merger into shares, interests, obligations, rights to acquire securities, other securities, cash, other property or any combination of the foregoing are converted and the former holders of the shares or interests are entitled only to the rights provided to them in the plan of merger or to any rights they may have under article thirteen of this chapter.

(b) When a share exchange becomes effective, the shares of each domestic corporation that are to be exchanged for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property or any combination of the foregoing are entitled only to the rights provided to them in the plan of share exchange or to any rights they may have under article thirteen of this chapter.

(c) Any shareholder of a domestic corporation that is a party to a merger or share exchange who, prior to the merger or share exchange, was liable for the liabilities or obligations of the

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corporation, may not be released from the liabilities or obligations by reason of the merger or share exchange.

(d) Upon a merger becoming effective, a foreign corporation, or a foreign other entity, that is the survivor of the merger is deemed to:

(1) Appoint the Secretary of State as its agent for service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is a party to the merger who exercise appraisal rights; and

(2) Agree that it will promptly pay the amount, if any, to which the shareholders are entitled under article thirteen of this chapter.

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§31D-11-1108. Abandonment of a merger or share exchange.

(a) Unless otherwise provided in a plan of merger or share exchange or in the laws under which a foreign corporation or a domestic or foreign other entity that is a party to a merger or a share exchange is organized or by which it is governed, after the plan has been adopted and approved as required by this article, and at any time before the merger or share exchange has become effective, it may be abandoned by any party thereto without action by the party's shareholders or owners of interests, in accordance with any procedures set forth in the plan of merger or share exchange or, if no procedures are set forth in the plan, in the manner determined by the board of directors of a corporation, or the managers of an other entity, subject to any contractual rights of other parties to the merger or share exchange.

(b) If a merger or share exchange is abandoned under subsection (a) of this section after articles of merger or share exchange have been filed with the Secretary of State but before the merger or share exchange has become effective, a statement that the merger or share exchange has been abandoned in accordance with this section, executed on behalf of a party to the merger or share exchange by an officer or other duly authorized representative, is to be delivered to the Secretary of State for filing prior to the effective date of the merger or share exchange. Upon filing, the statement is to take effect and the merger or share exchange is to be deemed abandoned and may not become effective.

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§31D-11-1109. Conversion of a domestic corporation to a domestic limited liability company.

(a) A corporation of this state may convert to a limited liability company, in accordance with this section.

(b) The Board of Directors of the corporation which desires to convert under this section shall adopt a plan of conversion approving the conversion and recommending the approval of the conversion by the shareholders of the corporation. Such resolution shall be submitted to the shareholders of the corporation at an annual or special meeting. The corporation must notify each shareholder, whether or not entitled to vote of the meeting of shareholders at which the plan of conversion is to be submitted for approval. At the meeting, the plan of conversion shall be considered and a vote taken for its adoption or rejection. Approval of the plan of conversion requires the approval of all of the shareholders, whether or not entitled to vote.

(c) After a plan of conversion is approved pursuant to subsection (b) of this section, the corporation shall file with the office of the Secretary of State articles of conversion which satisfy the requirements for articles of organization under section two hundred three, article two, chapter thirty-one-b of this code and which set forth:

(1) The name of the corporation, and if it has been changed, the name under which it was originally incorporated;

(2) The date of filing of its original articles of incorporation with the office of the Secretary of State;

(3) The name of the limited liability company into which the corporation shall be converted; and

(4) That the conversion has been approved in accordance with the provisions of this section.

(d) Upon the filing of articles of conversion in accordance with subsection (c) of this section and payment to the Secretary of State of all fees prescribed, the Secretary of State shall issue a certificate of conversion. Such certificate of the Secretary of State shall be prima facie evidence of the conversion of the corporation.

(e) A conversion takes effect when the articles of conversion are filed in the office of the Secretary of State or at any later date specified in the articles of conversion.

(f) The conversion of a corporation pursuant to articles of conversion under this section shall not be deemed to affect any obligations or liabilities of the corporation incurred prior to the conversion or the personal liability of any person incurred prior to the conversion.

(g) After the time the certificate of conversion becomes effective the corporation shall continue to exist as a limited liability company and the laws of this state shall apply to the

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entity to the same extent as prior to that time.

(h) Unless otherwise provided in the plan of conversion adopted in accordance with this section, the converting corporation shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not constitute a dissolution of the corporation and shall constitute a continuation of the existence of the converting corporation in the form of a limited liability company of this state.

(i) When a corporation has been converted to a limited liability corporation pursuant to this section, the limited liability company shall, for all purposes of the laws of this state, be deemed to be the same entity as the converting corporation, and all of the rights, privileges and powers of the corporation that has been converted, and all property, real, personal and mixed, and all debts due to the corporation, as well as all other things and causes of action belonging to the corporation, shall remain vested in the limited liability company to which the corporation has been converted and shall be the property of the limited liability company, and the title to any real property vested by deed or otherwise in the corporation shall not revert or in any way be impaired by reason of this chapter; but all rights of creditors and all liens upon the property of the corporation shall be preserved unimpaired, and all debts, liabilities and duties of the corporation that has been converted shall remain attached to the limited liability company to which the corporation has been converted, and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as a limited liability company. The rights, privileges, powers and interests in property of the corporation, as well as the debts, liabilities and duties of the corporation, shall not be deemed, as a consequence of the conversion, to have been transferred to the limited liability company to which the corporation has been converted for any purpose of the laws of this state.

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