

## ARTICLE 14

### Business Corporations; Mergers and Consolidations

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#### 53-14-1. Procedure for merger.

Any two or more domestic corporations may merge into one of the corporations pursuant to a plan of merger approved in the manner provided in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978]. The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of merger setting forth:

- A. the names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the "surviving corporation";
- B. the terms and conditions of the proposed merger;
- C. the manner and basis of converting the shares of each corporation into shares, obligations or other securities of the surviving corporation or of any other corporation or, in whole or in part, into cash or other property;
- D. a statement of any changes in the articles of incorporation of the surviving corporation to be effected by the merger; and
- E. other provisions with respect to the proposed merger as deemed necessary or desirable.

#### 53-14-2. Procedure for consolidation.

Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978]. The board of directors of each corporation shall, by a resolution adopted by each such board, approve a plan of consolidation setting forth:

- A. the names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the "new corporation";
- B. the terms and conditions of the proposed consolidation;
- C. the manner and basis of converting the shares of each corporation into shares, obligations or other securities of the new corporation or any other corporation or, in whole or in part, into cash or other property;
- D. with respect to the new corporation, all of the statements required to be set forth in articles of incorporation for corporations organized under the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978]; and
- E. other provisions with respect to the proposed consolidation as deemed necessary or desirable.

#### 53-14-3. Approval by shareholders.

A. The board of directors of each corporation in the case of a merger or consolidation, and the board of directors of the corporation the shares of which are to be acquired in the case of an exchange, upon approving a plan of merger, consolidation or exchange, shall, by resolution, direct that the plan be submitted to a vote at a meeting of its shareholders, which may be either an annual or a special meeting. Written notice shall be given to each shareholder

of record, whether or not entitled to vote at the meeting, not less than twenty days before the meeting in the manner provided in the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978] for the giving of notice of meetings of shareholders and, whether the meeting is an annual or a special meeting, shall state that the purpose or one of the purposes is to consider the proposed plan. A copy or a summary of the plan shall be included in or enclosed with the notice.

B. At each meeting, a vote of the shareholders shall be taken on the proposed plan. The plan shall be approved upon receiving the affirmative vote of the holders of a majority of the shares entitled to vote thereon of each such corporation, unless any class of shares of any such corporation is entitled to vote thereon as a class, in which event, as to such corporation, the plan shall be approved upon receiving the affirmative vote of the holders of a majority of the shares of each class of shares entitled to vote thereon. Any class of shares of any such corporation shall be entitled to vote as a class if any such plan contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle such class of shares to vote as a class and, in the case of an exchange, if the class is included in the exchange.

C. After such approval by a vote of the shareholders of each such corporation and at any time prior to the filing of the articles of merger or consolidation or exchange, the merger or consolidation or exchange may be abandoned pursuant to provisions therefor, if any, set forth in the plan.

D. (1) Notwithstanding the provisions of Subsections A and B of this section, submission of a plan of merger to a vote at a meeting of shareholders of a surviving corporation shall not be required if:

(a) the articles of incorporation of the surviving corporation do not differ except in name from those of the corporation before the merger;

(b) each holder of shares of the surviving corporation which were outstanding immediately before the effective date of the merger is to hold the same number of shares with identical rights immediately after;

(c) the number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable on conversion of other securities issued by virtue of the terms of the merger and on exercise of rights and warrants so issued, will not exceed by more than twenty percent the number of voting shares outstanding immediately before the merger; and

(d) the number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable on conversion of other securities issued by virtue of the terms of the merger and on exercise of rights and warrants so issued, will not exceed by more than twenty percent the number of participating shares outstanding immediately before the merger.

(2) As used in this subsection:

(a) "voting shares" means shares which entitle their holders to vote unconditionally in election of directors; and

(b) "participating shares" means shares which entitle their holders to participate without limitations in distribution of earnings or surplus.

#### **53-14-4. Articles of merger, consolidation or exchange.**

A. Upon receiving the approvals required by Sections 53-14-1, 53-14-2 and 53-14-3 NMSA 1978, articles of merger or articles of consolidation shall be executed by each corporation by an authorized officer and shall set forth:

(1) the plan of merger or the plan of consolidation;

(2) as to each corporation, either:

(a) the number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the designation and number of outstanding shares of each such class; or

(b) a statement that the vote of shareholders is not required by virtue of Subsection D of Section 53-14-3 NMSA 1978;

(3) as to each corporation the approval of whose shareholders is required, the number of shares voted for and against the plan, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against the plan, respectively; and

(4) as to the acquiring corporation in a plan of exchange, a statement that the adoption plan and performance of its terms were duly approved by its board of directors and such other requisite corporate action, if any, as may be required of it.

B. The original of the articles of merger, consolidation or exchange together with a copy, which may be signed, photocopied or conformed, shall be delivered to the commission [secretary of state]. If the commission [secretary of state] finds that the articles conform to law, it shall, when all fees have been paid:

(1) endorse on the original and copy the word "filed" and the month, day and year of the filing;

(2) file the original in its office; and

(3) issue a certificate of merger, consolidation or exchange to which it shall affix the file-stamped copy.

C. The certificate of merger, consolidation or exchange, together with the file-stamped copy of the articles affixed to it shall be returned by the commission [secretary of state] to the surviving, new or acquiring corporation or its representative.

### **53-14-5. Merger of subsidiary corporation.**

A. Any corporation owning at least ninety percent of the outstanding shares of each class of another corporation may merge the other corporation into itself without approval by a vote of the shareholders of either corporation. Its board of directors shall by resolution approve a plan of merger setting forth:

(1) the name of the subsidiary corporation and the name of the corporation owning at least ninety percent of its shares, which is hereinafter designated as the "surviving corporation"; and

(2) the manner and basis of converting the shares of the subsidiary corporation into shares, obligations or other securities of the surviving corporation or of any other corporation or, in whole or in part, into cash or other property.

B. A copy of the plan of merger shall be mailed to each shareholder of record of the subsidiary corporation.

C. Articles of merger shall be executed by the surviving corporation by an authorized officer and shall set forth:

(1) the plan of merger;

(2) the number of outstanding shares of each class of the subsidiary corporation and the number of such shares of each class owned by the surviving corporation; and

(3) the date of the mailing to shareholders of the subsidiary corporation of a copy of the plan of merger.

D. On and after the thirtieth day after the mailing of a copy of the plan of merger to shareholders of the subsidiary corporation or upon the waiver of the mailing requirement by the holders of all outstanding shares, an original of the articles of merger together with a copy, which may be signed, photocopied or conformed, shall be delivered to the commission [secretary of state]. If the commission [secretary of state] finds that the articles conform to law, it shall, when all fees have been paid:

(1) endorse on the original and copy the word "filed" and the month, day and year of the filing;

(2) file the original in its office; and

(3) issue a certificate of merger to which it shall affix the file-stamped copy.

E. The certificate of merger, together with the file-stamped copy affixed to it shall be returned by the commission [secretary of state] to the surviving corporation or its representative.

### **53-14-6. Effect of merger, consolidation or exchange.**

Unless the commission [secretary of state] disapproves pursuant to Subsection A of Section 53-18-2 NMSA 1978, a merger, consolidation or exchange shall become effective upon delivery of the articles of merger, consolidation or exchange to the commission [secretary of state] or on such later date, not more than thirty days subsequent to the delivery thereof to the commission[secretary of state], as shall be provided for in the plan. When a merger or consolidation has become effective:

A. the several corporations parties to the plan of merger or consolidation shall be a single corporation, which, in the case of a merger, shall be that corporation designated in the plan of merger as the surviving corporation and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation;

B. the separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;

C. the surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under the Business Corporation Act [Chapter 53, Articles 11 to 18 NMSA 1978];

D. the surviving or new corporation shall thereupon possess all the rights, privileges, immunities and franchises of a public or private nature of each of the merging or consolidating corporations; and all property, real, personal and mixed and all debts due on whatever account, including subscriptions to shares, and all other choses in action and every other interest of, or belonging to, or due to, each of the corporations so merged or consolidated shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed, and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of the merger or consolidation;

E. the surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated, and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if the merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by the merger or consolidation;

F. in the case of a merger, the articles of incorporation of the surviving corporation shall be deemed to be amended to the extent, if any, that changes in its articles of incorporation are stated in the plan of merger, and, in the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles of incorporation of corporations organized under the Business Corporation Act shall be deemed to be the original articles of incorporation of the new corporation; and

G. when a merger, consolidation or exchange has become effective, the shares of the corporation or corporations party to the plan that are, under the terms of the plan, to be converted or exchanged shall cease to exist, in the case of a merger or consolidation, or be deemed to be exchanged, in the case of an exchange, and the holders of such shares shall thereafter be entitled only to the shares, obligations, other securities, cash or other property into which they shall have been converted or for which they shall have been exchanged, in accordance with the plan, subject to any rights under Section 53-14-4 NMSA 1978.

### **53-14-7. Merger, consolidation or exchange of shares between domestic and foreign corporations.**

A. One or more foreign corporations and one or more domestic corporations may be merged or consolidated or participate in an exchange, in the following manner, if the merger, consolidation or exchange is permitted by the laws of the state under which each foreign corporation is organized:

(1) each domestic corporation shall comply with the provisions of the Business Corporation Act [53-11-1 to 53-18-12 NMSA 1978] with respect to the merger, consolidation or

exchange, as the case may be, of domestic corporations, and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized; and

(2) if the surviving or new corporation in a merger or consolidation is to be governed by the laws of any state other than this state, it shall comply with the provisions of the Business Corporation Act with respect to foreign corporations if it is to transact business in this state, and in every case it shall file with the commission [secretary of state]:

(a) an agreement that it may be served with process in this state in any proceeding for the enforcement of any obligation of any domestic corporation which is a party to the merger or consolidation and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such domestic corporation against the surviving or new corporation;

(b) an irrevocable appointment of the secretary of state as its agent to accept service of process in any such proceeding; and

(c) an agreement that it will promptly pay to the dissenting shareholders of any such domestic corporation the amount, if any, to which they shall be entitled under the provisions of the Business Corporation Act with respect to the rights of dissenting shareholders.

B. The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be governed by the laws of this state. If the surviving or new corporation is to be governed by the laws of any state other than this state, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise. At any time prior to the filing of the articles of merger or consolidation, the merger or consolidation may be abandoned pursuant to provisions therefor, if any, set forth in the plan of merger or consolidation.