This document contains selected sections of the South African Companies Act and the Delaware General Corporation Law applicable to mergers and acquisitions. It is intended to be used in connection with preparing for the first session of the symposium. Pertinent provisions of the South African Companies Act are discussed in footnotes.

SOUTH AFRICAN COMPANIES ACT: CHAPTER 5 - §§ 112-116, 124

Fundamental Transactions, Takeovers And Offers

§ 112. Proposals to dispose of all or greater part of assets or undertaking

(1) This section and section 115[1] do not apply to a proposal to dispose of all or the greater part of the assets or undertaking of a company, if that disposal would constitute a transaction -

(a) that is pursuant to or contemplated in a business rescue plan adopted in accordance with Chapter 6;

(b) between a wholly-owned subsidiary and its holding company; or

(c) between or among -

(i) two or more wholly-owned subsidiaries of the same holding company; or

(ii) a wholly-owned subsidiary of a holding company, on the one hand, and its holding company and one or more wholly-owned subsidiaries of that holding company, on the other hand.

(2) A company may not dispose of all or the greater part of its assets or undertaking unless -

(a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115; and

(b) the company has satisfied all other requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company.

(3) A notice of a shareholders meeting to consider a resolution to approve a disposal contemplated in subsection (2)(a) must -

[1] Section 115 of the South African Companies Act sets forth the shareholder approval process for mergers and provides opportunities for objecting shareholders to seek court review of the proposed merger.

(a) be delivered within the prescribed time, and in the prescribed manner, to each shareholder of the company, subject to section 62[2] read with any changes required by the context;

(b) include or be accompanied by a written summary of -

(i) the precise terms of the transaction or series of transactions, to be considered at the meeting; and

(ii) the provisions of sections 115 and 164[3], in a manner that satisfies the prescribed standards.

(4) Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner.

(5) A resolution contemplated in subsection (2)(a) is effective only to the extent that it authorises a specific transaction.

§ 113. Proposals for amalgamation or merger

(1) Two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.

(2)[4] Two or more companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger and, in particular, setting out -

(a) the proposed Memorandum of Incorporation of any new company to be formed by the amalgamation or merger;

(b) the name and identity number of each proposed director of any proposed amalgamated or merged company;

(c) the manner in which the securities of each amalgamating or merging

[2] Section 62 of the South African Companies Act sets forth the requirements for the timing and contents of notice to shareholders.

[3] Section 164 of the South African Companies Act provides dissenting shareholders with appraisal rights.

[4] Section 113(2) of the South African Companies Act sets forth the required contents of a merger proposal.

company are to be converted into securities of any proposed amalgamated or merged company, or exchanged for other property;

(d) if any securities of any of the amalgamating or merging companies are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those securities are to receive in addition to or instead of securities of any proposed amalgamated or merged company;

(e) the manner of payment of any consideration instead of the issue of fractional securities of an amalgamated or merged company or of any other juristic person the securities of which are to be received in the amalgamation or merger;

(f) details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented;

(g) details of any arrangement or strategy necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company or companies; and

(h) the estimated cost of the proposed amalgamation or merger.

(3) If the securities of one of the amalgamating or merging companies are held by or on behalf of another of the amalgamating or merging companies, the agreement required by subsection (2) must provide for the cancellation of those securities when the amalgamation or merger becomes effective, without any repayment of capital in respect thereof, and no provision may be made in the agreement for the conversion of those securities into securities of an amalgamated or merged company.

(4) Subject to subsection (6), the board of each amalgamating or merging company -

(a) must consider whether, upon implementation of the agreement, each proposed amalgamated or merged company will satisfy the solvency and liquidity test; and

(b) if the board reasonably believes that each proposed amalgamated or merged company will satisfy the solvency and liquidity test, it may submit the agreement for consideration at a shareholders meeting of that amalgamating or merging company, in accordance with section 115.

(5) Subject to subsection (6), a notice of a shareholders meeting contemplated in

subsection (4)(b) must be delivered to each shareholder of each respective amalgamating or merging company, and must include or be accompanied by a copy or summary of -

(a) the amalgamation or merger agreement; and

(b) the provisions of sections 115 and 164 in a manner that satisfies prescribed standards.

(6) The requirements of subsections (4) and (5) do not apply to a company engaged in business rescue proceedings, in respect of any transaction that is pursuant to or contemplated in the company's business rescue plan that has been adopted in accordance with Chapter 6.

§ 114. Proposals for scheme of arrangement

(1) Unless it is in liquidation or in the course of business rescue proceedings in terms of Chapter 6, the board of a company may propose and, subject to subsection (4) and approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities by way of, among other things -

(a) a consolidation of securities of different classes;

(b) a division of securities into different classes;

(c) an expropriation of securities from the holders;

(d) exchanging any of its securities for other securities;

(e) a re-acquisition by the company of its securities; or

(f) a combination of the methods contemplated in this subsection.

(2) The company must retain an independent expert, who meets the following requirements, to compile a report as required by subsection (3):

(a) The person to be retained must be -

(i) qualified, and have the competence and experience necessary to -

(aa) understand the type of arrangement proposed;

(bb) evaluate the consequences of the arrangement; and

(cc) assess the effect of the arrangement on the value of securities and on the rights and interests of a holder of any securities, or a creditor of the company; and

(ii) able to express opinions, exercise judgment and make decisions impartially.

(b) the person to be retained must not -

(i) have any other relationship with the company or with a proponent of the arrangement, such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;

(ii) have had any relationship contemplated in subparagraph (i) within the immediately preceding two years; or

(iii) be related to a person who has or has had a relationship contemplated in subparagraph (i) or (ii).

(3) The person retained in terms of subsection (2) must prepare a report to the board, and cause it to be distributed to all holders of the company's securities, concerning the proposed arrangement, which must, at a minimum -

(a) state all prescribed information relevant to the value of the securities affected by the proposed arrangement;

(b) identify every type and class of holders of the company's securities affected by the proposed arrangement;

(c) describe the material effects that the proposed arrangement will have on the rights and interests of the persons mentioned in paragraph (b);

(d) evaluate any material adverse effects of the proposed arrangement against -

(i) the compensation that any of those persons will receive in terms of that arrangement; and

(ii) any reasonably probable beneficial and significant effect of that arrangement on the business and prospects of the company;

(e) state any material interest of any director of the company or trustee for security holders;

(f) state the effect of the proposed arrangement on the interest and person

contemplated in paragraph (e); and

(g) include a copy of sections 115 and 164.

(4) Section 48 applies to a proposed arrangement contemplated in this section to the extent that the arrangement would result in any re-acquisition by a company of any of its previously issued securities.

§ 115. Required approval for transactions contemplated in Part

(1) Despite section 65[5], and any provision of a company's Memorandum of Incorporation, or any resolution adopted by its board or holders of its securities, to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements to dispose of, all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme of arrangement, unless -

(a) the disposal, amalgamation or merger, or scheme of arrangement -

(i) has been approved in terms of this section; or

(ii) is pursuant to or contemplated in an approved business rescue plan for that company, in terms of Chapter 6; and

(b) to the extent that Parts B and C of this Chapter, and the Takeover Regulations, apply to a company that proposes to -

(i) dispose of all or the greater part of its assets or undertaking;

(ii) amalgamate or merge with another company; or

(iii) implement a scheme of arrangement, the Panel has issued a compliance certificate in respect of the transaction, in terms of section 119(4)(b), or exempted the transaction in terms of section 119(6).

(2)[6] A proposed transaction contemplated in subsection (1) must be approved -

(a) by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which

[5] Section 65 of the South African Companies Act provides authority for shareholders to act by resolution.

[6] Section 115(2) of the South African Companies Act provides several statutory requirements for approval of a proposed merger.

sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that arc entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64(2); and

(b) by a special resolution, also adopted in the manner required by paragraph (a), by the shareholders of the company's holding company if any, if -

(i) the holding company is a company or an external company;

(ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and

(iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company; and

(c) by the court, to the extent required in the circumstances and manner contemplated in subsections (3) to (6).

(3)[7] Despite a resolution having been adopted as contemplated in subsections (2)(a) and (b), a company may not proceed to implement that resolution without the approval of a court if -

(a) the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution and, within five business days after the vote, any person who voted against the resolution requires the company to seek court approval; or

(b) the court, on an application within 10 business days after the vote by any person who voted against the resolution, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7).

(4) For the purposes of subsections (2) and (3), any voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them, must not be included in calculating the percentage of voting rights -

(a) required to be present, or actually present, in determining whether the applicable quorum requirements are satisfied; or

[7] Section 115(3) of the South African Companies Act sets forth the opportunities for objecting shareholders to obtain court review of the proposed merger.

(b) required to be voted in support of a resolution, or actually voted in support of the resolution.

(4A) In subsection (4), "act in concert" has the meaning set out in section 117(1)(b).

(5) If a resolution requires approval by a court as contemplated in terms of subsection (3)(a), the company must either -

(a) within 10 business days after the vote, apply to the court for approval, and bear the costs of that application; or

(b) treat the resolution as a nullity.

(6)[8] On an application contemplated in subsection (3)(b), the court may grant leave only if it is satisfied that the applicant -

(a) is acting in good faith;

(b) appears prepared and able to sustain the proceedings; and

(c) has alleged facts which, if proved, would support an order in terms of subsection (7).

(7)[9] On reviewing a resolution that is the subject of an application in terms of subsection (5)(a), or after granting leave in terms of subsection (6), the court may set aside the resolution only if -

(a) the resolution is manifestly unfair to any class of holders of the company's securities; or

(b) the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.

(8)[10] The holder of any voting rights in a company is entitled to seek relief in terms of section 164 if that person -

[8] Section 115(6) of the South African Companies Act provides additional requirements that must be satisfied for an objecting shareholder to obtain court review of a proposed merger that was otherwise opposed by less than 15% of the voting shareholders.

[9] Section 115(7) of the South African Companies Act provides the court's standard of review for resolving a shareholder's objection to a proposed merger.

[10] Section 115(8) of the South African Companies Act provides the process by which an objecting shareholder can preserve their appraisal rights.

(a) notified the company in advance of the intention to oppose a special resolution contemplated in this section; and

(b) was present at the meeting and voted against that special resolution.

(9) If a transaction contemplated in this Part has been approved, any person to whom assets are, or an undertaking is, to be transferred, may apply to a court for an order to effect -

(a) the transfer of the whole or any part of the undertaking, assets and liabilities of a company contemplated in that transaction;

(b) the allotment and appropriation of any shares or similar interests to be allotted or appropriated as a consequence of the transaction;

(c) the transfer of shares from one person to another;

(d) the dissolution, without winding-up, of a company, as contemplated in the transaction;

(e) incidental, consequential and supplemental matters that are necessary for the effectiveness and completion of the transaction; or

(f) any other relief that may be necessary or appropriate to give effect to, and properly implement, the amalgamation or merger.

§ 116. Implementation of amalgamation or merger

(1)[11] Subject to subsection (2), after a resolution approving an amalgamation or merger has been adopted by each company that is a party to the agreement -

(a) each of the amalgamating or merging companies must cause a notice of the amalgamation or merger to be given in the prescribed manner and form to every known creditor of that company;

(b) within 15 business days after delivery of a notice required by paragraph (a), a creditor may seek leave to apply to a court for a review of the amalgamation or merger only on the grounds that the creditor will be materially prejudiced by the amalgamation or merger; and

(c) a court may grant leave contemplated in paragraph (b) only if it is satisfied that -

[11] Section 116(1) of the South African Companies Act requires the parties to a merger agreement to notify their known creditors after the agreement is approved.

(i) the applicant for leave is acting in good faith;

(ii) if implemented, the amalgamation or merger would materially prejudice the creditor; and

(iii) there are no other remedies available to the creditor.
(2) Subsection (1) does not apply to a company engaged in business rescue proceedings, in respect of any transaction pursuant to or contemplated in the company's business rescue plan adopted in accordance with Chapter 6.

(3) A notice of amalgamation or merger must be filed after the transaction has satisfied all the applicable requirements set out in section 115, and -

(a) after the time contemplated in subsection (1)(b), if no application has been made to the court in terms of that subsection; or

(b) in any other case -

(i) after the court has disposed of any proceedings arising in terms of subsection (1)(b) and (c); and

(ii) subject to the order of the court.

(4) A notice of amalgamation or merger must include -

(a) confirmation that the amalgamation or merger -

(i) has satisfied the requirements of sections 113 and 115;

(ii) has been approved in terms of the Competition Act, if so required by that Act;

(iii) has been granted the consent of the Minister of Finance in terms of section 54 of the Banks Act, if so required by that Act; and

(iv) is not subject to -

(aa) further approval by any regulatory authority; or

(bb) any unfulfilled conditions imposed by or in terms of any law administered by a regulatory authority; and

(b) the Memorandum of Incorporation of any company newly incorporated in terms of the agreement.

(5) After receiving a notice of amalgamation or merger, the Commission must -

(a) issue a registration certificate for each company, if any, that has been newly incorporated in terms of the amalgamation or merger agreement; and

(b) deregister any of the amalgamating or merging companies that did not survive the amalgamation or merger.

(6) An amalgamation or merger -

(a) takes effect in accordance with, and subject to any conditions set out in the amalgamation or merger agreement;

(b) does not affect any -

(i) existing liability of a party to the agreement, or of a director of any of the amalgamating or merging companies, to be prosecuted in terms of any applicable law;

(ii) civil, criminal or administrative action or proceeding pending by or against an amalgamating or merging company, and any such proceeding may continue to be prosecuted by or against any amalgamated or merged company; or

(iii) conviction against, or ruling, order or judgment in favour of or against, an amalgamating or merging company, and any such ruling, order or judgment may be enforced by or against any amalgamated or merged, company.

(7) When an amalgamation or merger agreement has been implemented -

(a) the property of each amalgamating or merging company becomes the property of the newly amalgamated, or surviving merged, company or companies; and

(b) each newly amalgamated, or surviving merged company is liable for all of the obligations of every amalgamating or merging company, in accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement, but in any case subject to the requirement that each amalgamated or merged company must satisfy the solvency and liquidity test, and subject to subsection (8), if it is applicable.

(8) If, as a consequence of an amalgamation or merger, any property that is registered in terms of any public regulation is to be transferred from an amalgamating or merging company to an amalgamated or merged company, a copy of the amalgamation or merger agreement, together with a copy of the filed notice of

amalgamation or merger, constitutes sufficient evidence for the keeper of the relevant property registry to effect a transfer of the registration of that property.

(9) If, with respect to a transaction involving a company that is regulated in terms of the Banks Act, there is a conflict between a provision of subsection (7) and a provision of section 54 of that Act, the provisions of that Act prevail.

§ 124. Compulsory acquisitions and squeeze out

(1)[12] If, within four months after the date of an offer for the acquisition of any class of securities of a regulated company, that offer has been accepted by the holders of at least 90 percent of that class of securities, other than any such securities held before the offer by the offeror, a related or inter-related person, or persons acting in concert, or a nominee or subsidiary of any such person or persons -

(a) within two further months, the offeror may notify the holders of the remaining securities of the class, in the prescribed manner and form -

(i) that the offer has been accepted to that extent; and

(ii) that the offeror desires to acquire all remaining securities of that class; and

(b) subject to subsection (2), after giving notice in terms of paragraph (a), the offeror is entitled, and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer.

(2) Within 30 business days after receiving a notice in terms of subsection (1)(a),a person may apply to a court for an order -

(a) that the offeror is not entitled to acquire the applicant‟s securities of that class; or

(b) imposing conditions of acquisition different from those of the original offer.

(3) If an offer to acquire the securities of a particular class has not been accepted to the extent contemplated in subsection (1) -

(a) the offeror may apply to a court for an order authorising the offeror to give a notice contemplated in subsection (1)(a); and

[12] Section 124 of the South African Companies Act is very similar to Section 253 of the Delaware General Corporation Law.

(b) the court may make the order applied for, if -

(i) after making reasonable enquiries, the offeror has been unable to trace one or more of the persons holding securities to which the offer relates;

(ii) by virtue of acceptances of the original offer, the securities that are the subject of the application, together with the securities held by the person or persons referred to in subparagraph (i), amount to not less than the minimum specified in subsection (1);

(iii) the consideration offered is fair and reasonable; and

(iv) the court is satisfied that it is just and equitable to make the order, having regard, in particular, to the number of holders of securities who have been traced but who have not accepted the offer.

(4) If an offer for the acquisition of any class of securities of a regulated company has resulted in the acquisition by the offeror or a nominee or subsidiary of the offeror, or a related or inter-related person of any of them, individually or in aggregate, of sufficient securities of that class such that, together with any other securities of that class already held by that person, or those persons in aggregate, they then hold at least 90 percent of the securities of that class -

(a) the offeror must notify the holders of the remaining securities of the class that the offer has been accepted to that extent;

(b) within three months after receiving a notice in terms of paragraph (a), a person may demand that the offeror acquire all of the person's securities of the class concerned; and

(c) after receiving a demand in terms of paragraph (b), the offeror is entitled, and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer.

(5) If an offeror has given notice in terms of subsection (1), and no order has been made in terms of subsection (3), or if the offeror has received a demand in terms of subsection (4)(b) -

(a) six weeks after the date on which the notice was given or, if an application to a court is then pending, after the application has been disposed of, or after the date on which the demand was received, as the case may be, the offeror must -

(i) transmit a copy of the notice to the regulated company whose

securities are the subject of the offer, together with an instrument of transfer, executed on behalf of the holder of the those securities by any person appointed by the offeror; and

(ii) pay or transfer to that company the consideration representing the price payable by the offeror for the securities concerned.

(b) subject to the payment of prescribed fees or duties, the company must thereupon register the offeror as the holder of those securities.

(6) An instrument of transfer contemplated in subsection (5) is not required for any securities for which a share warrant is for the time being outstanding.

(7) A regulated company must deposit any consideration received under this section into a separate interest bearing bank account with a banking institution registered under the Banks Act and, subject to subsection (8), those deposits must be -

(a) held in trust by the company for the person entitled to the securities in respect of which the consideration was received; and

(b) paid on demand to the person contemplated in paragraph (a), with interest to the date of payment.

(8) If a person contemplated in subsection (7)(a) fails for more than three years to demand payment of an amount held in terms of that paragraph, the amount, together with any accumulated interest, must be paid to the benefit of the Guardian's Fund of the Master of the High Court, to be held and dealt with in accordance with the rules of that Fund.

(9) In this section any reference to a "holder of securities who has not accepted the offer" includes any holder who has failed or refused to transfer their securities to the offeror in accordance with the offer.

DELAWARE GENERAL CORPORATION LAW – 8 *Del. C.* §§ 251, 253

Mergers

§ 251. Merger or consolidation of domestic corporations

(a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability. The agreement shall state:

(1) The terms and conditions of the merger or consolidation;

(2) The mode of carrying the same into effect;

(3) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(4) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement;

(5) The manner, if any, of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation, or of cancelling some or all of such shares, and, if any shares of any of the constituent corporations are not to remain outstanding, to be converted solely into shares or other securities of the surviving or resulting corporation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares are to receive in exchange for, or upon conversion of such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation; and

(6) Such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with § 155 of this title.

The agreement so adopted shall be executed and acknowledged in accordance with § 103 of this title. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section shall be submitted to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each holder of stock, whether voting or nonvoting, of the corporation at the stockholder's address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof. At the meeting, the agreement shall be considered and a vote taken for its adoption or rejection. If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. If the agreement shall be so adopted and certified by each constituent corporation, it shall then be filed and shall become effective, in accordance with § 103 of this title. In lieu of filing the agreement of merger or consolidation required by this section, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with § 103 of this title, which states:

(1) The name and state of incorporation of each of the constituent corporations;

(2) That an agreement of merger or consolidation has been approved, adopted, executed and acknowledged by each of the constituent corporations in accordance with this section;

(3) The name of the surviving or resulting corporation;

(4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger (which amendments or changes may amend and restate the certificate of incorporation of the surviving corporation in its entirety), or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving corporation, stating the address thereof; and

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving corporation, on request and without cost, to any stockholder of any constituent corporation.

(d) Any agreement of merger or consolidation may contain a provision that at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with § 103 of this title, the agreement may be terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders of all or any of the constituent corporations; in the event the agreement of merger or consolidation is terminated after the filing of the agreement (or a certificate in lieu thereof) with the Secretary of State but before the agreement (or a certificate in lieu thereof) has become effective, a certificate of termination or merger or consolidation shall be filed in accordance with § 103 of this title. Any agreement of merger or consolidation may contain a provision that the boards of directors of the constituent corporations may amend the agreement at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with § 103 of this title, provided that an amendment made subsequent to the adoption of the agreement by the stockholders of any constituent corporation shall not (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such constituent corporation, (2) alter or change any term of the certificate of incorporation of the surviving corporation to be effected by the merger or consolidation, or (3) alter or change any of the terms and conditions of the agreement if such alteration or change would adversely affect the holders of any class or series thereof of such constituent corporation; in the event the agreement of merger or consolidation is amended after the filing thereof with the Secretary of State but before the agreement has become effective, a certificate of amendment of merger or consolidation shall be filed in accordance with § 103 of this title.

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if any, that changes in the certificate of incorporation are set forth in the agreement of merger.

(f) Notwithstanding the requirements of subsection (c) of this section, unless required by its certificate of incorporation, no vote of stockholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and (3) either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan

of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 20% of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger. No vote of stockholders of a constituent corporation shall be necessary to authorize a merger or consolidation if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. If an agreement of merger is adopted by the constituent corporation surviving the merger, by action of its board of directors and without any vote of its stockholders pursuant to this subsection, the secretary or assistant secretary of that corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and, (1) if it has been adopted pursuant to the first sentence of this subsection, that the conditions specified in that sentence have been satisfied, or (2) if it has been adopted pursuant to the second sentence of this subsection, that no shares of stock of such corporation were issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

(g) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation shall be necessary to authorize a merger with or into a single direct or indirect wholly-owned subsidiary of such constituent corporation if: (1) such constituent corporation and the direct or indirect wholly-owned subsidiary of such constituent corporation are the only constituent entities to the merger; (2) each share or fraction of a share of the capital stock of the constituent corporation outstanding immediately prior to the effective time of the merger is converted in the merger into a share or equal fraction of share of capital stock of a holding company having the same designations, rights, powers and preferences, and the qualifications, limitations and restrictions thereof, as the share of stock of the constituent corporation being converted in the merger; (3) the holding company and the constituent corporation are corporations of this State and the direct or indirect wholly-owned subsidiary that is the other constituent entity to the merger is a corporation or limited liability company of this State; (4) the certificate of incorporation and by-laws of the holding company immediately following the effective time of the merger contain provisions identical to the certificate of incorporation and by-laws of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate name, the registered office and agent, the initial board of directors and the initial subscribers

for shares and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination, or cancellation has become effective); (5) as a result of the merger the constituent corporation or its successor becomes or remains a direct or indirect wholly-owned subsidiary of the holding company; (6) the directors of the constituent corporation become or remain the directors of the holding company upon the effective time of the merger; (7) the organizational documents of the surviving entity immediately following the effective time of the merger contain provisions identical to the certificate of incorporation of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate or entity name, the registered office and agent, the initial board of directors and the initial subscribers for shares, references to members rather than stockholders or shareholders, references to interests, units or the like rather than stock or shares, references to managers, managing members or other members of the governing body rather than directors and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective); provided, however, that (i) if the organizational documents of the surviving entity do not contain the following provisions, they shall be amended in the merger to contain provisions requiring that (A) any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, that requires for its adoption under this chapter or its organizational documents the approval of the stockholders or members of the surviving entity shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; provided, however, that for purposes of this clause (i)(A), any surviving entity that is not a corporation shall include in such amendment a requirement that the approval of the stockholders of the holding company be obtained for any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, which would require the approval of the stockholders of the surviving entity if the surviving entity were a corporation subject to this chapter; (B) any amendment of the organizational documents of a surviving entity that is not a corporation, which amendment would, if adopted by a corporation subject to this chapter, be required to be included in the certificate of incorporation of such corporation, shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; and (C) the business and affairs of a surviving entity that is not a corporation shall be managed by or under the

direction of a board of directors, board of managers or other governing body consisting of individuals who are subject to the same fiduciary duties applicable to, and who are liable for breach of such duties to the same extent as, directors of a corporation subject to this chapter; and (ii) the organizational documents of the surviving entity may be amended in the merger (A) to reduce the number of classes and shares of capital stock or other equity interests or units that the surviving entity is authorized to issue and (B) to eliminate any provision authorized by § 141(d) of this title; and (8) the stockholders of the constituent corporation do not recognize gain or loss for United States federal income tax purposes as determined by the board of directors of the constituent corporation. Neither paragraph (g)(7)(i) of this section nor any provision of a surviving entity's organizational documents required by paragraph (g)(7)(i) of this section shall be deemed or construed to require approval of the stockholders of the holding company to elect or remove directors or managers, managing members or other members of the governing body of the surviving entity. The term "organizational documents", as used in paragraph (g)(7) of this section and in the preceding sentence, shall, when used in reference to a corporation, mean the certificate of incorporation of such corporation, and when used in reference to a limited liability company, mean the limited liability company agreement of such limited liability company.

As used in this subsection only, the term "holding company" means a corporation which, from its incorporation until consummation of a merger governed by this subsection, was at all times a direct or indirect wholly-owned subsidiary of the constituent corporation and whose capital stock is issued in such merger. From and after the effective time of a merger adopted by a constituent corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection: (i) to the extent the restrictions of § 203 of this title applied to the constituent corporation and its stockholders at the effective time of the merger, such restrictions shall apply to the holding company and its stockholders immediately after the effective time of the merger as though it were the constituent corporation, and all shares of stock of the holding company acquired in the merger shall for purposes of § 203 of this title be deemed to have been acquired at the time that the shares of stock of the constituent corporation converted in the merger were acquired, and provided further that any stockholder who immediately prior to the effective time of the merger was not an interested stockholder within the meaning of § 203 of this title shall not solely by reason of the merger become an interested stockholder of the holding company, (ii) if the corporate name of the holding company immediately following the effective time of the merger is the same as the corporate name of the constituent corporation immediately prior to the effective time of the merger, the shares of capital stock of the holding company into which the shares of capital stock of the constituent corporation are converted in the merger shall be represented by the stock certificates that previously represented shares of capital stock of the constituent corporation and (iii) to the extent a stockholder of the constituent corporation immediately prior to the merger had standing to institute or maintain derivative litigation on behalf of the constituent corporation, nothing in this section shall be deemed to limit or extinguish such standing. If an agreement of merger is adopted by a constituent

corporation by action of its board of directors and without any vote of stockholders pursuant to this subsection, the secretary or assistant secretary of the constituent corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in the first sentence of this subsection have been satisfied, provided that such certification on the agreement shall not be required if a certificate of merger or consolidation is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

(h) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation whose shares are listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the agreement of merger by such constituent corporation shall be necessary to authorize a merger if:

(1) The agreement of merger expressly:

a. Permits or requires such merger to be effected under this subsection; and

b. Provides that such merger shall be effected as soon as practicable following the consummation of the offer referred to in paragraph (h)(2) of this section if such merger is effected under this subsection;

(2) A corporation consummates a tender or exchange offer for any and all of the outstanding stock of such constituent corporation on the terms provided in such agreement of merger that, absent this subsection, would be entitled to vote on the adoption or rejection of the agreement of merger; provided, however, that such offer may exclude stock of such constituent corporation that is owned at the commencement of such offer by:

a. Such constituent corporation;

b. The corporation making such offer;

c. Any person that owns, directly or indirectly, all of the outstanding stock of the corporation making such offer; or

d. Any direct or indirect wholly-owned subsidiary of any of the foregoing;

(3) Following the consummation of the offer referred to in paragraph (h)(2) of this section, the stock irrevocably accepted for purchase or exchange pursuant to such offer and received by the depository prior to expiration of such offer, plus the stock otherwise owned by the consummating corporation equals at least such percentage of the stock, and of each class or series thereof, of such constituent corporation that, absent this subsection, would be required to adopt the agreement of merger by this chapter and by the certificate of incorporation of such constituent corporation;

(4) The corporation consummating the offer referred to in paragraph (h)(2) of this section merges with or into such constituent corporation pursuant to such agreement; and

(5) Each outstanding share of each class or series of stock of the constituent corporation that is the subject of and not irrevocably accepted for purchase or exchange in the offer referred to in paragraph (h)(2) of this section is to be converted in such merger into, or into the right to receive, the same amount and kind of cash, property, rights or securities to be paid for shares of such class or series of stock of such constituent corporation irrevocably accepted for purchase or exchange in such offer.

(6) As used in this section only, the term:

a. "Consummates" (and with correlative meaning, "consummation" and "consummating") means irrevocably accepts for purchase or exchange stock tendered pursuant to a tender or exchange offer;

b. "Depository" means an agent, including a depository, appointed to facilitate consummation of the offer referred to in paragraph (h)(2) of this section;

c. "Person" means any individual, corporation, partnership, limited liability company, unincorporated association or other entity; and

d. "Received" (solely for purposes of paragraph (h)(3) of this section) means physical receipt of a stock certificate in the case of certificated shares and transfer into the depository's account, or an agent's message being received by the depository, in the case of uncertificated shares.

If an agreement of merger is adopted without the vote of stockholders of a corporation pursuant to this subsection, the secretary or assistant secretary of the surviving corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in this subsection (other than the condition listed in paragraph (h)(4) of this section) have been satisfied; provided that

such certification on the agreement shall not be required if a certificate of merger is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

§ 253. Merger of parent corporation and subsidiary or subsidiaries

(a) In any case in which at least 90% of the outstanding shares of each class of the stock of a corporation or corporations (other than a corporation which has in its certificate of incorporation the provision required by § 251(g)(7)(i) of this title), of which class there are outstanding shares that, absent this subsection, would be entitled to vote on such merger, is owned by another corporation and 1 of the corporations is a corporation of this State and the other or others are corporations of this State, or any other state or states, or the District of Columbia and the laws of the other state or states, or the District permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction, the corporation having such stock ownership may either merge the other corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such other corporations, into 1 of the other corporations by executing, acknowledging and filing, in accordance with § 103 of this title, a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the subsidiary corporations, parties to a merger as aforesaid, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation, or the cancellation of some or all of such shares. Any of the terms of the resolution of the board of directors to so merge may be made dependent upon facts ascertainable outside of such resolution, provided that the manner in which such facts shall operate upon the terms of the resolution is clearly and expressly set forth in the resolution. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation. If the parent corporation be not the surviving corporation, the resolution shall include provision for the pro rata issuance of stock of the surviving corporation to the holders of the stock of the parent corporation on surrender of any certificates therefor, and the certificate of ownership and merger shall state that the proposed merger has been approved by a majority of the outstanding stock of the parent corporation entitled to vote thereon at a meeting duly called and held after 20 days' notice of the purpose of the meeting mailed to each such stockholder at the stockholder's address as it appears on the records of the corporation if the parent corporation is a corporation of this State or state that the proposed merger has been adopted, approved, certified, executed and acknowledged by the parent

corporation in accordance with the laws under which it is organized if the parent corporation is not a corporation of this State. If the surviving corporation exists under the laws of the District of Columbia or any state or jurisdiction other than this State:

(1) Section 252(d) of this title or § 258(c) of this title, as applicable, shall also apply to a merger under this section; and

(2) The terms and conditions of the merger shall obligate the surviving corporation to provide the agreement, and take the actions, required by § 252(d) of this title or § 258(c) of this title, as applicable.

(b) If the surviving corporation is a Delaware corporation, it may change its corporate name by the inclusion of a provision to that effect in the resolution of merger adopted by the directors of the parent corporation and set forth in the certificate of ownership and merger, and upon the effective date of the merger, the name of the corporation shall be so changed.

(c) Section § 251(d) of this title shall apply to a merger under this section, and § 251(e) of this title shall apply to a merger under this section in which the surviving corporation is the subsidiary corporation and is a corporation of this State. References to "agreement of merger" in § 251(d) and (e) of this title shall mean for purposes of this subsection the resolution of merger adopted by the board of directors of the parent corporation. Any merger which effects any changes other than those authorized by this section or made applicable by this subsection shall be accomplished under § 251, § 252, § 257, or § 258 of this title. Section 262 of this title shall not apply to any merger effected under this section, except as provided in subsection (d) of this section.

(d) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under this section is not owned by the parent corporation immediately prior to the merger, the stockholders of the subsidiary Delaware corporation party to the merger shall have appraisal rights as set forth in § 262 of this title.

(e) A merger may be effected under this section although 1 or more of the corporations parties to the merger is a corporation organized under the laws of a jurisdiction other than 1 of the United States; provided that the laws of such jurisdiction permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction.

(f) This section shall apply to nonstock corporations if the parent corporation is such a corporation and is the surviving corporation of the merger; provided, however, that references to the directors of the parent corporation shall be deemed to be references to members of the governing body of the parent corporation, and

references to the board of directors of the parent corporation shall be deemed to be references to the governing body of the parent corporation.

(g) Nothing in this section shall be deemed to authorize the merger of a corporation with a charitable nonstock corporation, if the charitable status of such charitable nonstock corporation would thereby be lost or impaired.