490.1104 Action on a plan of merger or share exchange.

In the case of a domestic corporation that is a party to a merger or the acquired entity in a share exchange, the plan of merger or share exchange shall be adopted in the following manner:

1. The plan of merger or share exchange shall first be adopted by the board of directors.

2. *a.* Except as provided in subsections 8, 10, and 12, and in section 490.1105, the plan of merger or share exchange shall then be approved by the shareholders. In submitting the plan of merger or share exchange to the shareholders for approval, the board of directors shall recommend that the shareholders approve the plan, or, in the case of an offer referred to in subsection 10, paragraph "*b*", that the shareholders tender their shares to the offeror in response to the offer, unless any of the following apply:

(1) The board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation.

(2) Section 490.826 applies.

b. If either paragraph "*a*", subparagraph (1) or (2), applies, the board shall inform the shareholders of the basis for its so proceeding.

3. The board of directors may set conditions for the approval of the plan of merger or share exchange by the shareholders or the effectiveness of the plan of merger or share exchange.

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 shall notify each shareholder, regardless of whether 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 foreign or domestic corporation or eligible entity, the notice must also include or be accompanied by a copy or summary of the articles of incorporation and bylaws or the organic rules of that corporation or eligible entity. If the corporation is to be merged with a domestic or foreign corporation or eligible entity and a new domestic or foreign corporation or eligible entity is to be created pursuant to the merger, the notice must include or be accompanied by a copy or a summary of the articles of incorporation and bylaws or the organic rules of the new corporation or eligible entity.

5. Unless the articles of incorporation, bylaws, or the board of directors acting pursuant to subsection 3, require a greater vote or a greater quorum, approval of the plan of merger or share exchange requires the approval of the shareholders at a meeting at which a quorum exists consisting of a majority of the votes entitled to be cast on the plan, 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 such separate voting group at a meeting at which a quorum of the voting group is present consisting of a majority of the votes entitled to be cast on the merger or share exchange by that voting group.

6. Subject to subsection 7, separate voting by voting groups is required for each of the following:

a. On a plan of merger, by each class or series of shares that are any of the following:

(1) To be converted under the plan of merger into shares, other securities, eligible interests, obligations, rights to acquire shares, other securities or eligible interests, cash, other property, or any combination of the foregoing.

(2) Entitled to vote as a separate group on a provision in the plan that constitutes a proposed amendment to the articles of incorporation of a surviving corporation that requires action by separate voting groups under section 490.1004.

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.

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, respectively.

7. The articles of incorporation may expressly limit or eliminate the separate voting rights provided in subsection 6, paragraph "*a*", subparagraph (1), and subsection 6, paragraph "*b*", as to any class or series of shares, except when all of the following apply:

a. The plan of merger or share exchange includes what is or would be in effect an amendment subject to subsection 6, paragraph "*a*", subparagraph (2).

b. The plan of merger or share exchange will not effect a substantive business combination.

8. Unless the articles of incorporation otherwise provide, approval by the corporation's shareholders of a plan of merger is not required if all of the following conditions are satisfied:

a. The corporation will survive the merger.

b. Except for amendments permitted by section 490.1005, 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, rights, and limitations, immediately after the effective date of the merger.

d. The issuance in the merger of shares or other securities convertible into or rights exercisable for shares does not require a vote under section 490.621, subsection 6.

9. *a.* If, as a result of a merger or share exchange, one or more shareholders of a domestic corporation would become subject to new interest holder liability, approval of the plan of merger or share exchange requires the signing in connection with the transaction, by each such shareholder, of a separate written consent to become subject to such new interest holder liability.

b. Paragraph "*a*" does not apply in the case of a shareholder that already has interest holder liability with respect to such domestic corporation, if all of the following apply:

(1) The new interest holder liability is with respect to a domestic or foreign corporation, which may be a different or the same domestic corporation in which the person is a shareholder.

(2) The terms and conditions of the new interest holder liability are substantially identical to those of the existing interest holder liability, other than for changes that eliminate or reduce such interest holder liability.

10. Unless the articles of incorporation otherwise provide, approval by the shareholders of a plan of merger or share exchange is not required if all of the following apply:

a. The plan of merger or share exchange expressly permits or requires the merger or share exchange to be effected under this subsection and provides that, if the merger or share exchange is to be effected under this subsection, the merger or share exchange will be effected as soon as practicable following the satisfaction of the requirement set forth in paragraph "*f*".

b. Another party to the merger, the acquiring entity in the share exchange, or a parent of another party to the merger or the acquiring entity in the share exchange, makes an offer to purchase, on the terms provided in the plan of merger or share exchange, any and all of the outstanding shares of the corporation that, absent this subsection, would be entitled to vote on the plan of merger or share exchange, except that the offer may exclude shares of the corporation that are owned at the commencement of the offer by the corporation, the offeror, or any parent of the offeror, or by any wholly owned subsidiary of any of the foregoing.

c. The offer discloses that the plan of merger or share exchange provides that the merger or share exchange will be effected as soon as practicable following the satisfaction of the requirement set forth in paragraph "*f*" and that the shares of the corporation that are not tendered in response to the offer will be treated as set forth in paragraph "*h*".

d. The offer remains open for at least ten days.

e. The offeror purchases all shares properly tendered in response to the offer and not properly withdrawn.

f. The shares listed below are collectively entitled to cast at least the minimum number of votes on the merger or share exchange that, absent this subsection, would be required by this subchapter and by the articles of incorporation for the approval of the merger or share exchange by the shareholders and by any other voting group entitled to vote on the merger or share exchange at a meeting at which all shares entitled to vote on the approval were present and voted:

(1) Shares purchased by the offeror in accordance with the offer.

(2) Shares otherwise owned by the offeror or by any parent of the offeror or any wholly owned subsidiary of any of the foregoing.

(3) Shares subject to an agreement that they are to be transferred, contributed, or delivered to the offeror, any parent of the offeror, or any wholly owned subsidiary of any of the foregoing in exchange for shares or eligible interests in such offeror, parent, or subsidiary.

g. The offeror or a wholly owned subsidiary of the offeror merges with or into, or effects a share exchange in which it acquires shares of, the corporation.

h. Each outstanding share of each class or series of shares of the corporation that the offeror is offering to purchase in accordance with the offer, and that is not purchased in accordance with the offer, is to be converted in the merger into, or into the right to receive, or is to be exchanged in the share exchange for, or for the right to receive, the same amount and kind of securities, eligible interests, obligations, rights, cash, or other property to be paid or exchanged in accordance with the offer for each share of that class or series of shares that is tendered in response to the offer, except that shares of the corporation that are owned by the corporation or that are described in paragraph *"f"*, subparagraph (2) or (3), need not be converted into or exchanged for the consideration described in this paragraph *"h"*.

11. As used in subsection 10:

a. *"Offer"* means the offer referred to in subsection 10, paragraph *"b"*.

b. *"Offeror"* means the person making the offer.

c. *"Parent"* of an entity means a person that owns, directly or indirectly, through one or more wholly owned subsidiaries, all of the outstanding shares of or eligible interests in that entity.

d. Shares tendered in response to the offer shall be deemed to have been "purchased" in accordance with the offer at the earliest time as of which the following applies:

(1) The offeror has irrevocably accepted those shares for payment.

(2) Either of the following applies:

(a) In the case of shares represented by certificates, the offeror, or the offeror's designated depository or other agent, has physically received the certificates representing those shares.

(b) In the case of shares without certificates, those shares have been transferred into the account of the offeror or its designated depository or other agent, or an agent's message relating to those shares has been received by the offeror or its designated depository or other agent.

e. *"Wholly owned subsidiary"* of a person means an entity of or in which that person owns, directly or indirectly, through one or more wholly owned subsidiaries, all of the outstanding shares or eligible interests.

12. Unless the articles of incorporation otherwise provide, all of the following applies:

a. Approval of a plan of share exchange by the shareholders of a domestic corporation is not required if the corporation is the acquiring entity in the share exchange.

b. Shares not to be exchanged under the plan of share exchange are not entitled to vote on the plan.

89 Acts, ch 288, §124; 2002 Acts, ch 1154, §68, 125; 2013 Acts, ch 31, §46, 82; 2021 Acts, ch 165, §151, 230

Referred to in §490.1105, 490.1302, 490.1320, 490.1321, 508B.2, 515G.2, 524.1402

2021 amendment effective January 1, 2022; 2021 Acts, ch 165, §230

Section stricken and rewritten