§ 55-11-03. Action on plan.

(a) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger (except as provided in subsections (g) and (j) of this section and in G.S. 55-11-04) or share exchange for approval by its shareholders.

(b) The following requirements shall be met for a plan of merger or share exchange to be approved:

(1) The board of directors shall recommend that the shareholders approve the plan of merger or share exchange or, in the case of an offer referred to in subdivision (2) of subsection (j) of this section, that the shareholders tender their shares to the offeror in response to the offer, unless one of the following circumstances exist, in which event the board of directors shall communicate to the shareholders the basis for not recommending that the shareholders approve the plan of merger or share exchange or tender their shares to the offeror in response to the offer at the time it submits to the shareholders the plan of merger or share exchange or communicates with the shareholders regarding an offer referred to in subdivision (2) of subsection (j) of this section:

a. The board of directors determines that, because of a conflict of interest or other special circumstances, it should not make a recommendation that the shareholders approve the plan of merger or share exchange or, in the case of an offer referred to in subdivision (2) of subsection (j) of this section, that the shareholders tender their shares to the offeror in response to the offer.

b. G.S. 55-8-26 applies.

(2) The shareholders entitled to vote must approve the plan of merger or share exchange.

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

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with G.S. 55-7-05. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(e) Unless this Chapter, the articles of incorporation, a bylaw adopted by the shareholders, or the board of directors (acting pursuant to subsection (c)) require a greater vote, the plan of merger or share exchange to be authorized must be approved by each voting group entitled to vote separately on the plan by a majority of all the votes entitled to be cast on the plan by that voting group and, for the purpose of Article 9 or any provision in the articles of incorporation or bylaws adopted prior to July 1, 1990, a merger shall be deemed to include a share exchange. If any shareholder of a merging corporation has or will have personal liability for any existing or future obligation of the surviving corporation in the merger solely as a result of owning one or more shares in the surviving corporation, then, in addition to the requirements of this subsection, authorization of the plan of merger by the merging corporation shall require the affirmative vote or written consent of that shareholder.

(f) Separate voting by voting groups is required for the following:

(1) On a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under

G.S. 55-10-04, except where the consideration to be received in exchange for the shares of that group consists solely of cash.

(2) On a plan of share exchange by each class or series of shares to be acquired in the exchange, with each class or series constituting a separate voting group.

(g) Unless the articles of incorporation provide otherwise, approval by the surviving corporation's shareholders of a plan of merger is not required if all of the following conditions are met:

(1) Except for amendments permitted by G.S. 55-10-02, its articles of incorporation will not be changed.

(2) Each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger will hold the same shares, with identical preferences, limitations, and relative rights, immediately after the effective date of the merger.

(3) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of voting shares of the surviving corporation outstanding immediately before the merger.

(4) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent (20%) the total number of participating shares outstanding immediately before the merger.

(h) As used in subsection (g):

(1) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(2) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(i) After a plan of merger or share exchange is authorized, but before the articles of merger or share exchange become effective, the plan of merger or share exchange (i) may be amended as provided in the plan of merger or share exchange, or (ii) may be abandoned, subject to any contractual rights, as provided in the plan of merger or share exchange or, if there is no such provision, as determined by the board of directors without further shareholder action.

(j) 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 all of the following requirements are met:

(1) The plan of merger or share exchange expressly (i) permits or requires the merger or share exchange to be effected under this subsection and (ii) provides that, if the merger or share exchange is to be effected under this subsection, the merger or share exchange shall be effected as soon as practicable following the satisfaction of the requirement set forth in subdivision (6) of this subsection.

(2) Another party to the merger or share exchange, or a parent of another party to the merger or 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 the corporation, the offeror, or any parent of the offeror.

(3) The offer discloses that the plan of merger or share exchange provides that the merger or share exchange shall be effected as soon as practicable following the satisfaction of the requirement set forth in subdivision (6) of this subsection and that the shares of the corporation that are not tendered in response to the offer shall be treated as set forth in subdivision (8) of this subsection.

(4) The offer remains open for at least 10 days.

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

(6) Any or all of the following types of shares 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 Articles 9 and 11 of this Chapter and by the articles of incorporation of the corporation 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:

a. Shares purchased by the offeror in accordance with the offer.

b. Shares otherwise owned by the offeror or by any parent or wholly owned subsidiary of the offeror.

c. Shares subject to an agreement to be transferred, contributed, or delivered to the offeror, any parent of the offeror, or any wholly owned subsidiary of the offeror in exchange for stock or other equity interests in the offeror, parent, or subsidiary.

(7) 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.

(8) 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, 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 sub-subdivisions b. and c. of subdivision (6) of this subsection need not be converted into or exchanged for the consideration described in this subdivision.

(k) The following definitions apply in subsection (j) of this section:

(1) Offer. – The offer referred to in subdivision (2) of subsection (j) of this section.

(2) Offeror. – The person making the offer.

(3) Parent. – A person that owns, directly or indirectly, through one or more wholly owned subsidiaries, all of the outstanding shares of or interests in an entity.

(4) Purchased. – Shares tendered in response to an offer are deemed to have been purchased in accordance with the offer at the earliest time as of which (i) the offeror has irrevocably accepted those shares for payment and (ii) either of the following has occurred:

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.

(5) Wholly owned subsidiary of a person. – 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 other interests. (1925, c. 77, s. 1; 1939, c. 5; 1943, c. 270; G.S., s. 55-165; 1955, c. 1371, s. 1; 1959, c. 1316, s. 37; 1973, c. 469, s. 33; 1989, c. 265, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 12.17; 1993, c. 552, s. 14; 2005-268, ss. 18, 19, 20; 2013-153, s. 9; 2018-45, s. 17.)