§ 55-11-20. Merger to effect a holding company reorganization.

(a) The following definitions apply in this section:

(1) "Company official" has the same meaning as in G.S. 57D-1-03.

(2) "Constituent corporation" means the original corporation incorporated under the laws of this State or limited liability company organized under the laws of this State that is a party to a merger that is intended to create a holding company structure under a plan of merger that satisfies the requirements of this section.

(3) "Holding company" means a corporation incorporated under the laws of this State or limited liability company organized under the laws of this State that from its incorporation or organization until consummation of a merger governed by this section was at all times a direct or indirect wholly owned subsidiary of the constituent corporation and whose capital stock is issued in the merger.

(4) "Manager" has the same meaning as in G.S. 57D-1-03.

(5) "Organizational documents" means the articles of incorporation of a corporation or the articles of organization of a limited liability company.

(6) "Surviving entity" means the corporation incorporated under the laws of this State or limited liability company organized under the laws of this State that is the surviving entity in a merger of a constituent corporation with or into a single direct or indirect wholly owned subsidiary of the constituent corporation, which immediately following the merger is a direct or indirect wholly owned subsidiary of the holding company.

(b) Notwithstanding the requirements of G.S. 55-11-03, unless expressly required by its articles of incorporation, no vote of shareholders of a constituent corporation is required to authorize a merger with or into a single direct or indirect wholly owned subsidiary of the constituent corporation if all of the following conditions are satisfied:

(1) The constituent corporation and the direct or indirect wholly owned subsidiary of the 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 a 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 or fraction of a share of the capital stock of the constituent corporation being converted in the merger.

(3) The holding company and the constituent corporation are both 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 articles of incorporation and bylaws of the holding company immediately following the effective time of the merger contain provisions identical to the articles of incorporation and bylaws of the constituent corporation immediately prior to the effective time of the merger other than provisions, if any, regarding any of the following:

a. The incorporator or incorporators.

b. The corporate name.

c. The registered office and agent.

d. The initial board of directors and the initial subscribers for shares.

e. Any provisions contained in any amendment to the articles of incorporation that were necessary to effect a change, exchange, reclassification, subdivision, combination, or cancellation of stock, if the 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) Except as provided in subsections (c) and (d) of this section, the organizational documents of the surviving entity immediately following the effective time of the merger contain provisions identical to the articles of incorporation of the constituent corporation immediately prior to the effective time of the merger other than provisions, if any, regarding any of the following:

a. The incorporator or incorporators.
b. The corporate or entity name.
c. The registered office and agent.
d. The initial board of directors and the initial subscribers for shares.
e. References to members rather than stockholders or shareholders.
f. References to interests, units, or other similar terms rather than stock or shares.
g. References to managers, managing members, or other members of the governing body rather than directors.
h. Any provisions contained in any amendment to the articles of incorporation that were necessary to effect a change, exchange, reclassification, subdivision, combination, or cancellation of stock, if the change, exchange, reclassification, subdivision, combination, or cancellation has become effective.

(8) The shareholders 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.

(c) Notwithstanding the provisions of subdivision (7) of subsection (b) of this section, 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 all of the following:

(1) 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 shareholders or members of the surviving entity shall, by specific reference to this subsection, require, in addition, the approval of the shareholders of the holding company, or any successor by merger, by the same vote as is required by this Chapter or by the organizational documents of the surviving entity. For purposes of this subdivision, any surviving entity that is not a corporation shall include in the amendment a requirement that the approval of the shareholders 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 shareholders of the surviving entity if the surviving entity were a corporation subject to this Chapter.

(2) Any amendment of the organizational documents of a surviving entity that is not a corporation that would, if adopted by a corporation subject to this Chapter, be required to be included in the articles of incorporation of the corporation shall, by specific reference to this subsection, require, in addition, the approval of the shareholders of the holding company, or any successor by merger, by the same vote as is required by this Chapter or by the organizational documents of the surviving entity.

(3) 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 those duties to the same extent as, directors of a corporation subject to this Chapter.

(d) Notwithstanding the provisions of subdivision (7) of subsection (b) of this section, the organizational documents of the surviving entity may be amended in the merger 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 to eliminate any provision authorized by G.S. 55-8-06.

(e) Neither subsection (c) of this section nor any provision of a surviving entity's organizational documents required by this section shall be deemed or construed to require approval of the shareholders of the holding company to elect or remove directors or managers, managing members, or other members of the governing body of the surviving entity.

(f) 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 shareholders pursuant to this section, the following provisions apply:

(1) To the extent the restrictions of Articles 9 and 9A of this Chapter applied to the constituent corporation and its shareholders at the effective time of the merger, such restrictions shall apply to the holding company and its shareholders immediately after the effective time of the merger as though it were the constituent corporation.

(2) 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.

(3) To the extent a shareholder 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 limits or extinguishes that standing.

(g) If a plan of merger is adopted by a constituent corporation by action of its board of directors and without any vote of shareholders pursuant to this section, but otherwise in accordance with G.S. 55-11-01, the secretary or assistant secretary of the constituent corporation shall certify on the plan of merger that the plan has been adopted pursuant to this section and that the conditions specified in subsection (b) of this section have been satisfied. This certification on the plan of merger is not required if a certificate of merger or consolidation is registered in lieu of filing the plan of merger. The plan so adopted and certified shall then be filed and become effective, in accordance with G.S. 55-11-05. That filing is a representation by the person who

executes the agreement that the facts stated in the certificate remain true immediately prior to the filing.

(h) Except as otherwise provided in this section:

(1) The provisions of G.S. 55-11-06(a) and G.S. 55-11-06(c) shall apply to any merger effected pursuant to this section.

(2) The provisions of Article 13 of this Chapter shall not apply to any merger effected pursuant to this section. (2014-102, s. 6(a); 2018-45, s. 22.)