

CHAPTER 40

AN ACT concerning resident domestic corporations and amending P.L.1986, c.74.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 3 of P.L.1986, c.74 (C.14A:10A-3) is amended to read as follows:

C.14A:10A-3 Definitions.

3. As used in this act:

a. "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified person.

b. "Announcement date," when used in reference to any business combination, means the date of the first public announcement of the final, definitive proposal for that business combination.

c. "Associate," when used to indicate a relationship with any person, means (1) any corporation or organization of which that person is an officer or partner or is, directly or indirectly, the beneficial owner of 10% or more of any class of voting stock, (2) any trust or other estate in which that person has a substantial beneficial interest or as to which that person serves as trustee or in a similar fiduciary capacity, or (3) any relative or spouse of that person, or any relative of that spouse, who has the same home as that person.

d. "Beneficial owner," when used with respect to any stock, means a person:

(1) that, individually or with or through any of its affiliates or associates, beneficially owns that stock, directly or indirectly;

(2) that, individually or with or through any of its affiliates or associates, has (a) the right to acquire that stock (whether that right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the beneficial owner of stock tendered pursuant to a tender or exchange offer made by that person or any of that person's affiliates or associates until that tendered stock is accepted for purchase or exchange; or (b) the right to vote that stock pursuant to any agreement, arrangement or understanding (whether or not in writing); provided, however, that a person shall not be deemed the beneficial owner of any stock under this subparagraph if the agreement, arrangement or understanding to vote that stock (i) arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act, and (ii) is not then reportable on a Schedule 13D under the Exchange Act (or any comparable or successor report); or

(3) that has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in subparagraph (b) of paragraph (2) of this subsection), or disposing of that stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, that stock.

e. "Business combination," when used in reference to any resident domestic corporation and any interested stockholder of that resident domestic corporation, means:

(1) any merger or consolidation of that resident domestic corporation or any subsidiary of that resident domestic corporation with (a) that interested stockholder or (b) any other corporation (whether or not it is an interested stockholder of that resident domestic

corporation) which is, or after a merger or consolidation would be, an affiliate or associate of that interested stockholder;

(2) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with that interested stockholder or any affiliate or associate of that interested stockholder of assets of that resident domestic corporation or any subsidiary of that resident domestic corporation (a) having an aggregate market value equal to 10% or more of the aggregate market value of all the assets, determined on a consolidated basis, of that resident domestic corporation, (b) having an aggregate market value equal to 10% or more of the aggregate market value of all the outstanding stock of that resident domestic corporation, or (c) representing 10% or more of the earning power or income, determined on a consolidated basis, of that resident domestic corporation;

(3) the issuance or transfer by that resident domestic corporation or any subsidiary of that resident domestic corporation (in one transaction or a series of transactions) of any stock of that resident domestic corporation or any subsidiary of that resident domestic corporation which has an aggregate market value equal to 5% or more of the aggregate market value of all the outstanding stock of that resident domestic corporation to that interested stockholder or any affiliate or associate of that interested stockholder, except pursuant to the exercise of warrants or rights to purchase stock offered, or a dividend or distribution paid or made, pro rata to all stockholders of that resident domestic corporation;

(4) the adoption of any plan or proposal for the liquidation or dissolution of that resident domestic corporation proposed by, on behalf of or pursuant to any agreement, arrangement or understanding (whether or not in writing) with that interested stockholder or any affiliate or associate of that interested stockholder;

(5) any reclassification of securities (including, without limitation, any stock split, stock dividend, or other distribution of stock in respect of stock, or any reverse stock split), or recapitalization of that resident domestic corporation, or any merger or consolidation of that resident domestic corporation with any subsidiary of that resident domestic corporation, or any other transaction (whether or not with, or into, or otherwise involving that interested stockholder), proposed by, on behalf of or pursuant to any agreement, arrangement or understanding (whether or not in writing) with that interested stockholder or any affiliate or associate of that interested stockholder, which has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of stock or securities convertible into voting stock of that resident domestic corporation or any subsidiary of that resident domestic corporation which is directly or indirectly owned by that interested stockholder or any affiliate or associate of that interested stockholder, except as a result of immaterial changes due to fractional share adjustments; or

(6) any receipt by that interested stockholder or any affiliate or associate of that interested stockholder of the benefit, directly or indirectly (except proportionately as a stockholder of that resident domestic corporation), of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through that corporation; provided, however, that the term "business combination" shall not be deemed to include the receipt of any of the foregoing benefits by that resident domestic corporation or any of that corporation's affiliates arising from transactions (such as intercompany loans or tax sharing arrangements) between that resident domestic corporation and its affiliates in the ordinary course of business.

f. "Common stock" means any stock other than preferred stock.

g. "Consummation date," with respect to any business combination, means the date of consummation of that business combination.

h. "Control," including the terms "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract, or otherwise. A person's beneficial ownership of 10% or more of the voting power of a corporation's outstanding voting stock shall create a presumption that that person has control of that corporation. Notwithstanding the foregoing in this subsection, a person shall not be deemed to have control of a corporation if that person holds voting power, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of that corporation.

i. "Exchange Act" means the "Securities Exchange Act of 1934," 48 Stat. 881 (15 U.S.C. s. 78a et seq.) as the same has been or hereafter may be amended from time to time.

j. "Interested stockholder," when used in reference to any resident domestic corporation, means any person (other than that resident domestic corporation or any subsidiary of that resident domestic corporation) that:

(1) is the beneficial owner, directly or indirectly, of 10% or more of the voting power of the outstanding voting stock of that resident domestic corporation; or

(2) is an affiliate or associate of that resident domestic corporation and at any time within the five-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of 10% or more of the voting power of the then outstanding stock of that resident domestic corporation. For the purpose of determining whether a person is an interested stockholder pursuant to this subsection, the number of shares of voting stock of that resident domestic corporation deemed to be outstanding shall include shares deemed to be beneficially owned by the person through application of subsection d. of this section but shall not include any other unissued shares of voting stock of that resident domestic corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

k. "Market value," when used in reference to property of any resident domestic corporation, means:

(1) in the case of stock, the highest closing sale price during the 30-day period immediately preceding the date in question of a share of that stock on the composite tape for New York Stock Exchange-listed stocks, or, if that stock is not quoted on that composite tape or if that stock is not listed on that exchange, on the principal United States securities exchange registered under the Exchange Act on which that stock is listed, or, if that stock is not listed on any such exchange, the highest closing bid quotation with respect to a share of that stock during the 30-day period preceding the date in question on the National Association of Securities Dealers, Inc. Automated Quotations System, or any system then in use, or if no such quotations are available, the fair market value on the date in question of a share of that resident domestic stock as determined by the board of directors of that corporation in good faith; and

(2) in the case of property other than cash or stock, the fair market value of that property on the date in question as determined by the board of directors of that resident domestic corporation in good faith.

l. "Preferred stock" means any class or series of stock of a resident domestic corporation which under the bylaws or certificate of incorporation of that resident domestic corporation is entitled to receive payment of dividends prior to any payment of dividends on some other class or series of stock, or is entitled in the event of any voluntary liquidation, dissolution or winding up of the resident domestic corporation to receive payment or

distribution of a preferential amount before any payments or distributions are received by some other class or series of stock.

m. "Resident domestic corporation" means an issuer of voting stock which is organized under the laws of this State, provided, however, that an issuer which did not have its principal executive offices located in this State and did not have significant business operations in this State on the date of enactment of P.L.2013, c.40, may elect not to be a resident domestic corporation and not be governed by P.L.1986, c.74 (C.14A:10A-1 et seq.), by its board of directors adopting an amendment to its bylaws to that effect within 90 days of the date of enactment of P.L.2013, c.40, and which amendment shall not be further amended by the board of directors.

n. "Stock" means:

(1) any stock or similar security, any certificate of interest, any participation in any profit sharing agreement, any voting trust certificate, or any certificate of deposit for stock; and

(2) any security convertible, with or without consideration, into stock, or any warrant, call or other option or privilege of buying stock without being bound to do so, or any other security carrying any right to acquire, subscribe to or purchase stock.

o. "Stock acquisition date," with respect to any person and any resident domestic corporation, means the date that person first becomes an interested stockholder of that resident domestic corporation.

p. "Subsidiary" of any resident domestic corporation means any other corporation of which voting stock having a majority of the votes entitled to be cast is owned, directly or indirectly, by that resident domestic corporation.

q. "Voting stock" means shares of capital stock of a corporation entitled to vote generally in the election of directors.

2. Section 4 of P.L.1986, c.74 (C.14A:10A-4) is amended to read as follows:

C.14A:10A-4 Five-year restriction; exceptions.

4. Notwithstanding anything to the contrary contained in this act (except section 6 of this act), no resident domestic corporation shall engage in any business combination with any interested stockholder of that resident domestic corporation for a period of five years following that interested stockholder's stock acquisition date unless:

a. that business combination is approved by the board of directors of that resident domestic corporation prior to that interested stockholder's stock acquisition date; or

b. the transaction or series of related transactions which caused the person to become an interested stockholder was approved by the board of directors of that resident domestic corporation prior to that interested stockholder's stock acquisition date and any subsequent business combinations with that interested stockholder are approved by the board of directors of that resident domestic corporation, provided that any such subsequent business combination is approved by (1) the board of directors, or a committee of that board, consisting solely of persons who are not employees, officers, directors, stockholders, affiliates or associates of that interested stockholder, and (2) the affirmative vote of the holders of a majority of the voting stock not beneficially owned by such interested stockholder at a meeting called for such purpose.

3. Section 5 of P.L.1986, c.74 (C.14A:10A-5) is amended to read as follows:

C.14A:10A-5 Permissible business combinations.

5. In addition to the restriction contained in section 4 of this act, and except as provided in section 6 of this act, no resident domestic corporation shall engage at any time in any business combination with any interested stockholder of that resident domestic corporation other than a business combination specified in any one of subsection a., b., c. or d. of this section (the satisfaction of any one subsection being sufficient):

a. a business combination approved by the board of directors of that resident domestic corporation prior to that interested stockholder's stock acquisition date.

b. a business combination approved by the affirmative vote of the holders of two-thirds of the voting stock not beneficially owned by that interested stockholder at a meeting called for such purpose.

c. a business combination that meets all of the following conditions:

(1) the aggregate amount of the cash and the market value, as of the consummation date, of consideration other than cash to be received per share by holders of outstanding shares of common stock of that resident domestic corporation in that business combination is at least equal to the higher of the following:

(a) the highest per share price (including any brokerage commissions, transfer taxes and soliciting dealers' fees) paid by that interested stockholder for any shares of common stock of the same class or series acquired by it (i) within the five-year period immediately prior to the announcement date with respect to that business combination, or (ii) within the five-year period immediately prior to, or in, the transaction in which that interested stockholder became an interested stockholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which that highest per share acquisition price was paid through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since that earliest date, up to the amount of that interest; and

(b) the market value per share of common stock on the announcement date with respect to that business combination or on that interested stockholder's stock acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since that date, up to the amount of that interest;

(2) the aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of stock, other than common stock, of that resident domestic corporation is at least equal to the highest of the following (whether or not that interested stockholder has previously acquired any shares of that class or series of stock):

(a) the highest per share price (including any brokerage commissions, transfer taxes and soliciting dealers' fees) paid by that interested stockholder for any shares of that class or series of stock acquired by it (i) within the five-year period immediately prior to the announcement date with respect to that business combination, or (ii) within the five-year period immediately prior to, or in, the transaction in which that interested stockholder became an interested stockholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which that highest per share acquisition price was paid through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid,

and the market value of any dividends paid other than in cash, per share of that class or series of stock since that earliest date, up to the amount of that interest;

(b) the highest preferential amount per share to which the holders of shares of that class or series of stock are entitled in the event of any liquidation, dissolution or winding up of that resident domestic corporation, plus the aggregate amount of any dividends declared or due as to which those holders are entitled prior to payment of dividends on some other class or series of stock (unless the aggregate amount of those dividends is included in that preferential amount); and

(c) the market value per share of that class or series of stock on the announcement date with respect to that business combination or on that interested stockholder's stock acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of that class or series of stock since that date, up to the amount of that interest;

(3) the consideration to be received by holders of a particular class or series of outstanding stock (including common stock) of that resident domestic corporation in that business combination is in cash or in the same form as the interested stockholder has used to acquire the largest number of shares of that class or series of stock previously acquired by it;

(4) the holders of all outstanding shares of stock of that resident domestic corporation not beneficially owned by that interested stockholder immediately prior to the consummation of that business combination are entitled to receive in that business combination cash or other consideration for those shares in compliance with paragraphs (1), (2) and (3) of this subsection; and

(5) after that interested stockholder's stock acquisition date and prior to the consummation date with respect to that business combination, that interested stockholder has not become the beneficial owner of any additional shares of stock of that resident domestic corporation, except:

(a) as part of the transaction which resulted in that interested stockholder becoming an interested stockholder;

(b) by virtue of proportionate stock splits, stock dividends or other distributions of stock in respect of stock not constituting a business combination under paragraph (5) of subsection e. of section 2 of this act;

(c) through a business combination meeting all of the conditions of paragraph (3) and this paragraph; or

(d) through purchase by that interested stockholder at any price which, if that price had been paid in an otherwise permissible business combination, the announcement date and consummation date of which were the date of that purchase, would have satisfied the requirements of paragraphs (1), (2) and (3) of this subsection.

d. a business combination approved by (1) the board of directors, or a committee of the board of directors, of that resident domestic corporation consisting solely of persons who are not employees, officers, directors, stockholders, affiliates or associates of that interested stockholder prior to the consummation of the business combination; and (2) the affirmative vote of the holders of a majority of the voting stock not beneficially owned by such interested stockholder at a meeting called for such purpose if the transaction or series of related transactions with the interested stockholder which caused the person to become an interested stockholder was approved by the board of directors of the resident domestic corporation prior to the consummation of such transaction or series of related transactions.

4. Section 6 of P.L.1986, c.74 (C.14A:10A-6) is amended to read as follows:

C.14A:10A-6 Exemptions.

6. a. Unless the certificate of incorporation provides otherwise, the provisions of this act shall not apply to any business combination of a resident domestic corporation with an interested stockholder if the resident domestic corporation did not have a class of voting stock registered or traded on a national securities exchange or registered with the Securities and Exchange Commission pursuant to section 12(g) of the Exchange Act, 48 Stat. 892 (15 U.S.C. s.781) on that interested stockholder's stock acquisition date.

b. Unless the certificate of incorporation provides otherwise, the provisions of this act shall not apply to any business combination with an interested stockholder who was an interested stockholder prior to the effective date of this act unless subsequent thereto that interested stockholder increased his or its interested stockholder's proportion of the voting power of the resident domestic corporation's outstanding voting stock to a proportion in excess of the proportion of voting power that interested stockholder held prior to the effective date of this act.

c. (Deleted by amendment, P.L.1987, c.380.)

d. The provisions of this act shall not apply to any business combination of a resident domestic corporation with an interested stockholder of that corporation which became an interested stockholder inadvertently, if such interested stockholder (1) as soon as practicable divests itself or himself of a sufficient amount of the voting stock of that resident domestic corporation so that he or it no longer is the beneficial owner, directly or indirectly, of 10% or more of the voting power of the outstanding voting stock of that corporation, or a subsidiary of that resident domestic corporation, and (2) would not at any time within the five-year period preceding the announcement date with respect to that business combination have been an interested stockholder but for that inadvertent acquisition.

e. (Deleted by amendment, P.L.1989, c.106.)

f. The provisions of this act shall not apply to any business combination of a resident domestic corporation with an interested stockholder of that corporation which, prior to August 5, 1986, became the beneficial owner of more than 50% of the voting power of the outstanding voting stock of that resident domestic corporation by reason of a purchase of voting stock directly from that resident domestic corporation in a transaction approved by the board of directors of that resident domestic corporation, provided that, at the time of the approval, none of the directors of the resident domestic corporation was an employee, officer, director, shareholder, affiliate or associate of the interested stockholder.

g. The provisions of this act shall not apply to any business combination of a resident domestic corporation with an interested stockholder of that corporation which became an interested stockholder on or after August 5, 1986 and before January 1, 1987.

h. The provisions of P.L.1986, c.74 (C.14A:10A-1 et seq.) shall not apply to any stockholder who was the beneficial owner of 5% or more of the voting power of the outstanding voting stock of that resident domestic corporation on the effective date of P.L.2013, c.40 if the resident domestic corporation did not, on the effective date of P.L.2013, c.40, have its principal executive offices located in this State or significant business operations located in this State.

5. This act shall take effect on the 90th day next following enactment.

Approved April 1, 2013.