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SENATE BILL NO. 78

Offered January 11, 2006

Prefiled January 6, 2006

A BILL to amend and reenact §§ 13.1-718 and 13.1-720 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 13.1-719.1, relating to the Virginia Stock Corporation Act; formation of holding companies.

 Patron—Watkins

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 13.1-718 and 13.1-720 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered 13.1-719.1, as follows:

§ 13.1-718. Action on a plan of merger or share exchange.

A. In the case of a domestic corporation that is a party to a merger or share exchange:

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

2. Except as provided in subsection F ~~and of this section~~ and in §§ 13.1-719 and 13.1-719.1, after adopting the plan of merger or share exchange the board of directors shall submit the plan to the shareholders for their approval. The board of directors shall also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the shareholders the basis for that determination.

B. The board of directors may condition its submission of the plan of merger or share exchange to the shareholders on any basis.

C. 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, whether or not entitled to vote, of the meeting of shareholders at which the plan is to be submitted for approval. The notice shall 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 domestic or foreign corporation or eligible entity and its shareholders are to receive capital stock or other interests in the surviving corporation or eligible entity, the notice shall also include or be accompanied by a copy or summary of the articles of incorporation or organic document of that corporation or eligible entity. If the corporation is to be merged into a domestic or foreign corporation or eligible entity that is to be created pursuant to the merger and its shareholders are to receive capital stock or other interests in the surviving corporation or eligible entity, the notice shall include or be accompanied by a copy or a summary of the articles of incorporation or organic document of the new domestic or foreign corporation or eligible entity.

D. Unless the articles of incorporation, or the board of directors acting pursuant to subsection B, require a greater vote, the plan of merger or share exchange to be authorized shall be approved by each voting group entitled to vote on the plan by more than two-thirds of all the votes entitled to be cast by that voting group. The articles of incorporation may provide for a greater or lesser vote than that provided for in this subsection or a vote by separate voting groups so long as the vote provided for is not less than a majority of all the votes cast on the plan by each voting group entitled to vote on the transaction at a meeting at which a quorum of the voting group exists.

E. Separate voting by voting groups is required:

1. On a plan of merger by each class or series of shares that:

a. Is 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; or

b. Would be entitled to vote as a separate group on a provision in the plan that, if contained in a proposed amendment to articles of incorporation, would require action by separate voting groups under § 13.1-708;

2. 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; and

3. 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.

F. Unless the articles of incorporation otherwise provide, approval by the corporation's shareholders

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59 of a plan of merger or share exchange is not required if:

- 60 1. The corporation will survive the merger or is the acquiring corporation in a share exchange;
61 2. Except for amendments permitted by § 13.1-706, its articles of incorporation will not be changed;
62 and

63 3. Each shareholder of the corporation whose shares were outstanding immediately before the
64 effective date of the merger or share exchange will hold the same number of shares, with identical
65 preferences, limitations, and rights immediately after the effective date of the merger or share exchange.

66 G. If as a result of a merger or share exchange one or more shareholders of a domestic corporation
67 would become subject to owner liability for the debts, obligations, or liabilities of any other person or
68 entity, approval of the plan of merger or share exchange shall require the execution, by each
69 shareholder, of a separate written consent to become subject to such owner liability.

70 § 13.1-719.1. *Formation of a holding company.*

71 A. *In this section:*

72 "*Constituent corporation*" means a corporation which, from the incorporation of the holding
73 company until consummation of a merger governed by this section, was at all times the sole direct
74 parent of the holding company and whose shares are converted into shares of the holding company in
75 such merger.

76 2. "*Holding company*" means a corporation which, from its incorporation until consummation of a
77 merger governed by this section, was at all times a direct wholly-owned subsidiary of the constituent
78 corporation and whose shares are issued in such merger in exchange for the shares of the constituent
79 corporation.

80 3. "*Indirect subsidiary*" means a corporation which, from its incorporation until consummation of a
81 merger governed by this section, was at all times a direct wholly-owned subsidiary of the holding
82 company.

83 B. *Unless its articles of incorporation otherwise provide, a constituent corporation may merge an*
84 *indirect subsidiary into itself, or may merge itself into an indirect subsidiary, without the approval of*
85 *the shareholders of the constituent corporation or the board of directors or shareholders of the indirect*
86 *subsidiary, if:*

87 1. *Such constituent corporation and indirect subsidiary are the only parties to the merger;*

88 2. *The provisions in the articles of incorporation and bylaws of the constituent corporation and the*
89 *holding company at the effective date of the merger are identical as they relate to:*

90 a. *The designation, number, and par value of each class and series of shares that are authorized,*
91 *and the preferences, rights and limitations of each class and series of shares;*

92 b. *Any terms of the shares that are dependent upon facts objectively ascertainable outside of the*
93 *articles of incorporation or that vary among the holders of the same class or series;*

94 c. *The preemptive right of the shareholders to acquire unissued shares, provided, however, that if the*
95 *constituent corporation was formed on or before December 31, 2005, and its articles of incorporation*
96 *do not deny the preemptive right of its shareholders, and the holding company was formed after*
97 *December 31, 2005, the articles of incorporation of the holding company must provide that its*
98 *shareholders have the preemptive right to acquire the holding company's unissued shares to the same*
99 *extent the shareholders of the constituent corporation had a preemptive right to acquire unissued shares*
100 *of the constituent corporation;*

101 d. *The definition, limitation, and regulation of the powers of the corporation, its directors, and*
102 *shareholders;*

103 e. *The management of the business and regulation of the affairs of the corporation; and*

104 f. *For purposes of subdivision 2 c of this subsection, shares includes any warrants, rights or options*
105 *to acquire any such shares or any security or other obligation of the corporation convertible into any*
106 *such shares or into warrants, rights or options to acquire any such shares.*

107 3. *Each share or fraction of a share of the constituent corporation outstanding immediately prior to*
108 *the effective date of the merger is converted in the merger into a share or equal fraction of a share of*
109 *the holding company having the same preferences, rights, and limitations as the share or fraction of a*
110 *share of the constituent corporation being converted in the merger;*

111 4. *Each right to acquire shares of the constituent corporation outstanding immediately prior to the*
112 *effective date of the merger is converted in the merger into a right to acquire shares of the holding*
113 *company having the same preferences, rights, and limitations as the right to acquire shares of the*
114 *constituent corporation being converted in the merger; and*

115 5. *The directors of the constituent corporation become or remain the directors of the holding*
116 *company upon the effective date of the merger.*

117 C. *Notwithstanding any provision in this chapter to the contrary, a plan of merger adopted pursuant*
118 *to this section may include:*

119 1. *If the indirect subsidiary is the survivor:*

120 a. *An amendment or restatement of the indirect subsidiary's articles of incorporation to change the*

name of the indirect subsidiary to a name that satisfies the requirements of this chapter; and

b. A provision that the shares of the holding company into which the shares of the constituent corporation are converted in the merger may be represented by the share certificates that previously represented shares of the constituent corporation, if the holding company adopts the former name of the constituent corporation by filing articles of amendment that are effective immediately following consummation of the merger; and

2. If the constituent corporation is the survivor:

a. An amendment or restatement of the constituent corporation's articles of incorporation:

(1) To change the name of the constituent corporation to a name that satisfies the requirements of this chapter;

(2) To delete any existing provisions that authorize the issuance of or relate to multiple classes or series of shares and to add one or more provisions that authorizes a new, single class of shares with unlimited voting rights in lieu thereof;

(3) To delete any existing provision that provides for staggering the terms of directors pursuant to § 13.1-678; or

(4) To make any change permitted by § 13.1-706;

b. A provision that one or more of the directors of the constituent corporation immediately prior to the effective date of the merger will no longer be directors of the constituent corporation immediately following the effective date of the merger; and

c. A provision that the shares of the holding company into which the shares of the constituent corporation are converted in the merger may be represented by the share certificates that previously represented shares of the constituent corporation, if the constituent corporation adopts a new name in the merger that is distinguishable upon the records of the Commission and the holding company adopts the former name of the constituent corporation by filing articles of amendment that are effective immediately following consummation of the merger.

D. Articles of merger filed with respect to a merger authorized by this section shall include a statement that the plan of merger did not require approval by the shareholders of the constituent corporation or by the board of directors or shareholders of the indirect subsidiary because the merger was authorized by this section and that the conditions specified in subsection B of this section have been satisfied.

E. Except as provided in this section, a merger governed by this section shall comply with the provisions of this article applicable to mergers generally.

F. From and after the effective date of a merger adopted by a constituent corporation pursuant to this section:

1. To the extent the restrictions of § 13.1-725.1 or § 13.1-728.2 applied to the constituent corporation and its shareholders at the effective date of the merger, such restrictions shall apply to the holding company and its shareholders immediately after the effective date of the merger as though it were the constituent corporation, and all shares of the holding company acquired in the merger shall for purposes of §§ 13.1-725.1 and 13.1-728.2 be deemed to have been acquired at the time that the shares of the constituent corporation converted in the merger were acquired, and provided further that:

a. Any shareholder who immediately prior to the effective date of the merger was not an interested shareholder within the meaning of § 13.1-725 shall not solely by reason of the merger become an interested shareholder of the holding company; and

b. Any shares which immediately prior to the effective date of the merger were not interested shares within the meaning of § 13.1-728.1 shall not solely by reason of the merger become interested shares of the holding company; and

2. To the extent a shareholder of the constituent corporation immediately prior to the effective date of the merger had standing to institute or maintain a derivative proceeding on behalf of the constituent corporation, consummation of the merger shall not be deemed to limit or extinguish such standing.

3. To the extent a voting trust authorized by § 13.1-670, a voting agreement authorized by § 13.1-671, a shareholder agreement authorized by § 13.1-671.1, a proxy or any similar agreement or instrument applied to the constituent corporation, its shares or its shareholders at the effective date of the merger, such voting trust, voting agreement, shareholder agreement, proxy or other agreement or instrument shall apply to the holding company and its shares and shareholders immediately following consummation of the merger to the same extent that it applied to the constituent corporation and its shares and shareholders immediately prior to consummation of the merger.

§ 13.1-720. Articles of merger or share exchange.

A. After a plan of merger or share exchange has been adopted and approved as required by this chapter, articles of merger or share exchange shall be executed on behalf of each party to the merger or share exchange. The articles shall set forth:

1. The plan of merger or share exchange, the names of the parties to the merger or share exchange

182 and, for each party that is a foreign corporation or eligible entity, the name of the state or country under
183 whose law it is incorporated or formed;

184 2. If the articles of incorporation of a domestic corporation that is the survivor of a merger are
185 amended, or if a new domestic corporation is created as a result of a merger, as an attachment to the
186 articles of merger or share exchange, the amendments to the survivor's articles of incorporation or the
187 articles of incorporation of the new corporation;

188 3. If the plan of merger or share exchange required approval by the shareholders of a domestic
189 corporation that was a party to the merger or share exchange, either:

190 a. A statement that the plan was approved by the unanimous consent of the shareholders; or

191 b. A statement that the plan was submitted to the shareholders by the board of directors in
192 accordance with this chapter, and a statement of:

193 (1) The designation, number of outstanding shares, and number of votes entitled to be cast by each
194 voting group entitled to vote separately on the plan; and

195 (2) Either the total number of votes cast for and against the plan by each voting group entitled to
196 vote separately on the plan or the total number of undisputed votes cast for the plan separately by each
197 voting group and a statement that the number cast for the plan by each voting group was sufficient for
198 approval by that voting group;

199 4. If the plan of merger or share exchange did not require approval by the shareholders of a domestic
200 corporation that was a party to the merger or share exchange, a statement to that effect including the
201 reason approval was not required *and, in the case of a merger pursuant to § 13.1-719.1, the additional*
202 *statements required by subsection D of § 13.1-719.1;* and

203 5. As to each foreign corporation or eligible entity that was a party to the merger or share exchange,
204 a statement that the participation of the foreign corporation or eligible entity was duly authorized as
205 required by the organic law of the corporation or eligible entity.

206 B. Articles of merger or share exchange shall be filed with the Commission by the survivor of the
207 merger or the acquiring corporation in a share exchange. If the Commission finds that the articles of
208 merger or share exchange comply with the requirements of law and that all required fees have been
209 paid, it shall issue a certificate of merger or share exchange. Articles of merger or share exchange filed
210 under this section may be combined with any filing required under the organic law of any domestic
211 eligible entity involved in the transaction if the combined filing satisfies the requirements of both this
212 section and the other organic law.

213 C. In the case of a merger pursuant to § 13.1-719:

214 1. The articles need only be executed on behalf of the surviving corporation; and

215 2. The certificate of merger shall not be deemed a part of the articles of incorporation.