

UTAH REVISED BUSINESS CORPORATE ACT

AMENDMENTS

2016 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Rich Cunningham

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies provisions regulating business corporations.

Highlighted Provisions:

This bill:

- ▶ amends the provision addressing general standards of conduct for directors and officers;
- ▶ enacts provisions related to business combinations; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

16-10a-840, as last amended by Laws of Utah 1993, Chapter 266

ENACTS:

16-10a-1801, Utah Code Annotated 1953

16-10a-1802, Utah Code Annotated 1953

16-10a-1803, Utah Code Annotated 1953



28 16-10a-1804, Utah Code Annotated 1953

29

30 *Be it enacted by the Legislature of the state of Utah:*

31 Section 1. Section **16-10a-840** is amended to read:

32 **16-10a-840. General standards of conduct for directors and officers.**

33 (1) Each director shall discharge ~~his~~ the director's duties as a director, including
34 duties as a member of a committee, and each officer with discretionary authority shall
35 discharge ~~his~~ the officer's duties under that authority:

36 (a) in good faith;

37 (b) with the care an ordinarily prudent person in a like position would exercise under
38 similar circumstances; and

39 (c) in a manner the director or officer reasonably believes to be in the best interests of
40 the corporation.

41 (2) In discharging ~~his~~ the director's or officer's duties, a director or officer is entitled
42 to rely on information, opinions, reports, or statements, including financial statements and
43 other financial data, if prepared or presented by:

44 (a) one or more officers or employees of the corporation or of any other corporation of
45 which at least 50% of the outstanding shares of stock entitling the holder of the shares to vote
46 in the election of directors is owned directly or indirectly by the corporation, whom the director
47 or officer reasonably believes to be reliable and competent in the matters presented;

48 (b) legal counsel, public accountants, or other persons as to matters the director or
49 officer reasonably believes are within the person's professional or expert competence; or

50 (c) in the case of a director, a committee of the board of directors of which ~~he~~ the
51 director is not a member~~[-]~~:

52 (i) if the committee is designated in accordance with the articles of incorporation or the
53 bylaws;

54 (ii) if the information, opinion, report, or statement is within the committee's
55 designated authority;

56 (iii) if the director reasonably believes the committee merits confidence~~[-]~~; and

57 (iv) subject to Subsection (3), so long as in so relying the director is acting in good
58 faith with the degree of care contemplated by Subsection (1)(b).

59 (3) A director or officer is not acting in good faith if ~~he~~ the director or officer has
60 knowledge concerning the matter in question that makes reliance otherwise permitted by
61 Subsection (2) unwarranted.

62 (4) A director or officer is not liable to the corporation, its shareholders, or any
63 conservator or receiver, or any assignee or successor-in-interest thereof, for any action taken, or
64 any failure to take any action, as an officer or director, as the case may be, unless:

65 (a) the director or officer has breached or failed to perform the duties of the office in
66 compliance with this section; and

67 (b) the breach or failure to perform constitutes gross negligence, willful misconduct, or
68 intentional infliction of harm on the corporation or the shareholders.

69 (5) (a) For purposes of this Subsection (5) and notwithstanding Section 16-10a-102,
70 "control" means the possession, directly or indirectly, of the power to direct or cause the
71 direction of the management and policies of the corporation whether through the ownership or
72 voting stock, by contract, or otherwise.

73 (b) In taking action, including action that may involve or relate to a change or potential
74 change in the control of the corporation, the director is entitled to consider:

75 (i) both the long-term and the short-term interests of the corporation and the
76 corporation's shareholders; and

77 (ii) the effects that the corporation's actions may have in the long-term or short-term on
78 any of the following:

79 (A) the prospects for potential growth, development, productivity, and profitability of
80 the corporation;

81 (B) the corporation's current employees;

82 (C) the corporation's retired employees and other beneficiaries receiving or entitled to
83 receive retirement, welfare, or similar benefits from or pursuant to any plan sponsored, or
84 agreement entered into, by the corporation;

85 (D) the corporation's customers and creditors; and

86 (E) the ability of the corporation to provide, as a going concern, goods, services,
87 employment opportunities, employment benefits, and otherwise contribute to the communities
88 in which the corporation does business.

89 (c) This Subsection (5) does not create any duty owed by a director to any person to

90 consider or afford any particular weight to any factor listed in Subsection (5)(b) or abrogate any
91 duty of the director, either statutory or recognized by common law or court decisions.

92 Section 2. Section **16-10a-1801** is enacted to read:

93 **Part 18. Business Combinations**

94 **16-10a-1801. Title.**

95 This part is known as "Business Combinations."

96 Section 3. Section **16-10a-1802** is enacted to read:

97 **16-10a-1802. Definitions.**

98 As used in this part:

99 (1) "Affiliate" means the same as that term is defined in Section [16-10a-102](#).

100 (2) "Announcement date," when used in reference to a business combination, means
101 the date of the first public announcement of the final, definitive proposal for the business
102 combination.

103 (3) "Associate," when used to indicate a relationship with a person, means:

104 (a) a corporation or organization of which the person is an officer or partner or is,
105 directly or indirectly, the beneficial owner of 10% or more of any class of voting stock;

106 (b) a trust or other estate in which the person has a substantial beneficial interest or as
107 to which the person serves as trustee or in a similar fiduciary capacity; and

108 (c) a relative or spouse of the person, or any relative of the spouse, who has the same
109 home as the person.

110 (4) "Beneficial owner," when used with respect to stock, means a person:

111 (a) that, individually or with or through any of its affiliates or associates, beneficially
112 owns the stock, directly or indirectly;

113 (b) that, individually or with or through any of its affiliates or associates, has:

114 (i) the right to acquire the stock:

115 (A) whether the right is exercisable immediately or only after the passage of time,
116 pursuant to an agreement, arrangement, or understanding, whether or not in writing; or

117 (B) upon the exercise of conversion rights, exchange rights, warrants, or options, or
118 otherwise, except that a person may not be considered the beneficial owner of stock tendered
119 pursuant to a tender or exchange offer made by the person or an affiliate or associate of the
120 person until the tendered stock is accepted for purchase or exchange; or

121 (ii) the right to vote the stock pursuant to an agreement, arrangement, or understanding,
122 whether or not in writing, except that a person may not be considered the beneficial owner of
123 any stock under this Subsection (4)(b)(ii) if the agreement, arrangement, or understanding to
124 vote the stock arises solely from a revocable proxy or consent given in response to a proxy or
125 consent solicitation made in accordance with the applicable regulations under the Exchange
126 Act and is not then reportable on a Schedule 13D under the Exchange Act, or any comparable
127 or successor report; or

128 (c) that has an agreement, arrangement, or understanding, whether or not in writing, for
129 the purpose of acquiring, holding, voting, except voting pursuant to a revocable proxy or
130 consent as described in Subsection (4)(b)(ii), or disposing of the stock with any other person
131 that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly,
132 the stock.

133 (5) "Business combination," when used in reference to any domestic corporation and
134 an interested shareholder of the corporation, means:

135 (a) a merger or consolidation of the corporation or any subsidiary of the corporation
136 with:

137 (i) the interested shareholder; or

138 (ii) any other corporation, whether or not that corporation is an interested shareholder
139 of the corporation, that is, or after the merger or consolidation would be, an affiliate or
140 associate of the interested shareholder;

141 (b) any sale, lease, exchange, mortgage, pledge, transfer, or other disposition, in one
142 transaction or a series of transactions, to or with the interested shareholder or any affiliate or
143 associate of the interested shareholder of assets of the corporation or any subsidiary of the
144 corporation:

145 (i) having an aggregate market value equal to 10% or more of the aggregate market
146 value of all the assets, determined on a consolidated basis, of the corporation;

147 (ii) having an aggregate market value equal to 10% or more of the aggregate market
148 value of all the outstanding stock of the corporation; or

149 (iii) representing 10% or more of the earning power or net income, determined on a
150 consolidated basis, of the corporation;

151 (c) the issuance or transfer by the corporation or any subsidiary of the corporation, in

152 one transaction or a series of transactions, of any stock of the corporation or any subsidiary of
153 the corporation that has an aggregate market value equal to 5% or more of the aggregate market
154 value of all the outstanding stock of the corporation to the interested shareholder or any
155 affiliate or associate of the interested shareholder except pursuant to the exercise of warrants or
156 rights to purchase stock offered, or a dividend or distribution paid or made, pro rata to all
157 shareholders of the corporation;

158 (d) the adoption of any plan or proposal for the liquidation or dissolution of the
159 corporation proposed by, or pursuant to any agreement, arrangement, or understanding,
160 whether or not in writing, with, the interested shareholder or any affiliate or associate of the
161 interested shareholder;

162 (e) any reclassification of securities, including a stock split, stock dividend, or other
163 distribution of stock in respect of stock, or any reverse stock split, or recapitalization of the
164 corporation, or any merger or consolidation of the corporation with any subsidiary of the
165 corporation, or any other transaction, whether or not with, into, or otherwise involving the
166 interested shareholder:

167 (i) proposed by, or pursuant to any agreement, arrangement, or understanding, whether
168 or not in writing, with, the interested shareholder or any affiliate or associate of the interested
169 shareholder; and

170 (ii) that has the effect, directly or indirectly, of increasing the proportionate share of the
171 outstanding shares of any class or series of voting stock or securities convertible into voting
172 stock of the corporation or any subsidiary of the corporation that is directly or indirectly owned
173 by the interested shareholder or any affiliate or associate of the interested shareholder, except
174 as a result of immaterial changes due to fractional share adjustments; or

175 (f) a receipt by the interested shareholder or an affiliate or associate of the interested
176 shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of the
177 corporation, of a loan, advance, guarantee, pledge, or other financial assistance or any tax credit
178 or other tax advantage provided by or through the corporation.

179 (6) "Common stock" means stock other than preferred stock.

180 (7) "Consummation date," with respect to a business combination, means:

181 (a) the date of consummation of the business combination; or

182 (b) in the case of a business combination as to which a shareholder vote is taken, the

183 later of:

184 (i) the business day before the vote; or

185 (ii) 20 days before the date of consummation of the business combination.

186 (8) (a) "Control," including the terms "controlling," "controlled by," and "under

187 common control with," means the same as that term is defined in Section 16-10a-102.

188 (b) A person's beneficial ownership of 10% or more of a corporation's outstanding

189 voting stock creates a presumption that the person has control of the corporation.

190 (c) Notwithstanding the other provisions of this Subsection (8), a person may not be

191 considered to have control of a corporation if the person holds voting stock, in good faith and

192 not for the purpose of circumventing this part, as an agent, bank, broker, nominee, custodian, or

193 trustee for one or more beneficial owners that do not individually or as a group have control of

194 the corporation.

195 (9) "Exchange Act" means the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78a et

196 seq. as amended.

197 (10) (a) "Interested shareholder," when used in reference to a domestic corporation,

198 means a person, other than the corporation or a subsidiary of the corporation, that:

199 (i) is the beneficial owner, directly or indirectly, of 20% or more of the outstanding

200 voting stock of the corporation; or

201 (ii) is an affiliate or associate of the corporation and at any time within the five-year

202 period immediately before the date in question was the beneficial owner, directly or indirectly,

203 of 20% or more of the then outstanding voting stock of the corporation.

204 (b) For the purpose of determining whether a person is an interested shareholder, the

205 number of shares of voting stock of the corporation considered to be outstanding shall include

206 shares considered to be beneficially owned by the person through application of Subsection (4),

207 but may not include any other unissued shares of voting stock of the corporation that may be

208 issuable pursuant to any agreement, arrangement, or understanding, or upon exercise of

209 conversion rights, warrants, or options, or otherwise.

210 (11) "Market value," when used in reference to stock or property of a domestic

211 corporation, means:

212 (a) in the case of stock:

213 (i) the highest closing sale price during the 30-day period immediately preceding the

214 date in question of a share of the stock on the composite tape for New York stock
215 exchange-listed stocks;

216 (ii) if the stock is not quoted on the composite tape or listed on the exchange described
217 in Subsection (11)(a)(i), the highest closing sale price during the 30-day period immediately
218 preceding the date in question on the principal United States securities exchange registered
219 under the Exchange Act on which the stock is listed;

220 (iii) if the stock is not quoted on the composite tape or listed on the exchange described
221 in Subsection (11)(a)(i) and is not listed on an exchange described in Subsection (11)(a)(ii), the
222 highest closing bid quotation with respect to a share of the stock during the 30-day period
223 preceding the date in question on the National Association of Securities Dealers, Inc.,
224 Automated Quotations System or any system then in use; or

225 (iv) if no quotation is available under Subsections (11)(a)(i) through (iii), the fair
226 market value on the date in question of a share of the stock as determined by the board of
227 directors of the corporation in good faith; and

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

230 (12) "Preferred stock" means a class or series of stock of a domestic corporation that
231 under the bylaws or articles of incorporation of the corporation:

232 (a) is entitled to receive payment of dividends before any payment of dividends on
233 some other class or series of stock; or

234 (b) is entitled in the event of a voluntary liquidation, dissolution, or winding up of the
235 corporation to receive payment or distribution of a preferential amount before a payment or
236 distribution is received by some other class or series of stock.

237 (13) "Stock" means:

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

240 (b) a security convertible, with or without consideration, into stock;

241 (c) a warrant, call, or other option or privilege of buying stock without being bound to
242 do so; or

243 (d) any other security carrying a right to acquire, subscribe to, or purchase stock.

244 (14) "Stock acquisition date," with respect to a person and a domestic corporation,

245 means the date that the person first becomes an interested shareholder of the corporation.

246 (15) "Subsidiary" of a person means any other corporation of which a majority of the
247 voting stock is owned, directly or indirectly, by the person.

248 (16) "Voting stock" means shares of capital stock of a corporation entitled to vote
249 generally in the election of directors.

250 Section 4. Section **16-10a-1803** is enacted to read:

251 **16-10a-1803. Business combinations.**

252 (1) Notwithstanding anything to the contrary in this chapter, except Section
253 16-10a-1804, a domestic corporation may not engage in a business combination with an
254 interested shareholder of the corporation for a period of five years following the interested
255 shareholder's stock acquisition date unless the business combination or the purchase of stock
256 made by the interested shareholder on the interested shareholder's stock acquisition date is
257 approved by the board of directors of the corporation before the interested shareholder's stock
258 acquisition date.

259 (2) (a) If a good faith proposal is made in writing to the board of directors of the
260 corporation regarding a business combination, the board of directors shall respond in writing,
261 within 30 days or such shorter period, if any, as may be required by the Exchange Act, setting
262 forth the board of directors' reasons for the board of directors' decision regarding the proposal.

263 (b) If a good faith proposal to purchase stock is made in writing to the board of
264 directors of the corporation, unless the board of directors responds affirmatively in writing
265 within 30 days or such shorter period, if any, as may be required by the Exchange Act, the
266 board of directors is considered to have disapproved the proposal.

267 (3) Notwithstanding anything to the contrary in this chapter, except Subsection (2) and
268 Section 16-10a-1804, a domestic corporation may not engage at any time in any business
269 combination with an interested shareholder of the corporation other than a business
270 combination specified in Subsection (4), (5), or (6).

271 (4) A domestic corporation may engage in a business combination with an interested
272 shareholder of the corporation if:

273 (a) the business combination is approved by the board of directors of the corporation
274 before the interested shareholder's stock acquisition date; or

275 (b) the purchase of stock made by the interested shareholder on the interested

276 shareholder's stock acquisition date is approved by the board of directors of the corporation
277 before the interested shareholder's stock acquisition date.

278 (5) A domestic corporation may engage in a business combination with an interested
279 shareholder of the corporation if the business combination is approved by the affirmative vote
280 of the holders of a majority of the outstanding voting stock not beneficially owned by the
281 interested shareholder or an affiliate or associate of the interested shareholder at a meeting
282 called for that purpose no earlier than five years after the interested shareholder's stock
283 acquisition date.

284 (6) A domestic corporation may engage in a business combination with an interested
285 shareholder of the corporation if the business combination meets all of the following
286 conditions:

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

291 (i) the sum of:

292 (A) the highest per share price paid by the interested shareholder at a time when the
293 interested shareholder was the beneficial owner, directly or indirectly, of 5% or more of the
294 outstanding voting stock of the corporation, for any shares of common stock of the same class
295 or series acquired by the interested shareholder within the five-year period immediately before
296 the announcement date with respect to the business combination, or within the five-year period
297 immediately before, or in, the transaction in which the interested shareholder became an
298 interested shareholder, whichever is higher; and

299 (B) interest compounded annually from the earliest date on which the highest per share
300 acquisition price was paid through the consummation date at the rate for one-year United States
301 treasury obligations from time to time in effect, less the aggregate amount of any cash
302 dividends paid, and the market value of any dividends paid other than in cash, per share of
303 common stock since the earliest date, up to the amount of the interest; and

304 (ii) the sum of:

305 (A) the higher of the market value per share of common stock on the announcement
306 date with respect to the business combination or on the interested shareholder's stock

307 acquisition date; and

308 (B) interest compounded annually from the acquisition date through the consummation
309 date at the rate for one-year United States treasury obligations from time to time in effect, less
310 the aggregate amount of any cash dividends paid, and the market value of any dividends paid
311 other than in cash, per share of common stock since the acquisition date, up to the amount of
312 the interest;

313 (b) the aggregate amount of the cash and the market value as of the consummation date
314 of consideration other than cash to be received per share by holders of outstanding shares of
315 any class or series of stock, other than common stock, of the corporation is at least equal to the
316 highest of the following, whether or not the interested shareholder has previously acquired any
317 shares of the class or series of stock:

318 (i) the sum of:

319 (A) the higher of the highest per share price paid by the interested shareholder at a time
320 when the interested shareholder was the beneficial owner, directly or indirectly, of 5% or more
321 of the outstanding voting stock of the corporation, for any shares of the class or series of stock
322 acquired by the interested shareholder within the five-year period immediately before the
323 announcement date with respect to the business combination, or within the five-year period
324 immediately before, or in, the transaction in which the interested shareholder became an
325 interested shareholder, whichever is higher; and

326 (B) interest compounded annually from the earliest date on which the highest per share
327 acquisition price was paid through the consummation date at the rate for one-year United States
328 treasury obligations from time to time in effect, less the aggregate amount of any cash
329 dividends paid, and the market value of any dividends paid other than in cash, per share of the
330 class or series of stock since the earliest date, up to the amount of the interest;

331 (ii) the sum of:

332 (A) the highest preferential amount per share to which the holders of shares of the class
333 or series of stock are entitled in the event of a voluntary liquidation, dissolution, or winding up
334 of the corporation; and

335 (B) the aggregate amount of any dividends declared or due as to which the holders are
336 entitled before payment of dividends on some other class or series of stock, unless the
337 aggregate amount of the dividends is included in the preferential amount; and

338 (iii) the sum of:

339 (A) the market value per share of the class or series of stock on the announcement date
340 with respect to the business combination or on the interested shareholder's stock acquisition
341 date, whichever is higher; and

342 (B) interest compounded annually from the acquisition date through the consummation
343 date at the rate for one-year United States treasury obligations from time to time in effect, less
344 the aggregate amount of any cash dividends paid, and the market value of any dividends paid
345 other than in cash, per share of the class or series of stock since the acquisition date, up to the
346 amount of the interest;

347 (c) the consideration to be received by holders of a particular class or series of
348 outstanding stock, including common stock of the corporation, in the business combination is
349 in cash or in the same form as the interested shareholder has used to acquire the largest number
350 of shares of the class or series of stock previously acquired by the interested shareholder, and
351 the consideration shall be distributed promptly;

352 (d) the holders of all outstanding shares of stock of the corporation not beneficially
353 owned by the interested shareholder immediately before the consummation of the business
354 combination are entitled to receive in the business combination cash or other consideration for
355 the shares in compliance with Subsections (6)(a), (b), and (c); and

356 (e) after the interested shareholder's stock acquisition date and before the
357 consummation date with respect to the business combination, the interested shareholder has not
358 become the beneficial owner of any additional shares of voting stock of the corporation except:

359 (i) as part of the transaction that resulted in the interested shareholder becoming an
360 interested shareholder;

361 (ii) by virtue of proportionate stock splits, stock dividends, or other distributions of
362 stock in respect of stock not constituting a business combination under Subsection
363 16-10a-1802(5)(e);

364 (iii) through a business combination meeting the conditions of Subsection (5); or

365 (iv) through purchase by the interested shareholder at any price that, if the price is paid
366 in an otherwise permissible business combination the announcement date and consummation
367 date of which were the date of the purchase, would have satisfied the requirements of
368 Subsections (4), (5), and (6).

369 Section 5. Section **16-10a-1804** is enacted to read:

370 **16-10a-1804. Scope of part.**

371 This part does not apply:

372 (1) to a business combination of a domestic corporation that does not have a class of
373 voting stock registered with the Securities and Exchange Commission pursuant to Exchange
374 Act, Sec. 12, 15 U.S.C. Sec. 78l, unless the articles of incorporation provide otherwise;

375 (2) to a business combination of a domestic corporation whose articles of incorporation
376 are amended to provide that the domestic corporation is subject to this part that:

377 (a) did not have a class of voting stock registered with the Securities and Exchange
378 Commission pursuant to Exchange Act, Sec. 12, 15 U.S.C. Sec. 78l, on the effective date of the
379 amendment; and

380 (b) is a business combination with an interested shareholder whose stock acquisition
381 date is before the effective date of the amendment;

382 (3) to a business combination of a domestic corporation:

383 (a) the original articles of incorporation of which contain a provision expressly electing
384 not to be governed by this part;

385 (b) that adopts an amendment to the corporation's bylaws before May 10, 2016,
386 expressly electing not to be governed by this part; or

387 (c) that adopts an amendment to the corporation's bylaws, approved by the affirmative
388 vote of a majority of votes of the outstanding voting stock of the corporation, excluding the
389 voting stock of interested shareholders and their affiliates and associates, expressly electing not
390 to be governed by this part, provided that the amendment to the bylaws:

391 (i) may not be effective until 18 months after the vote of the corporation's shareholders;
392 and

393 (ii) may not apply to a business combination of the corporation with an interested
394 shareholder whose stock acquisition date is on or before the effective date of the amendment;

395 (4) to any business combination of a domestic corporation with an interested
396 shareholder of the corporation that became an interested shareholder inadvertently, if the
397 interested shareholder:

398 (a) as soon as practicable, divests itself of a sufficient amount of the voting stock of the
399 corporation so that it no longer is the beneficial owner, directly or indirectly, of 20% or more of

400 the outstanding voting stock of the corporation; and
401 (b) would not at any time within the five-year period preceding the announcement date
402 with respect to the business combination have been an interested shareholder but for the
403 inadvertent acquisition; or
404 (5) to any business combination with an interested shareholder who was the beneficial
405 owner, directly or indirectly, of 5% or more of the outstanding voting stock of the corporation
406 on May 10, 2016, and remained so to the interested shareholder's stock acquisition date.

Legislative Review Note
Office of Legislative Research and General Counsel