



Corporation Law: New York

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A Q&A guide to corporation law in New York.

FORMING A CORPORATION AND CORPORATE FORMALITIES

1. What is required to form and organize a corporation in your jurisdiction? Please include information on:

- Documents.
- Corporate actions (board vs. incorporator actions).
- Name requirements and reservation options.
- Filing requirements (including what needs to be filed and where, timing, electronic vs. paper and availability of expedited/rush services).

DOCUMENTS

Certificate of Incorporation

Under the New York Business Corporation Law (NYBCL), the incorporator of a corporation must be a natural person over the age of 18. The incorporator must file a certificate of incorporation with the New York State Department of State (Department of State). The certificate of incorporation must include:

- The name and address of the incorporator.
- The name of the corporation.
- The corporation's business or purpose. This can be a broad statement that the corporation may engage in any lawful act or activity for which corporations may be organized under the NYBCL.

- The county within New York where the office of the corporation will be located.
- The total number of shares of all classes, which the corporation has the authority to issue, the number of shares of each class and their respective par values, and a statement as to which shares (if any) have no par value.
- The designation of each class of shares (if any) and a statement of their relative rights, preferences and limitations.
- The designation of each series of a preferred class of shares (if any), their variations in the relative rights, preferences and limitations. The certificate of incorporation must also state whether the board of directors has the authority to establish and designate a series, fix variations in the relative rights, preferences, and limitations as between series and change the number of shares of any series of preferred shares.
- A designation of the Secretary of State as agent of the corporation for the purpose of service of process against the corporation. Also a designation of the post office address within or without New York, which the Secretary of State can use to forward a copy of any service of process to the corporation.
- The name and address of the registered agent (if any) within the state of New York and a statement that the registered agent is to be its agent for the purpose of service of process against the corporation.
- The duration of the corporation if other than perpetual.

(NYBCL § 402(a).)

The certificate of incorporation may also contain a statement that limits the personal liability of the corporation's directors for breaches of their duties as directors. However, it may not limit acts or omissions that:

- Were in bad faith.
- Involved intentional misconduct or a knowing violation of law.
- Resulted in a personal gain to which the director was not entitled.
- Violated *Section 719 of the NYBCL*, which provides for liability for certain acts and omissions of directors.

(*NYBCL § 402(b)*.)

By-laws

A corporation's by-laws set out the rules that govern the:

- Rights, powers, business and affairs of the corporation.
- Rights, powers, and duties of the corporation's shareholders, directors and officers.
- The business of the corporation.

If there are any conflicts between the certificate of incorporation and the by-laws, the certificate of incorporation governs (*NYBCL § 601*).

The incorporator adopts the initial by-laws at the organization meeting. After this, the by-laws may be adopted, amended or repealed by a majority of the votes cast by the shares at the time entitled to vote in the election of directors, subject to any limitations or rights of other shareholders set out in the certificate of incorporation. By-laws may also be adopted, amended or repealed by the board of directors, if permitted by the certificate of incorporation or a by-law adopted by the shareholders. Any by-law adopted by the board of directors may be amended or repealed by the shareholders entitled to vote thereon.

CORPORATE ACTIONS

After the certificate of incorporation is filed, the incorporator holds an organizational meeting (either in person or by written consent) to:

- Adopt by-laws.
- Appoint directors to hold office until the first annual meeting of shareholders.
- Transact other business that may come before the meeting.

If there are two or more incorporators, the meeting may be called by any incorporator with five-day advance notice to the other incorporators. The notice:

- Must be sent by mail and include the time and place of the meeting.
- May be waived by any incorporator who attends the meeting or submits a signed waiver of notice before or after the meeting.

If there are more than two incorporators, a majority constitutes a quorum. The act of the majority of the incorporators present at a meeting at which a quorum is present is an act of the incorporators. An incorporator may act in person or by proxy. If an

incorporator dies or is for any reason unable to act, action may be taken as follows:

- When there are two or more incorporators, the other or others may act.
- If there is no incorporator able to act, any agent of the incorporator may act in the place of the incorporator. If the agent also dies or is for any reason unable to act, the agent's legal representative may act.

NAME REQUIREMENTS AND RESERVATION OPTIONS

Naming a New York Corporation

The name of a New York corporation must contain one of the following words, or their abbreviation:

- Corporation.
- Incorporated.
- Limited.

The name of the corporation must be different than the name of an existing domestic or foreign business entity. Unless approval is granted by applicable state agencies and other third parties, New York prohibits using the following words and related phrases:

- Bank.
- Finance.
- Savings.
- Trust.
- Board of trade.
- Chamber of commerce.

A complete list of the prohibited words and phrases is in *Section 301 of the NYBCL*.

Name Reservations

Corporations can reserve a name by submitting an application to the Department of State. The application must list:

- The applicant's name and address.
- The name to be reserved.
- A statement that the person filing the application wants to form a New York corporation.

If the name is available, the Department of State reserves the name for a period of 60 days and issues a certificate of reservation. The certificate of reservation must accompany the certificate of incorporation delivered to the Department of State.

The filing fee for an application for reservation of name is \$20. The reservation can be extended twice for 60-day periods by written request before the expiration of the current reservation period for an additional \$20 fee per extension.



FILING REQUIREMENTS

The certificate of incorporation is filed with the Department of State. The filing fee for filing the certificate of incorporation is \$125, plus the applicable tax on shares.

There is an expedited processing available for the filing of the certificate of incorporation for the following fees:

- Two hour filing fee is \$150.
- Same day filing fee is \$75.
- 24 hour filing fee is \$25.

Along with the filing fee, the corporation must pay a minimum tax of \$10 on shares that the corporation is authorized to issue. The \$10 tax authorizes the corporation to issue a maximum of 200 shares no par value or a par value of all authorized shares up to \$20,000. Corporations authorized to issue more than 200 shares no par value or par value shares totaling more than \$20,000 will incur a tax of more than \$10. The tax rate is \$0.05 per share of no par value stock and 0.05% of the par value of the shares that have a stated par value. For more information, see *Section 180 of the New York Tax Law*.

2. What corporate formalities are required annually? In particular, what are the:

- Annual filing requirements (including franchise tax amounts)?
- Requirements for holding an annual meeting of the shareholders (including the requirements for calling a meeting)?

ANNUAL REPORT AND FRANCHISE TAXES

Instead of an annual report, all New York corporations must file a Biennial Statement every two years with the Department of State during the calendar month in which the original certificate of incorporation was filed. The fee for filing the Biennial Statement is \$9.

In addition to filing the Biennial Statement, corporations (excluding non-stock corporations that are also non-profit corporations), must also pay an annual franchise tax. The franchise tax is calculated by using one of the four following bases that generates the highest taxable amount allocated to, or received in, New York:

- Entire net income base.
- Business and investment capital base.
- Minimum taxable income base.
- Fixed dollar minimum tax.

In addition, there is a tax on allocated subsidiary capital. Reports must be filed on forms provided by the Department of State. These forms are automatically mailed to the corporation one month before the due date. This franchise tax return must be filed within two and a half months following the corporation's reporting period. If the corporation is reporting for the calendar year, the return is due on or before March 15.

ANNUAL MEETING OF SHAREHOLDERS

Shareholders elect directors annually at either an annual meeting or by written consent in lieu of an annual meeting. The annual meeting of shareholders must be held for the election of directors on the date and time or in the manner described in the by-laws (*NYBCL § 602(b)*).

Unless the certificate of incorporation states otherwise, shareholders can elect directors by written consent, provided that consent is unanimous. If consent is less than unanimous, prompt notice must be given to the shareholders who did not consent in writing (*NYBCL § 615*).

If the annual meeting is not held (or action by written consent is not taken) within one month after the date designated for the annual meeting (or if no date is designated and 13 months has passed since the last election), the board must call a special meeting for the election of directors (*NYBCL § 603(a)*).

If the board fails to call a special meeting within two weeks after the expiration of that time period, or if a meeting is called but directors are not elected, then two months after the expiration of that time period, the holders of 10% of the votes of the shares entitled to vote in an election of directors may demand that a special meeting be called for the election of directors. The demand must be in writing and must specify the date and month on which the meeting is to be held (not less than 60 or more than 90 days from the date of the written demand) (*NYBCL § 603(a)*).

FOREIGN CORPORATIONS

3. When and how does a corporation qualify to do business in your jurisdiction? Please include information on:

- State nexus analysis.
- Filing requirements.
- Fees.
- Name requirements.

STATE NEXUS ANALYSIS

Any corporation organized under a jurisdiction other than New York and "doing business" in New York must qualify to do business as a foreign corporation. Foreign corporations that are qualified to do business in New York may engage in any lawful business activity, if it is authorized to conduct that business in its jurisdiction of its incorporation. The NYBCL is silent with regard to what "doing business" means in New York. However, a foreign corporation is not considered to be "doing business" in New York by:

- Maintaining or defending any action or proceeding, whether judicial, administrative, arbitral or otherwise, or settling claims or disputes.
- Holding meetings of its directors or its shareholders.

- Maintaining bank accounts.
- Maintaining offices or agencies only for the transfer, exchange and registration of its securities, or appointing and maintaining trustees or depositaries for its securities.

In determining whether or not a corporation is “doing business” in New York, the courts analyze the particular facts with a presumption that a foreign corporation is doing business in its own state and not in New York (see *Bonnell Co. v. Katz*, 23 Misc.2d 1028 (N.Y. Sup. Ct. 1960); *Great White Whale Advertising, Inc. v. First Festival Productions*, 81 A.D.2d 704, 438 N.Y.S.2d 655 (3d Dep’t 1981)).

In general, the foreign corporation must do more than engage in an isolated piece of business or an occasional undertaking. Rather, it must carry on business with some continuity and regularity (see *International Fuel & Iron Corporation v. Donner Steel Co.*, 242 N.Y. 224, 151 N.E. 214 (1926)). For example, courts have held the following:

- Leasing an office in New York, employing several persons, sharing a bank account, and doing public relations work are enough to constitute “doing business” in New York even though no actual business of the type the corporation was organized to conduct was done in New York (see *Bryant v. Finnish National Airline*, 15 N.Y.2d 426 (1965)).
- A foreign corporation operating a warehouse in New York on a continuous and systematic basis may be found to be “doing business” in New York (see *Manow Intern. Corp. v. High Point Chair, Inc.*, 91 A.D.2d 546, 457 N.Y.S.2d 21 (1st Dep’t 1982)).

FILING REQUIREMENTS

Registration Documents

To qualify to do business in New York, a foreign corporation must file an application for authority with the New York Department of State, setting out:

- The name of the foreign corporation.
- The fictitious name the corporation agrees to use in this state (if any).
- The jurisdiction and date of its incorporation.
- The purpose or purposes for which it is formed.
- The county within New York where its office will be located. Although, the corporation is not required to have an actual physical office in New York.
- A designation of the Secretary of State as its agent for the purpose of service of process and the post office address within or without New York, which the Secretary of State can use to forward any service of process to the corporation.
- The name and address of the registered agent (if any) within New York and a statement that the registered agent is to be its agent for the purpose of services of process.
- A statement that the foreign corporation has not engaged in any unauthorized activity in this state.

Alternatively, if the foreign corporation has done business in New York before applying for the license, it must obtain the consent of the State Tax Commission (see *NYBCL § 1304(a)(8)*) by sending the completed application for authority, together with fees (including \$225 filing fee) to the Department of Taxation and Finance (Tax Department). The Tax Department, on consenting to the filing, will in turn forward the application for authority and fees directly to the Department of State for filing.

(*NYBCL § 1304.*)

In addition, the corporation must attach a certificate signed by an authorized officer of the jurisdiction of its incorporation certifying that the foreign corporation is an existing corporation. If the certificate is in a foreign language, it must also attach a translation under oath of the translator.

Biennial Statements

Foreign business corporations are required to file a Biennial Statement every two years with the Department of State during the calendar month that its original application for authority was filed (*NYBCL § 408*). The Biennial Statement must be made on a form provided by the Department of State, must be signed and delivered to the Department of State, and must state:

- The name and business address of its chief executive officer.
- The street address of its principal executive office.
- The address which the Secretary of State can then forward copies of process accepted on behalf of the corporation.

Not-for-profit corporations are not required to file Biennial Statements.

FEES

There is a filing fee of \$225 for the filing of the application for authority (*NYBCL § 104-A(1)*). Expedited handling services are also available for the following additional fees:

- Two hour filing fee is \$150.
- Same day filing fee is \$75.
- 24 hour filing fee is \$25.

The fee for filing a Biennial Statement for a business corporation is \$9. Expedited handling is not available for Biennial Statements.

NAME REQUIREMENTS

The name of the foreign corporation must be different from any other name of a corporation of any type or kind, or a fictitious name of any other authorized foreign corporation. A foreign corporation whose corporate name is not acceptable for authorization may submit in its application for authority a fictitious name (*NYBCL § 1301*). If submitting a fictitious name, the foreign corporation must use that fictitious name when conducting business in New York.

FIDUCIARY DUTIES

4. Please summarize the fiduciary duties of directors and officers in your jurisdiction.

DIRECTORS

Directors of New York corporations have a duty to act in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances in fulfilling their responsibilities as a member of the corporation's board of directors. The duties encompass the duty of care and duty of loyalty. Directors may be held personally liable for breaches of their duties to the corporation.

Duty of Care

The fiduciary duty of due care obligates directors to act in an informed and reasonably diligent basis in considering material information. The exercise of these duties by the directors is reviewed by New York courts under the business judgment rule. The business judgment rule was developed under case law, and provides that courts will not interfere with the decisions and actions of directors in managing a corporation's affairs if the decisions and actions:

- Were made in good faith.
- Have a reasonable basis.
- Were within the board of directors' power.

When a decision or action of the board of directors is in accordance with these principles, the courts do not:

- Enjoin that action or decision of the directors.
- Hold the directors liable for harm suffered by the corporation.

The corporation's certificate of incorporation can eliminate or limit directors' personal liability to the corporation or its shareholders for breaches of their duty of care. However, a corporation may not limit directors' liability in certain circumstances such as those in bad faith, involving intentional misconduct or violating the directors' duty of loyalty (*NYBCL §402(b)(10)*).

Duty of Loyalty

The fiduciary duty of loyalty requires directors not to engage in the promotion of personal interests, which are incompatible with the superior interests of the corporation. Accordingly, directors cannot profit personally at the expense of the corporation, and must not allow their private interests to conflict with those of the corporation.

OFFICERS

An officer of a New York corporation has similar duties to that of a director and must act in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances. The officers must also follow the duty of loyalty and duty of care standards.

MERGERS

5. What is required to complete a merger in your jurisdiction? Please include information on:

- Documents.
- Board actions.
- Filing requirements (including timing, electronic vs. paper and availability of expedited/rush services).
- Shareholder actions.
- Availability of appraisal rights (including requirements to exercise such rights).

DOCUMENTS

To complete a merger, each participating corporation must adopt a merger agreement. To effect the merger, a certificate of merger must be signed and delivered to the Department of State. The merger agreement is not required to be included in its entirety in the certificate of merger. The merger requirements differ depending on whether the merger is between two or more domestic corporations, domestic and foreign corporations, or parent and subsidiary corporations.

Domestic Corporations

Each constituent corporation must adopt a **merger agreement** stating:

- The name of each constituent corporation and of the surviving corporation.
- The designation and number of outstanding shares of each class and series of each constituent corporation, including:
 - a description of the voting rights of each class and series; and
 - if the number of any of those shares is subject to change before the effective date of the merger, how that change may occur.
- The terms and conditions of the proposed merger, including the conversion of the shares of each constituent into:
 - securities of the surviving corporation;
 - the cash or other consideration to be paid for the shares; or
 - any other mix of consideration.
- Any amendments to the certificate of incorporation of the surviving corporation.

A **certificate of merger** must be signed on behalf of each constituent corporation and delivered to the Department of State. The certificate of merger must state:

- Each of the statements required in the merger agreement (see above), except for the terms and conditions of the merger.
- The effective date of the merger, if different than the date of filing.

- The date when the certificate of incorporation of each constituent corporation was filed.
- How the merger was authorized by each constituent corporation.

Mergers between Domestic and Foreign Corporations

In a merger between domestic and foreign corporations, each domestic corporation must comply with the provisions of the NYBCL relating to domestic corporations, and each foreign corporation must comply with the applicable provisions of the law of the jurisdiction under which it is incorporated (*NYBCL § 907(b)*).

If the surviving corporation is the **domestic** corporation, it must sign and deliver a **certificate of merger** to the Department of State in accordance with the procedures for a completely domestic transaction. In addition, the certificate of merger must state:

- The jurisdiction and date of incorporation of each constituent foreign corporation.
- The date when each constituent applied for authority to do business in New York, and its fictitious name (if any), or a statement that no application has been filed.
- A statement that the merger is permitted by, and in compliance with, the laws of the jurisdiction of each constituent foreign corporation.

If the surviving corporation is the **foreign** corporation, it must sign and deliver a **certificate of merger** to the Department of State, signed on behalf of each constituent domestic and foreign corporation. The certificate of merger must state:

- The name of each constituent corporation and of the surviving corporation.
- The designation and number of outstanding shares of each class and series of each constituent corporation, including:
 - a description of the voting rights of each class and series; and
 - if the number of any of those shares is subject to change before the effective date of the merger, how the change may occur.
- The effective date of the merger, if different than the date of filing.
- How the merger was authorized by each constituent domestic corporation and that the merger is permitted by, and is in compliance with, the laws of the jurisdiction of each constituent foreign corporation.
- The jurisdiction and date of incorporation of the surviving foreign corporation.
- The date when the surviving foreign corporation applied for authority to do business in New York, and its fictitious name, if applicable. Alternatively, a statement that no application has been filed, and that it will not do business in New York until an application is filed.
- The date of incorporation of each constituent domestic corporation.

- The jurisdiction and date of incorporation of each constituent foreign corporation (other than the surviving corporation) and, for each constituent corporation authorized to do business in New York, the date it applied for authority to do business in New York.
- An agreement that the surviving foreign corporation may be served with process in New York in any action against a constituent corporation in the merger previously amenable to suit in New York. This includes an action for the enforcement of the right of shareholders of any constituent domestic corporation to receive payment for their shares.
- An agreement that the surviving foreign corporation will promptly pay to the dissenting shareholders of each constituent domestic corporation the amount (if any) to which they are entitled.
- A designation of the Secretary of State as agent for the service of process in any action or special proceeding, and a post office address where a copy of any process served may be mailed.
- A certification that:
 - all applicable fees and taxes due and payable by each constituent domestic corporation have been paid;
 - a cessation franchise tax report has been filed; and
 - an agreement that the surviving foreign corporation will (within 30 days after filing the certificate of merger) file the cessation franchise tax report and promptly pay all fees and taxes due by each constituent domestic corporation.

Parent and Subsidiary Mergers

In a merger between domestic parent and subsidiary corporations (where the parent corporation owns at least 90% of the outstanding shares), the parent corporation must adopt a **merger agreement** stating:

- The name of each constituent corporation and of the surviving corporation.
- The designation and number of outstanding shares of each class of each constituent corporation, and:
 - the number of shares of each class (if any) owned by the surviving corporation; and
 - if the number of any of those shares is subject to change before the effective date of the merger, how the change may occur.
- The terms and conditions of the proposed merger, including the conversion of shares not owned by the parent into:
 - shares, bonds or other securities of the surviving corporation;
 - cash or other consideration to be paid for the shares; or
 - any other mix of consideration.
- If the parent corporation is not the surviving corporation, a provision for the pro rata issuance of shares of the surviving corporation to the shareholders of the parent corporation on surrender of any certificates.
- If the parent corporation is not the surviving corporation, any amendments to the certificate of incorporation of the surviving corporation.



A **certificate of merger** must be signed and delivered to the Department of State by the surviving corporation. The certificate of merger must state:

- Each of the statements required in the merger agreement (see above), except for the terms and conditions of the merger.
- The effective date of the merger, if different than the date of filing.
- The date when the certificate of incorporation of each constituent corporation was filed.
- A statement that the merger agreement was adopted by the board of directors of the parent corporation.
- If the parent corporation is the surviving corporation, either:
 - the date that a copy or outline of the merger agreement was submitted to any minority shareholders of each subsidiary corporation being merged; or
 - a statement that this requirement was waived.
- If the parent corporation is not the surviving corporation, a statement that the proposed merger has been approved by the parent corporation's shareholders in accordance with *Section 903(a) of the NYBCL*.

In a merger between parent and subsidiary corporations involving a **foreign corporation**, the foreign corporation can be either the parent or subsidiary corporation. If the foreign corporation is the parent corporation, it must own at least 90% of the outstanding shares of the domestic subsidiary corporation (*NYBCL § 907(c)*). The requirements for the **certificate of merger** vary depending on the surviving corporation. For example:

- **Domestic survivor.** In a merger between parent and subsidiary corporations involving a foreign corporation, where the domestic corporation is the surviving corporation, it must sign and deliver a certificate of merger to the Department of State in accordance with the procedures for a completely domestic transaction between parent and subsidiary corporations. In addition, the certificate of merger must include the statements in the domestic survivor certificate of merger (see *Mergers between Domestic and Foreign Corporations*).
- **Foreign survivor.** In a merger between parent and subsidiary corporations involving a foreign corporation, where the foreign corporation is the surviving corporation, it must deliver a certificate of merger to the Department of State, signed on behalf of each constituent domestic and foreign corporation. The certificate of merger must include both the statements in the certificate of merger between a parent and a subsidiary and those in the foreign survivor certificate of merger (see *Mergers between Domestic and Foreign Corporations*).

BOARD ACTIONS

The board of directors of each constituent corporation proposing to participate in a merger must adopt the merger agreement (*NYBCL § 902(a)*). If shareholder approval is required, the board of directors must also agree to submit the merger agreement to its shareholders for their vote.

FILING REQUIREMENTS

The surviving corporation must file the certificate of merger with the Department of State (see *Documents*). The surviving corporation must then file a copy of the certificate of merger certified by the Department of State with:

- The clerk of each county where any other constituent corporation has an office.
- The recording officer of each county in New York where the constituents have real property.

(*NYBCL § 904 (b)*.)

The fee for filing the certificate of merger with the Department of State is \$60. Expedited filing services are also available for the following additional fees:

- Two hour filing fee is \$150.
- Same day filing fee is \$75.
- 24 hour filing fee is \$25.

SHAREHOLDER ACTIONS

After the board of directors approves a merger agreement, the board must submit the merger agreement to a vote of shareholders. Notice of the shareholder meeting to vote on the merger agreement, as well as a copy or outline of the merger agreement, must be given to every shareholder of record, whether or not entitled to vote (*NYBCL § 903(a)*). Under *Section 604 of the NYBCL*, the record date for voting purposes may be provided for in the corporation's by-laws or, in the absence of that provision, the board of directors may fix the record date in advance. The record date, however, may not be less than ten days or more than 60 days before the date of the meeting (or more than 60 days before any other action). A corporation may also obtain shareholder approval through action by written consent without a meeting.

The merger agreement must be adopted at a shareholder's meeting by a majority (for corporations formed after February 22, 1998 and other corporations that amend their certificates of incorporation to allow for a majority vote) or two-thirds (for all other corporations) of the votes of the shares entitled to vote on the merger.

In a merger between a parent and subsidiary corporations (of which the parent corporation owns at least 90% of the outstanding shares), there is no requirement of shareholder approval from either corporation if the subsidiary is merged into the parent corporation. If the parent corporation is merged into the subsidiary corporation, the board of directors of the parent corporation must submit the merger agreement to a vote of shareholders under *Section 903(a) of the NYBCL* (*NYBCL § 905*).

Even if the shareholders have authorized the merger agreement, it may be abandoned (if permitted by the merger agreement) at any time before the filing of the certificate of merger (*NYBCL § 903(b)*).

APPRAISAL RIGHTS

The NYBCL generally provides for appraisal rights to dissenting shareholders who are entitled to vote on the proposed merger (NYBCL § 910(a)). Appraisal rights are also available:

- In a merger between a parent and subsidiary corporation, to a dissenting shareholder of the subsidiary corporation (NYBCL § 910(a)(2)).
- To any shareholder who is not entitled to vote on a merger agreement and whose shares will be cancelled or exchanged for cash or consideration other than shares of the surviving corporation or another corporation (NYBCL § 910(a)(3)).

If the dissenting shareholder is a shareholder of the surviving corporation (in a merger other than parent-sub subsidiary merger), the shareholder must show that the proposed merger will adversely affect specified rights of his shares (NYBCL § 910(a)(1)(A)(iii)). Appraisal rights are not available to a shareholder of a parent corporation in a merger between a parent and subsidiary corporation (NYBCL § 910(a)(1)(A)(i)).

A shareholder intending to enforce his appraisal rights must file with the corporation a written objection to the merger agreement at or before the meeting of shareholders at which the merger agreement is submitted to a vote. The objection must include:

- A notice of election to dissent.
- The name and address of the dissenting shareholder.
- The number and classes of shares as to which the shareholder dissents.
- A demand for payment of fair value of the shares if the merger is consummated.

(NYBCL § 623(a).)

ASSET SALES

6. What is required for an asset sale in your jurisdiction? Please include any distinctions for a sale of substantially all of the assets. In particular, please include information on:

- Documents.
- Board actions.
- Shareholder actions.
- Bulk sales compliance.
- Successor liability or de facto merger analysis.

DOCUMENTS

Although the NYBCL does not require any filings to effect an asset sale, generally a corporation that wishes to sell its property or assets enters into an asset purchase agreement with the buyer. The asset purchase agreement sets out:

- What is being sold.

- The details of the sale process.
- The liabilities and obligations of the parties.

BOARD ACTIONS

If a corporation sells, leases, exchanges or otherwise disposes of all or substantially all of its property or assets, other than in the usual course of business, the board of directors must authorize the transaction and submit it to a vote of the shareholders (NYBCL § 909(a)). In authorizing the transaction, the board of directors must adopt a resolution that approves the transaction and the execution of the asset purchase agreement (and any related agreements).

A corporation sale of property is not considered “all or substantially all” of a corporation’s assets, and the corporation’s board of directors does not need to get shareholder approval to sell the property if the corporation retains valuable property of comparable size and location, or of value approximately equal to the asset sold (see *Soho Gold, Inc. v. 33 Rector Street Ltd.*, 227 A.D.2d 314, 642 N.Y.S.2d 684 (1st Dep’t 1996); *Posner v. Post Road Development Equity L.L.C.*, 253 A.D.2d 866, 678 N.Y.S.2d 350 (2d Dep’t 1998); and *Story v. Kennecott Copper Corp.*, 90 Misc. 2d 333, 394 N.Y.S.2d 353 (N.Y. Sup. Ct. 1977)). Likewise, shareholder approval is unnecessary when the business engaged in by the corporation continues and the business is not liquidated (see *Resnick v. Karmax Camp Corp.*, 149 A.D.2d 709, 540 N.Y.S.2d 503 (2d Dep’t 1989); *Dukas v. Davis Aircraft Products Co., Inc.*, 131 A.D.2d 720, 516 N.Y.S.2d 781 (2d Dep’t 1987)).

SHAREHOLDER ACTIONS

A corporation must obtain approval by a majority (for corporations formed after February 22, 1998 and other corporations that amend their certificates of incorporation to allow for a majority vote) or two-thirds (for all other corporations) of all outstanding shares entitled to vote to sell all or substantially all of its property or assets.

Shareholders must be given notice of the meeting, whether or not entitled to vote (NYBCL § 909(a)(3)). The shareholders may also fix, or authorize the board to fix, any of the terms and conditions of the transaction and the consideration to be received by the corporation (NYBCL § 909(a)(3)).

BULK SALES

If the purchaser is buying or otherwise acquiring some or all of the business assets of an existing business other than in the ordinary course of business, the purchaser may be held personally liable for any sales taxes due to the Tax Department from the seller. The purchaser may be held liable for the amount of the seller’s unpaid sales taxes, up to the selling price or fair market value of the assets purchased or acquired, whichever is greater. This applies whether the assets the purchaser is acquiring are tangible personal property, intangible property or real property.

A purchaser, transferee or assignee in a bulk sale transaction will not be held liable for the seller's unpaid sales taxes if the purchaser complies with the following requirements:

- The purchaser must notify the Tax Department of the pending bulk sale transaction at least ten days before paying for, or taking possession of any business assets, whichever occurs first, by filing Form AU-196.10, *Notification of Sale, Transfer or Assignment in Bulk*. The purchaser must send Form AU-196.10 by registered mail to the address given on the form. The failure of the seller to advise the purchaser of this notification requirement does not relieve the purchaser of liability for the seller's unpaid sales taxes.
- Within five business days of receiving Form AU-196.10, the Tax Department will advise the purchaser whether it is possible that the seller has unpaid sales taxes. If the seller has unpaid sales taxes or is selected for additional review or audit, the Department will issue the purchaser Form AU-196.2, *Notice of Claim to Purchaser*. If the seller does not have any unpaid sales taxes and if an additional review or audit is not necessary, the Department will issue the purchaser Form AU-197.1, *Purchaser's and/or Escrow Agent's Release-Bulk Sale*.
- If the purchaser receives Form AU-197.1, the purchaser may pay the seller the full purchase price. The Tax Department will not hold the purchaser liable for any unpaid sales taxes, even if there are outstanding warrants or judgments.
- If the purchaser timely receives Form AU-196.2, the purchaser must not pay the seller until the Tax Department completes its review of the seller's sales tax account. Within 90 days of the receipt of Form AU-196.10, the Tax Department must notify the purchaser (and the seller) of the actual amount of sales taxes due from the seller for which the purchaser will be held liable.

If the Tax Department does not issue Form AU-196.2 within five business days of the date of receipt of a properly completed and timely Form AU-196.10, the purchaser cannot be held liable for any of the seller's unpaid sales taxes unless there are outstanding warrants or judgments for unpaid sales taxes (*N.Y. Tax Law § 1141(c)*).

SUCCESSOR LIABILITY

New York courts follow the general rule that the buyer of assets in an asset sale does not automatically assume the liabilities of the seller. However, under New York law, a court can hold the buyer liable if it determines that one of the following exceptions is met:

- The purchaser expressly or impliedly assumes the liabilities.
- The transaction amounts to a consolidation or merger of the seller into the purchaser.
- The purchaser is a mere continuation of the seller.
- The transaction was fraudulent or intended to defraud creditors.

(See *Riverside Marketing, LLC v. Signaturecard, Inc.*, 425 F.Supp.2d 523 (S.D.N.Y. 2006); *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41 (2d Cir. 2003); and *In re Flutie New York Corp.*, 310 B.R. 31 (Bankr. S.D.N.Y. 2004).)

ANTI-TAKEOVER LAWS

7. Please describe any state anti-takeover laws. Do corporations have the ability to opt in or out of these laws?

New York law provides several takeover protections, including business combination, fair price, expanded constituency, heightened disclosure and anti-greenmail statutes.

BUSINESS COMBINATION STATUTE

A business combination statute (also known as a freeze-out statute) is designed to enhance the ability of directors to protect shareholders in the context of a takeover. New York's business combination statute prohibits a bidder that acquires 20% or more of the voting stock of a New York corporation from effecting a "business combination" with that corporation for five years following the acquisition, unless the bidder obtained prior board approval (*NYBCL § 912(b)*).

A business combination is also permitted if the combination was approved by the disinterested shareholders at a meeting called no earlier than five years after the interested shareholder's stock acquisition date, or the price paid to all shareholders meets certain statutory criteria (see *Fair Price Statute*).

FAIR PRICE STATUTE

The fair price statute requires that a business combination with a 20% shareholder after the expiration of the five year period described above (see *Business Combination Statute*) contains protections ensuring that all shares receive a minimum fair price in the transaction. Generally speaking, the required "fair" price provided in Section 912(c)(3) is the higher of the price paid by the interested shareholder or the market value of the stock, computed as the higher of its value when acquired or when the announcement of the business combination was made (*NYBCL § 912(c)(3)*).

A New York corporation may opt out of the business combination and fair price statutes by including a provision expressly electing not to be governed by Section 912 in its original certificate of incorporation. Apart from this initial opt-out option, a New York corporation may choose not to be covered by Section 912 by amending its by-laws with the approval of a majority of the disinterested shareholders. This opt-out, however, does not become effective until 18 months after the successful vote. It will also not apply to any business combination of the corporation with an interested shareholder whose stock acquisition date is on or before the effective date of the amendment (*NYBCL § 912(d)(3)*).

In addition, Section 912 does not apply to a corporation that does not have a class of voting stock registered with the SEC under Section 12 of the Securities Exchange Act of 1934, unless the corporation provides otherwise in its certificate of incorporation (*NYBCL § 912(d)*).

EXPANDED CONSTITUENCY STATUTE

New York law permits directors to consider interests other than those of current shareholders in the context of a corporate takeover (*NYBCL* § 717(b)). Specifically, New York law permits a board of directors to consider an “expanded constituency” in taking action involving a takeover proposal. In taking action, a director may consider both, the long-term and the short-term interests of the corporation and its shareholders and the effects that the corporation’s actions may have in the short-term or in the long-term on any of the following:

- The prospects for potential growth, development, productivity and profitability of the corporation.
- The corporation’s current employees.
- The corporation’s retired employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from or pursuant to any plan sponsored, or agreement entered into by the corporation.
- The corporation’s customers and creditors.
- The ability of the corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business.

(*NYBCL* § 717(b).)

This statute adds significantly to a board’s ability to defend against unwanted takeovers.

HEIGHTENED DISCLOSURE STATUTES

Article 16 of the *NYBCL*, referred to as the Security Takeover Disclosure Act, imposes significant disclosure obligations on hostile tender offerors. Article 16 requires offerors who make a takeover bid of more than 5% of any class of the securities of a target company that is incorporated in and has an additional specified nexus with New York to file a disclosure statement with the target New York corporation and the New York Attorney General (*NYBCL* § 1602). The offeror must make the following extensive disclosures in its disclosure statement:

- Copies of all information material to a decision to accept or reject the offer.
- The identity and background of all persons on whose behalf the acquisition is to be effected.
- The exact title and number of shares outstanding of the class of equity securities being sought, the number of those securities being sought and the consideration being offered.
- The source and amount of funds or other consideration used or to be used in acquiring any equity security.
- A statement of any plans or proposals which the offeror, on gaining control, may have to make fundamental changes in its business, corporate structure, management personnel, or policies of employment.
- The number of shares of any equity security of the target company of which each offeror is beneficial or record owner or has a right to acquire, directly or indirectly.

- Particulars as to any contracts, arrangements or understandings to which an offeror is party with respect to any equity security of the target company.
- Complete information on the organization and operations of the offeror.
- A statement as to the potential impact, if any, of the offeror’s plans or proposals on the residents of New York.
- Particulars as to certain specified employee benefits plans and labor records (including certain violations).
- If the offeror is a natural person, information concerning his identity and background.
- If debt securities or preferred stock are either offered in the takeover bid or used as a source of funds in making the takeover bid, the investment rating, if any, by a generally recognized rating service of the debt security or preferred stock.

(*NYBCL* § 1603.)

The information required above is more extensive than required under the tender offer rules of the US federal securities laws. If any material change occurs in the facts set out in the required registration statement, the offeror must promptly notify the Attorney General and the target New York company. The statute also imposes additional substantive requirements on a tender offer that is not subject to regulation under the US federal securities law (*NYBCL* § 1612). However, tender offers of this type are relatively rare.

ANTI-GREENMAIL STATUTE

Greenmail is a technique for defending against a hostile takeover of a corporation by having the corporation repurchase large blocks of its own shares for more than their market value from the shareholder who would otherwise vote the stock to accomplish the takeover. Designed to promote the fair treatment of all shareholders, New York’s anti-greenmail law prohibits a corporation that is subject to Section 912 from buying back more than 10% of its stock from a shareholder for more than market value, unless approved by an affirmative vote of both the board of directors and a majority vote of the shareholders (unless the certificate of incorporation requires a greater percentage of the votes of the outstanding shares to approve) (*NYBCL* § 513(c)).

DISSOLVING A CORPORATION

8. What is required to dissolve a corporation in your jurisdiction? Please include information on:

- Documents.
- Board actions.
- Filing requirements (including timing, electronic vs. paper and availability of expedited/rush services).
- Shareholder actions.

DOCUMENTS

Generally, a corporation that wishes to dissolve must file with the Department of State a certificate of dissolution signed by an officer, director or authorized person of the corporation. The certificate of dissolution must include:

- The name of the corporation and, if its name has been changed, the name under which it was formed.
- The date its certificate of incorporation was filed by the Department of State.
- The name and address of each of its officers and directors.
- That the corporation elects to dissolve.
- The manner in which the dissolution was authorized.

In addition, the corporation must file a request for consent to dissolve from the New York State Department of Taxation and Finance (*NYBCL § 1004(a)*). Two copies of the consent must be attached to the certificate of dissolution when it is submitted to the Department of State. The person filing a request for consent to dissolution on behalf of a corporation must also submit a signed and dated Power of Attorney. Consent of the New York City Commissioner of Finance must also be attached to the certificate of dissolution if the corporation has done business in and incurred tax liability to the City of New York.

At any time after dissolution, the corporation may give a notice requiring all creditors and claimants to present their claims in writing, not less than six months after the first publication of the notice. The notice must be published at least once a week for two successive weeks in a newspaper of general circulation in the county in which the office of incorporation was located at the date of dissolution (*NYBCL § 1007(a)*).

BOARD ACTIONS

The NYBCL provides for judicial dissolution of the corporation by a petition of a majority of the board of directors, without any action by the shareholders. The board of directors must adopt a resolution, which states that the assets of the corporation are not sufficient to discharge its liabilities or that a dissolution will be beneficial to the shareholders (*NYBCL § 1102*).

FILING REQUIREMENTS

The certificate of dissolution must be filed with the Department of State. The corporation must also pay a \$60 filing fee. Expedited filing services are also available for the following additional fees:

- Two hour filing fee is \$150.
- Same day filing fee is \$75.
- 24 hour filing fee is \$25.

SHAREHOLDER ACTION: VOLUNTARY DISSOLUTION

The NYBCL provides for dissolution of the corporation by action of the shareholders, without approval by the board of directors. Dissolution may be authorized at a meeting of the shareholders by a majority (for corporations formed after February 22, 1998 and other corporations that amend their certificates of incorporation to allow for a majority vote) or two-thirds (for all other corporations) of all outstanding shares entitled to vote or as otherwise provided by an amendment to the certificate of incorporation.

The NYBCL also provides for dissolution of the corporation at will or on the occurrence of a specified event by any shareholder, or the holders of any specified number or proportion of shares or votes of shares of any class or series, if authorized by the certificate of incorporation (*NYBCL § 1002(a)*).

SHAREHOLDER ACTION: INVOLUNTARY DISSOLUTION

The NYBCL provides for judicial dissolution of the corporation by shareholder petition if the shareholders of the corporation adopt a resolution stating that they find that the assets are not sufficient to discharge its liabilities or that they deem a dissolution to be beneficial to the shareholders (*NYBCL § 1103(a)*). A shareholders' meeting to consider the dissolution may be called by the holders of shares representing 10% of the votes of all outstanding, voting shares or a lesser proportion if authorized by the certificate of incorporation (*NYBCL § 1103 (b)*). A resolution must be adopted by a majority of all outstanding shares entitled to vote on the resolution, or a greater proportion if required by the certificate of incorporation (*NYBCL § 1103(c)*).

Except as otherwise provided in the certificate of incorporation, the holders of shares representing one-half of the votes of all outstanding shares of a corporation entitled to vote in an election of directors may present a petition for dissolution on the grounds that:

- The directors or the shareholders are deadlocked.
- Dissolution would be beneficial due to internal dissension between two or more factions of shareholders.

(*NYBCL § 1104(a)*.)

If the certificate of incorporation provides that the proportion of votes required for action by the board, or the proportion of votes of shareholders required for election of directors, must be greater than what is required under the NYBCL, the petition may be presented by the holders of shares representing more than one-third of the votes of all outstanding shares entitled to vote on non-judicial

dissolution (*NYBCL § 1104(b)*). Additionally, a single shareholder entitled to vote at an election of directors may bring the petition for dissolution on the ground that the shareholders are so divided that they have failed to elect successors to directors whose terms have expired, or would have expired on the election and qualification of their successors, for a period which includes at least two consecutive annual meeting dates (*NYBCL § 1104(c)*).

PETITION FOR JUDICIAL DISSOLUTION UNDER SPECIAL CIRCUMSTANCES

The NYBCL also provides for judicial dissolution of a private corporation by minority shareholders in cases of misconduct by directors, officers or those in control of the corporation. Holders of 20% or more of the voting shares may present a petition for dissolution on one or more of the following grounds:

- Illegal, fraudulent or oppressive actions by the directors or those in control toward the complaining shareholder.
- The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.

(*NYBCL § 1104-a(a)*.)

Within 30 days of the filing of the petition, the directors or those in control of the corporation must make available for inspection and copying to the petitioners the corporate financial books and records for the last three years (*NYBCL § 1104-a(c)*).

Within 90 days of filing the petition, any other shareholder or the corporation may make an irrevocable election to purchase the shares owned by the petitioning shareholders at fair value. If not agreed to by the parties, fair value will be determined by the court (*NYBCL § 1118*).

ACTIVITIES REQUIRING SHAREHOLDER CONSENT

9. What activities require shareholder consent in your jurisdiction?

In addition to consent to specific actions that may be required by the certificate of incorporation or by-laws, the following actions of a corporation require shareholder approval:

- Issuance of rights or options to acquire shares to officers, directors and employees (*NYBCL § 505(d)*).
- Election of directors (*NYBCL § 602(b)*).
- Amendment to the certificate of incorporation and by-laws (*NYBCL § 803 and § 601(a)*).
- Certain mergers and consolidations (*NYBCL § 903*).
- The sale of all or substantially all the assets of a corporation, if not made in the usual or regular course of the business actually conducted by the corporation (*NYBCL § 909*).
- Share exchanges (*NYBCL § 913*).

- Non-judicial dissolution (*NYBCL § 1001*).
- Guarantees of the corporation not in furtherance of its corporate purposes (*NYBCL § 908*).

Unless otherwise provided under the NYBCL, the certificate of incorporation or the by-laws, any shareholder action is authorized by a majority of the votes cast in favor of or against an action at a meeting of shareholders by the holders of shares entitled to vote (*NYBCL § 614*). The action may be taken without a meeting by written consent. The written consent must contain the action to be taken, signed by either:

- The holders of all outstanding shares entitled to vote.
- If the certificate of incorporation permits, the holders of outstanding shares, of at least the minimum number of votes necessary to authorize or take action at a meeting at which all shares entitled to vote are present and voting.

(*NYBCL § 615*.)

PRE-EMPTIVE RIGHTS

10. Is there a statutory provision for pre-emptive rights? Do corporations have the ability to opt in or out of this provision?

New York has a comprehensive statute addressing pre-emptive rights (*NYBCL § 622*).

CORPORATIONS FORMED BEFORE FEBRUARY 22, 1998

For corporations formed before February 22, 1998, pre-emptive rights exist in favor of equity shares having unlimited dividend rights, which would be adversely affected by the proposed issuance of shares, convertible securities, rights or options, unless the certificate of incorporation provides otherwise. Pre-emptive rights similarly exist in favor of the holders of voting shares where voting rights will be adversely affected by the proposed issuance of voting shares, convertible securities, rights or options. However, no pre-emptive rights exist (absent a provision in the certificate of incorporation to the contrary) where the shares are:

- Issued to effect a merger or consolidation, or where they are offered for consideration other than cash.
- Issued or subjected to rights or options granted to directors, officers or employees of the corporation under *Section 505(d) of the NYBCL*.
- Issued to satisfy pre-existing conversion or option rights granted by the corporation.
- Treasury shares.
- Part of the securities of the corporation authorized in the original certificate of incorporation, and are issued, sold or optioned within two years from the date of filing the certificate.
- Issued under a reorganization plan approved in a proceeding under US federal law.

(*NYBCL § 622(e)*.)



CORPORATIONS FORMED AFTER FEBRUARY 22, 1998

For any corporation incorporated on or after February 22, 1998, pre-emptive rights do not exist, except as otherwise expressly provided in the certificate of incorporation.

AMENDMENT TO THE CERTIFICATE OF INCORPORATION

Amending the certificate of incorporation to deny pre-emptive rights requires a majority vote of the shareholders, including class vote by a majority of any adversely affected class of shares (*NYBCL § 804*). A shareholder whose pre-emptive rights would be adversely affected by the amendment, and who does not vote for or consent to the amendment, may dissent and become entitled to receive payment for his shares (*NYBCL § 623*).

LIMITATIONS ON CLASSES OR SERIES OF STOCK

11. Are there any limits on the classes or series of shares that can be issued in your jurisdiction?

The NYBCL does not impose any limits on the classes or series of stock that can be issued by a corporation. Any limitations or restrictions on any classes or series of stock must be in the certificate of incorporation.

If the shares of a corporation are to be divided into classes, the certificate of incorporation must set out the designation of each class and a statement of the relative rights, preferences and limitations of the shares of each class (*NYBCL § 402(a)(5)*).

If the shares of any preferred class are to be issued in series, the certificate of incorporation must set out the designation of each series and a statement of the variations in the relative rights, preferences and limitations as between series (*NYBCL § 402(a)(6)*).

LIMITATIONS ON DIVIDENDS

12. Please describe any limitations on the ability of a corporation to pay dividends on capital stock.

Directors may declare and pay dividends on the shares of its capital stock, subject to any restrictions in the certificate of incorporation or restrictions due to insolvency (*NYBCL § 510*).

Dividends may be declared or paid either:

- Out of surplus, so that the net assets of the corporation remaining after the declaration, payment or distribution will at least equal the amount of the corporation's stated capital.
- If there is no surplus, then out of the corporation's net profits for the fiscal year in which the dividend is declared or the preceding fiscal year. However, the directors may not declare or pay a dividend if the capital of the corporation was diminished by:
 - depreciation in the value of its property; or
 - losses or otherwise an amount less than the aggregate amount of the stated capital represented by the issued and outstanding shares of all classes having a preference on the distribution of assets.

Directors of a corporation who vote for or concur in the declaration of an unlawful dividend are jointly and severally liable to the corporation, including potential criminal liability.

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