

Cherokee Nation Code Annotated

Title 18: Corporations

Chapter 1: Cherokee Nation General Corporation Act

Article 10: Merger or Consolidation

§ 90.3. Business combinations with interested shareholders

Cite as: 18 CNCA § 90.3

A. Notwithstanding any other provisions of this title, a corporation shall not engage in any business combination with any interested shareholder for a period of three (3) years following the date that such person became an interested shareholder, unless:

1. prior to such date, the board of directors of the corporation approved either the business combination or the transaction which resulted in the person becoming an interested shareholder;
2. upon consummation of the transaction which resulted in the person becoming an interested shareholder, the interested shareholder owned of record or beneficially capital stock having at least eighty-five percent (85%) of all voting power of the corporation at the time the transaction commenced, excluding for purposes of determining such voting power the votes attributable to those shares owned of record or beneficially by:
 - a. persons who are directors and also officers, and
 - b. employee stock plans in which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or exchange offer; or
3. on or subsequent to such date, the business combination is approved by the board of directors and authorized at an annual or special meeting of shareholders, and not by written consent, by the affirmative vote of at least sixty-six and two-thirds percent (66 2/3%) of all voting power which is not attributable to shares owned of record or beneficially by the interested shareholder.

B. The restrictions contained in this section shall not apply if:

1. the corporation's original certificate of incorporation contains a provision expressly electing not to be governed by this section;
2. the corporation, by action of its board of directors, adopts an amendment to its bylaws within ninety (90) days of the effective date of this section, expressly electing not to be governed by this section, which amendment shall not be further amended by the board of directors;

3. the corporation, by action of its shareholders, adopts an amendment to its certificate of incorporation or bylaws expressly electing not to be governed by this section, provided that, in addition to any other vote required by law, such amendment to the certificate of incorporation or bylaws must be approved by the affirmative vote of a majority of all voting power of a corporation. An amendment adopted pursuant to this paragraph shall not be effective until twelve (12) months after the adoption of such amendment and shall not apply to any business combination between such corporation and any person who became an interested shareholder of such corporation on or prior to such adoption. A bylaw amendment adopted pursuant to this paragraph shall not be further amended by the board of directors;

4. the corporation does not have a class of voting stock that is:

a. listed on a national securities exchange,

b. authorized for quotation on an inter-dealer quotation system of a registered national securities association, or

c. held of record by one thousand or more shareholders, unless any of the foregoing results from action taken, directly or indirectly, by an interested shareholder or from a transaction in which a person becomes an interested shareholder;

5. a person becomes an interested shareholder inadvertently and:

a. as soon as practicable divests sufficient shares so that the person ceases to be an interested shareholder, and

b. would not, at any time within the three-year period immediately prior to a business combination between the corporation and such person, have been an interested shareholder but for the inadvertent acquisition;

6. a. the business combination is proposed prior to the consummation or abandonment of, and subsequent to the earlier of the public announcement or the notice required hereunder of, a proposed transaction which:

i. constitutes one of the transactions described in subparagraph b of this paragraph,

ii. is with or by a person who either was not an interested shareholder during the previous three (3) years or who became an interested shareholder with the approval of the corporation's board of directors, and

iii. is approved or not opposed by a majority of the members of the board of directors then in office, but not less than one, who were directors prior to any person becoming an

interested shareholder during the previous three (3) years or were recommended for election or elected to succeed such directors by a majority of such directors;

b. the proposed transactions referred to in subparagraph a of this paragraph are limited to:

i. a share acquisition pursuant to 18 CNCA § 90.1, or a merger or consolidation of the corporation, except for a merger in respect of which, pursuant to 18 CNCA § 81(F), no vote of the shareholders of the corporation is required,

ii. a sale, lease, exchange, mortgage, pledge, transfer or other disposition, in one transaction or a series of transactions, whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation, other than to any direct or indirect wholly-owned subsidiary or to the corporation, having an aggregate market value equal to fifty percent (50%) or more of either the aggregate market value of all of the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation, or

iii. a proposed tender or exchange offer for outstanding stock of the corporation which represents fifty percent (50%) or more of all voting power of the corporation. The corporation shall give not less than twenty (20) days' notice to all interested shareholders prior to the consummation of any of the transactions described in divisions (i) or (ii) of this subparagraph.

C. Notwithstanding paragraphs (1), (2), (3) and (4) of subsection (B) of this section, a corporation may elect by a provision of its original certificate of incorporation or any amendment thereto to be governed by this section, provided that any such amendment to the certificate of incorporation shall not apply to restrict a business combination between the corporation and an interested shareholder of the corporation if the interested shareholder became such prior to the effective date of the amendment.

D. As used in this section only:

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

2. **"All voting power"** means the aggregate number of votes which the holders of all classes of capital stock of the corporation would be entitled to cast in an election of directors generally;

3. **"Associate"**, when used to indicate a relationship with any person, means:

- a. any corporation or organization of which such person is a director, officer or partner or is, of record or beneficially, the owner of outstanding stock of the corporation having twenty percent (20%) or more of all voting power of the corporation,
- b. any trust or other estate in which such person has at least a twenty percent (20%) beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and
- c. any relative or spouse of such person, or any relative of such spouse, who has the same residence as such person;

4. **"Beneficial ownership"** shall have the meaning ascribed to such term by Rule 13d-3 under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., as amended, except that a person shall be deemed to be the owner or beneficial owner of securities of which he has the right to acquire ownership either immediately or only after the passage of any time or the giving of notice or both; provided, however, that a person shall not be deemed the owner or beneficial owner of any stock if:

- a. the agreement, arrangement or understanding to vote such stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made to more than ten (10) persons, or
- b. the stock is tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates, until such tendered stock is accepted for purchase or exchange;

5. **"Business combination"**, when used in reference to any corporation and any interested shareholder of such corporation, means:

- a. any merger or consolidation of the corporation or any direct or indirect majority-owned subsidiary of the corporation with:

- i. the interested shareholder, or
- ii. any other corporation if the merger or consolidation is caused by the interested shareholder and as a result of such merger or consolidation subsection (A) of this section is not applicable to the surviving corporation,

- b. any sale, lease, exchange, mortgage, pledge, transfer or other disposition, in one transaction or a series of transactions, except proportionately as a shareholder of such corporation, to or with the interested shareholder, whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation which assets have an aggregate market value equal to ten

percent (10%) or more of either the aggregate market value of all the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation,

c. any transaction which results in the issuance or transfer by the corporation or by any direct or indirect majority-owned subsidiary of the corporation of any stock of the corporation or of such subsidiary to the interested shareholder, except:

i. pursuant to the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary which securities were outstanding prior to the time that the interested shareholder became such,

ii. pursuant to a dividend or distribution paid or made, or the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary which security is distributed, pro rata to all holders of a class or series of stock of such corporation subsequent to the time the interested shareholder became such, or

iii. pursuant to an exchange offer by the corporation to purchase stock made on the same terms to all holders of said stock; provided, however, that in no case under divisions ii and iii of this subparagraph shall there be an increase in the interested shareholder's proportionate share of the stock of any class or series of the corporation or of all voting power of the corporation,

d. any transaction involving the corporation or any direct or indirect majority-owned subsidiary of the corporation which has the effect, directly or indirectly, of increasing the proportionate share of the stock of any class or series, or securities convertible into the stock of any class or series, or all voting power, of the corporation or of any such subsidiary which is owned by the interested shareholder, except as a result of immaterial changes due to fractional share adjustments or as a result of any purchase or redemption of any shares of stock not caused, directly or indirectly, by the interested shareholder,

e. any receipt by the interested shareholder of the benefit, directly or indirectly, except proportionately as a shareholder of such corporation, of any loans, advances, guarantees, pledges, or other financial benefits, other than those expressly permitted in subparagraphs a through d of this paragraph, provided by or through the corporation or any direct or indirect majority-owned subsidiary, or

f. any share acquisition by the interested shareholder from the corporation or any direct or indirect majority-owned subsidiary of the corporation pursuant to 18 CNCA § 90.1;

6. **"Control"**, including the terms **"controlling"**, **"controlled by"** and **"under common control with"**, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract, or otherwise. A person who owns, of record or beneficially, outstanding stock of the corporation having twenty percent (20%) or more of all voting power of the corporation shall be presumed to have control of such corporation, in the absence of proof by a preponderance of the evidence to the contrary. Notwithstanding the foregoing, a presumption of control shall not apply where such person holds stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more owners who do not individually or as a group have control of such corporation;

7. **"Group"** means two or more persons who agree to act together for the purpose of acquiring, holding, voting or disposing of securities of the corporation;

8.a. **"Interested shareholder"** means:

i. any person, other than the corporation and any direct or indirect majority-owned subsidiary of the corporation, that:

(a) owns of record or beneficially outstanding stock of the corporation having fifteen percent (15%) or more of all voting power of the corporation, or

(b) is an affiliate or associate of the corporation and owned of record or beneficially outstanding stock of the corporation having fifteen percent (15%) or more of all voting power of the corporation at any time within the three- (3) year period immediately prior to the date on which it is sought to be determined whether such person is an interested shareholder, and

ii. the affiliates and associates of such person;

b. the term **"interested shareholder"** shall not include:

i. any person who:

(a) owned of record or beneficially shares in excess of the fifteen percent (15%) limitation set forth herein as of, or acquired such shares pursuant to a tender offer commenced prior to, September 1, 1991, or pursuant to an exchange offer announced prior to September 1, 1991, and commenced within ninety (90) days thereafter and continued to own shares in excess of such fifteen percent (15%) limitation or would have but for action by the corporation, or

(b) acquired such shares from a person described in subdivision (a) of this division by gift, inheritance or in a transaction in which no consideration was exchanged, or

ii. any person whose ownership of shares in excess of the fifteen percent (15%) limitation set forth herein is the result of action taken solely by the corporation provided that such person shall be an interested shareholder if thereafter he acquires additional shares of voting stock of the corporation, except as a result of further corporate action not caused, directly or indirectly, by such person;

c. for the purpose of determining whether a person is an interested shareholder, the stock of the corporation deemed to be outstanding shall include stock owned of record or beneficially by such person, but shall not include any other unissued stock of such corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise;

9. **"Person"** means any individual, corporation, partnership, unincorporated association, any other entity, any group and any member of a group.

E. No provisions of a certificate of incorporation or bylaw shall require, for any vote of shareholders required by this section, a greater vote of shareholders than that specified in this section.

Historical Data

LA 16–96, eff. July 15, 1996.