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To Our Clients

Despite the editorial objections of the NEW YORK TIMES, we believe the proposed new New York takeover statute should be enacted. We recommend it for every state. It will reduce bust-up, junk-bond takeovers. Attached is a model statute similar to the proposed New York statute.

M. Lipton

Attachments

# Raiders and Romance

Last summer, lobbyists for CBS tiptoed through the New York Legislature with a bill that had wide national implications, considering how many corporations are headquartered in the state. It passed, quickly and quietly, making hostile takeovers of corporations (including CBS) almost impossible. Governor Cuomo vetoed the bill, sensibly arguing that no anti-takeover legislation should become law without extensive public discussion.

The Governor has now introduced his own, less restrictive measure, one that would permit hostile takeovers but keep the target company from being swallowed so fast. The bill is a big improvement over the Legislature's crude preference for the interests of entrenched managers over those of stockholders. But the case has yet to be made that any anti-takeover legislation is in the public's interest.

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Under Mr. Cuomo's proposal, any company or investor group would remain free to wage a proxy fight for control of another company. Anyone would be free to gain control in a company by purchasing a majority of the shares. But for anyone to acquire 20 percent of a company's stock without prior approval from management would trigger an important constraint: if the takeover bid succeeded, the acquiring company would have to wait five years to merge with the acquiree.

The idea is selective deterrence. Buyers whose goal is to make money by running the company better would be unaffected. But buyers seeking only to profit from the quick resale or mortgage of a company's assets would be hobbled. Unfortunately, so simple a device cannot always distinguish the earnest manager from the Wall Street shark. It's true the predators usually borrow heavily to raise cash for takeover bids. It's also true that the heavy debt is typically accommodated by merging companies and selling off some assets. But that pattern holds for almost any relatively small corporation seeking to buy and revitalize a larger one.

The proposed limitation on mergers probably would reduce the total number of takeovers, whether predatory or not. It would also give an unintended edge to acquisitions by large, cash-rich companies able to underwrite their own purchases. But even if the measure were to work as intended, it is far from clear that the public would benefit.

In the romantic mythology of hostile takeovers, good, productive companies are stripped by myopic manipulators. That can't be profitable unless financial markets value the parts of a business more than the whole. In a market economy, it seems presumptuous to build in a legal bias against the sale of assets to the party who values them most.

It's not surprising that the current wave of corporate takeovers makes people uneasy, as brand names that seem like old friends disappear overnight. Before Government acts to stop change, society needs a clear idea of why it is harmful. So far, the only clear victim is nostalgia.

THE INTERESTED STOCKHOLDER MERGER ACT OF 198_

I. Introduction

During the past few years, there has been sharp growth in highly leveraged takeovers by entrepreneurs who are not interested in operating the target companies, but seek the opportunity for profit through bust-up liquidation of the target, forcing a white knight transaction that usually also results in bust-up liquidation of the target or greenmail. These takeovers are not for the purpose of diversification, expansion or growth, but are financial transactions for the profit of the takeover entrepreneurs. These transactions merely rearrange ownership interests by substituting lenders for stockholders and shift risk from equity owners to creditors. They adversely affect employees and communities and place the State's banking system and credit market in jeopardy. They restrict the ability of the affected businesses to grow and to provide increased productivity and employment. The State has a significant interest in regulating the relationships among or between corporations organized in the State and their officers, directors and stockholders. Moreover, the State is intimately concerned about avoiding the adverse effects on the State and its citizens of these types of bust-up takeovers.

It is recognized that some argue that hostile takeovers move the assets of the targets into the hands of more efficient management and therefore are economically desirable. This is correct with respect to soundly financed acquisitions by operating companies that are seeking to diversify or expand. Mergers by successful operating companies have been an integral part of our State's economic development. On the other hand, bust-up liquidation takeovers do not move assets into more efficient management. They move assets into hands that profit by reducing expenditures for research and development and capital improvements. After a highly leveraged takeover, a very high percentage of the revenues produced by the acquired assets are diverted to pay the acquisition debt.

As observed by the highly respected economist and former Chairman of the President's Council of Economic Advisers, Alan Greenspan, in an editorial in the September 27, 1985 issue of The Wall Street Journal, the stock market today discounts substantially profits that will be produced in the future by long-term investment. Instead, the market

prefers immediate stockholder realization of the present value of investments that would otherwise finance the research and development and capital improvements that would provide long-term growth and future profits to stockholders.

This prevailing short-term orientation is exemplified by the activities of institutional investors. Institutions will accept any premium over the current stock market price rather than hold a portfolio investment for appreciation in the future. This investment policy is mandated by the competitive necessity for institutional investment managers to show better short-term performance than the market as a whole and other investment managers. New business flows to investment managers on the basis of their investment performance compared to each other and to the stock market as a whole. Thus, they have a stong incentive to focus on short-term portfolio performance rather than long-term investment. In view of this mindset, takeover entrepreneurs have gained the active support of major institutional investors.

This state of affairs creates an atmosphere in which takeover entrepreneurs thrive. If a company wants to avoid being taken over and busted up, it must sacrifice long-term growth and future profits. It must use the maximum amount of leverage and operate with the primary objective of short-term profitability.

## II. Proposed Legislation

Our State recognizes the application of the business judgment rule to decisions of a board of directors. The decisions of a board of directors in addressing a takeover proposal, like all other business decisions of a board, are subject to the business judgment rule. A decision of a board of directors acting in good faith, in an informed manner and with due care will not be second-guessed by a court. A board will be presumed to have acted within the business judgment rule unless it can be shown that the board's decisions were primarily based on perpetuating itself in office or some other breach of fiduciary duty such as fraud, over-reaching, lack of good faith or being uninformed. This rule works well to regulate the activities of boards of directors.

The Interested Stockholder Merger Act would build upon the business judgment rule. It would prohibit a domestic corporation for five years after an acquisition of 10% of its voting stock from combining with the acquiring person, unless the business combination or the acquiring person's acquisition of stock was approved by the board of directors in advance of the 10% acquisition. Any combination transaction implemented after the five year period that was not so approved would have to be at a price per share determined by a formula, based on the highest price per share paid by the acquiring person plus interest (after deduction of dividends paid by the corporation) for the period from the date such price was paid to the date of the combination transaction. The proposed legislation would prohibit the corporation from merging with a 10% stockholder if the stockholder, after acquiring his 10% holding, acquires additional stock of the corporation except through acquisitions of stock at the formula price or by way of certain business combination transactions, effected in compliance with the statute, in which all stockholders share proportionately. The term "business combination" is broadly defined to include certain self dealing transactions in addition to mergers and consolidations.

The effect of the legislation would be to encourage a potential acquiror to negotiate its proposed acquisition with the board of directors and to discourage unilateral takeovers that depend upon the assets of the target to support the transaction. A potential acquiror would be free to purchase as much stock of the target as it wished, but would be restricted in its ability to effect a combination transaction unless it had previously received the approval of the target's board of directors.

A board of directors, acting within the business judgment rule and the proposed Act, would have the burden of assuring that the provisions of the Act are not used to the detriment of the corporation's stockholders or employees or the other constituencies that the board represents. The proposed legislation would effectively eliminate the need to employ overly aggressive tactics in defending against a takeover and could remove the incentive that corporations may have to engage in abusive defensive tactics. The business judgment rule could be applied in a new context -- given the proposed legislation, certain defensive tactics might no longer be subject to the protection of the business judgment rule, even as presently interpreted. Furthermore, a board of directors that improperly rejects an acquisition proposal would be subject to removal by means of the proxy mechanism.

In sum, the Interested Stockholder Merger Act would permit corporations organized in the State to conduct their businesses without fear of being subjected to bust-up, bootstrap takeovers, and within the framework of the business judgment rule. That rule would continue to regulate the actions of the corporation's board of directors and its responses to takeover proposals.

## III. Analysis of Proposed Legislation

The Interested Stockholder Merger Act adds a new section to the State's Corporation Law. The new section encourages any person, before acquiring voting equity securities of a corporation which would entitle that person to cast 10% or more of the votes entitled to be cast in the election of directors of the corporation, to seek in advance the approval of the corporation's board of directors for any contemplated future business combination between such person and the corporation or for such person's acquisition of stock. The proposed legislation does not prohibit any acquisition of securities, but without such advance approval, no person who acquires 10% or more of the voting power of the corporation could thereafter engage in any business combination with the corporation for a period of five years from the date such person first acquired 10% or more of the voting power of the corporation. After the expiration of such five-year period, such person could engage in a business combination with the corporation only if it is approved by a two-thirds vote of the disinterested stockholders or if he pays at least a formula price, described below, designed to ensure that all holders (other than such person) of shares of equity securities of the corporation receive at least the highest price per share paid by such person, determined as of the date such business combination was first proposed in its final, definitive form. In the latter case such person may engage in a business combination with the corporation, only if since first acquiring 10% or more of the corporation's voting power such person has not acquired additional equity securities of the corporation other than (i) through permissible business combinations with the corporation, (ii) by virtue of stock splits, or proportionate dividends or distributions to holders of the corporation's equity securities not having the effect of materially increasing such person's proportion of the voting power of the corporation, or (iii) in transactions in which such person paid at least the formula price described below.

The formula price as of any date for a share of any series or class of equity securities sought to be acquired by a person holding 10% or more of the voting power of a corpo-

ration is an amount of cash and other consideration with a fair market value as of such date equal to the highest of (i) the highest price per share (including costs of acquisition) paid by such person for any shares of the same class or series within the two years immediately preceding either such date or the date such person first acquired 10% or more of the voting power of the corporation (whichever is higher), plus interest from the date such price was first paid, less, to the extent of such interest, the fair market value of dividends and distributions received by such holders in respect of such shares since the date such price was first paid, (ii) the highest closing sale price of a share of the same class or series during the 30 days preceding such date or the date such person first acquired 10% or more of the voting power of the corporation (whichever is higher), or (iii) the highest preferential amount, if any, to which the holders of shares of such class or series are entitled upon liquidation, dissolution or winding up of the corporation, plus the aggregate amount of any dividend arrearages, if any, due on such shares as of such date (unless such arrearages are included in such preferential amount). Any consideration other than cash must be in the same form as such person used to acquire the largest number of shares of such class or series previously acquired by such person. The fair market value of consideration other than cash is determined as of the date such consideration is paid or as of the date of consummation of the business combination in which such consideration is paid.

"Business combination" is broadly defined to include not only mergers and consolidations of the corporation with a person who holds 10% or more of the corporation's voting power, but also sales, leases, exchanges, mortgages, pledges, transfers and other dispositions of 10% or more of the corporation's stock, assets or earning power to such person, issuance or transfer by the corporation of a substantial amount of its securities to such person, liquidations and dissolutions of the corporation proposed by or on behalf of such person, and transactions by the corporation which have the effect of increasing the proportion of the corporation's voting power held by such person or of conferring the benefit (other than proportionately as a stockholder) of any loans, advances, loan guarantees, pledges or other financial assistance, or any tax advantages, provided by or through the corporation, on such person. In addition, the prohibitions and requirements of the section apply equally to transactions involving affiliates and associates of, or persons acting in concert with, such person as to transactions involving such person.

The Interested Stockholder Merger Act does not apply to proxy solicitations, to continued holding (but not additional purchases) by a person who holds more than 10% of the corporation's voting power on the effective date of the legislation, to acquisitions of a corporation's securities by any subsidiary of the corporation or business combinations between a corporation and its subsidiaries, or to inadvertent acquisitions of 10% of the corporation's voting power provided an amount of stock necessary to decrease such inadvertent ownership to less than 10% is promptly disposed of.

The Interested Stockholder Merger Act does not prevent any business combination, or regulate the price at which a tender or exchange offer may be made, provided that the person proposing to effect such business combination or tender or exchange offer obtains the approval of the corporation's board before acquiring 10% of the corporation's voting power. Nor does the Act apply to acquisitions of the securities of any corporation the certificate of incorporation of which contains a provision, or which prior to 90 days after the effective date of the Act adopts an amendment to its by-laws, expressly electing not to be governed by the Act. In addition, the Act permits any form of acquisition, including partial and two-tier tender offers involving a 10% stockholder, provided again that such transaction is approved by the board in advance of the 10% acquisition. The Act recognizes that once a person has acquired 10% or more of a corporation's voting power, this ownership position will likely mean that the ability of the corporation's board to bargain freely will be seriously constrained. By prohibiting a merger with a 10% stockholder for five years, the Act attempts to preserve the board's independence from, and ability to negotiate freely on behalf of the corporation with, persons wishing to enter into business combinations with the corporation before they acquire a stock position that could adversely affect the negotiating process.

[NEW SECTION]. REQUIREMENTS RELATING TO CERTAIN BUSINESS COMBINATIONS - (a) For the purposes of this section:

(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, a specified person.

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

(3) "Associate," when used to indicate a relationship with any person, means (A) any corporation or organization of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, (B) any trust or other estate in which such person has a substantial 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 home as such person.

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

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

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

(C) that has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in clause (ii) of subparagraph (B) of this paragraph (4)), or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

(5) "Business combination," when used in reference to any corporation and any interested stockholder of such corporation, means:

(A) any merger or consolidation of such corporation or any subsidiary of such corporation with (i) such interested stockholder or (ii) any other corporation (whether or not itself an interested stockholder of such corporation) which is, or after such merger or consolidation would be, an affiliate or associate of such interested stockholder;

(B) any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with such interested stockholder or any affiliate or associate of such interested stockholder of assets of such corporation or any subsidiary of such corporation (i) having an aggregate market value equal to 10 percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of such corporation, (ii) having an aggregate market value equal to 10 percent or more of the aggregate market value of all the outstanding stock of such corporation, or (iii) representing 10 percent or more of the earning power or income, determined on a consolidated basis, of such corporation;

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

(D) the adoption of any plan or proposal for the liquidation or dissolution of such corporation proposed by or on behalf of such interested stockholder or any affiliate or associate of such interested stockholder;

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

(F) any receipt by such interested stockholder or any affiliate or associate of such interested stockholder of the benefit, directly or indirectly (except proportionately as a stockholder of such corporation) of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through such corporation.

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

(7) "Consummation date," with respect to any business combination, means the date of consummation of such business combination.

(8) "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 securities, by contract, or otherwise. A person's beneficial ownership of 10 percent or more of the voting power of a corporation's outstanding voting stock shall create a presumption that such person has control of such corporation. Notwithstanding the foregoing, a person shall not be deemed to have control of a corporation if such person holds voting power, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of such corporation.

(9) "Exchange Act" means the Act of Congress known as the Securities Exchange Act of 1934, as the same has been or hereafter may be amended from time to time.

(10) "Interested stockholder," when used in reference to any corporation, means any person (other than such corporation or any subsidiary of such corporation) that

(A)(i) is the beneficial owner, directly or indirectly, of more than 10 percent of the voting power of the outstanding voting stock of such corporation; or

(ii) is an affiliate or associate of such corporation and at any time within the five-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of 10 percent or more of the voting power of the then outstanding stock of such corporation; provided that

(B) for the purpose of determining whether a person is an interested stockholder, the number of shares of voting stock of such corporation deemed to be outstanding shall include shares deemed to be beneficially owned by the person through application of paragraph (4) of this subsection (a) but shall not include any other unissued shares of voting 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.

(11) "Market value," when used in reference to property of any corporation, means:

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

(B) in the case of property other than cash or stock, the fair market value of such property on the date in question as determined by the Board of Directors of such corporation in good faith.

(12) "Preferred stock" means any class or series of stock of a corporation which under the by-laws or articles of incorporation of such corporation is entitled to receive payment of dividends prior to any payment of dividends on some other class or series of stock, or is entitled in the event of any voluntary liquidation, dissolution or winding up of the corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of stock.

(13) "Stock" means:

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

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

(14) "Stock acquisition date", with respect to any person and any corporation, means the date that such person first becomes an interested stockholder of such corporation.

(15) "Subsidiary" of any corporation means any other corporation of which voting stock having a majority of the votes entitled to be cast is owned, directly or indirectly, by such corporation.

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

(b) Notwithstanding anything to the contrary contained in this chapter (except the provisions of subsection (d) of this section), no domestic corporation shall engage in any business combination with any interested stockholder of such corporation for a period of five years following such interested stockholder's stock acquisition date unless such business combination is approved by the board of directors

of such corporation prior to such interested stockholder's stock acquisition date.

(c) Notwithstanding anything to the contrary contained in this chapter (except the provisions of subsection (d) of this section), no domestic corporation shall engage at any time in any business combination with any interested stockholder of such corporation other than a business combination specified in any one of paragraphs (1), (2) or (3):

(1) A business combination (A) approved by the board of directors of such corporation prior to such interested stockholder's stock acquisition date or (B) with an interested stockholder whose acquisition of stock making such person an interested stockholder was approved by the board of directors of such corporation prior to such stockholder's stock acquisition date.

(2) A business combination approved by the affirmative vote of the holders of two-thirds of the voting stock not beneficially owned by such interested stockholder at a meeting called for such purpose no earlier than five years after such interested stockholder's stock acquisition date.

(3) A business combination that meets all of the following conditions:

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

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

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

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

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

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

(ii) the highest preferential amount per share to which the holders of shares of such class or series of stock are entitled in the event of any voluntary liquidation, dissolution or winding up of the corporation, plus the aggregate amount of any dividends declared or due as to which such holders are entitled prior to payment of dividends on some

other class or series of stock (unless the aggregate amount of such dividends is included in such preferential amount); and

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

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

(D) The holders of all outstanding shares of stock of such corporation not beneficially owned by such interested stockholder immediately prior to the consummation of such business combination are entitled to receive in such business combination cash or other consideration for such shares in compliance with subparagraphs (A), (B) and (C) of this paragraph (2).

(E) After such interested stockholder's stock acquisition date and prior to the consummation date with respect to such business combination, such interested stockholder has not become the beneficial owner of any additional shares of stock of such corporation except

(i) as part of the transaction which resulted in such interested stockholder becoming an interested stockholder;

(ii) by virtue of proportionate stock splits, stock dividends or other distributions of stock in respect of stock not constituting a business combination under subparagraph (E) of paragraph (5) of subsection (a) of this section;

(iii) through a business combination meeting all of the conditions of subsections (b) and (c) of this section; or

(iv) through purchase by such interested stockholder at any price which, if such price had been paid in an other-wise permissible business combination the announcement date and consummation date of which were the date of such purchase, would have satisfied the requirements of subparagraphs (A), (B) and (C) of this paragraph (2).

(d)(1) Unless the certificate of incorporation provides otherwise, the provisions of this section shall not apply:

(A) to any business combination of a corporation that does not have a class of voting stock (i) registered or traded on a national securities exchange or (ii) registered with the Securities and Exchange Commission pursuant to section 12(g) of the Exchange Act; or

(B) to any business combination with an interested stockholder who was an interested stockholder on _________, 198_, unless subsequent to _______ ___, 1985, such interested stockholder increased such interested stockholder's proportion of the voting power of the corporation's outstanding voting stock to a proportion in excess of the proportion of voting power such interested stockholder held prior to __________, 198_.

(2) The provisions of this section shall not apply:

(A) to any business combination of a corporation the certificate of incorporation of which contains a provision, or which adopts an amendment to the corporation's by-laws prior to _____________, 198_, expressly electing not to be governed by this section; or

(B) to any business combination of a corporation with an interested stockholder of such corporation which became an interested stockholder inadvertently, if such interested stockholder (i) as soon as practicable divests itself of a sufficient amount of the voting stock of such corporation so that it no longer is the beneficial owner, directly or indirectly, of 10% or more of the voting power of the outstanding voting stock of such corporation, and (ii) would not at any time within the five-year period preceding the announcement date with respect to such business combination have been an interested stockholder but for such inadvertent acquisition.