

IN PRACTICE

## BUSINESS LAW

### Getting Down To Business: The Work of State's Littlest Commission

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The New Jersey Corporate and Business Law Study Commission was created by the New Jersey Legislature and charged with the responsibility of studying and reviewing all aspects of the New Jersey statutes, legislation and court decisions relating to business entities, including business corporations and partnerships and the issuance of ownership interests or securities thereby, as well as all aspects of laws governing nonprofit corporations. The commission's duties also entail engaging in comparative study and examination of the business and corporate laws of the other states. It has only three members, who are appointed to three-year terms by the New Jersey governor, the Senate, and the Assembly, respectively; the commission reports to

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the governor and the Legislature. This article surveys the mission and the work of this tiny legislative commission.

The commission has set out to restore New Jersey to its glory days as "the place to incorporate." In 1903, 60 percent of the state's income was earned from fees charged to corporations — not surprising, considering that in that year 95 percent of the nation's major corporations were incorporated in New Jersey. This all came to an abrupt end when then-Gov. Woodrow Wilson got a series of antitrust laws (known as the "Seven Sisters Act") passed. This provided the opening for Delaware, which had duplicated New Jersey's liberal corporate laws and was patiently waiting in the wings for a turn of events that would bring an end to New Jersey's monopoly on incorporation dollars. Of course, Delaware got on top and has stayed there. Studies have shown that for corporations not incorporating in their home state, many consider the Delaware incorporation to be the most attractive alternative.

In 1958 the commission's predecessor, the "Corporation Law Revision Commission," was created with the mandate to modernize New Jersey's corporation laws. This resulted in Title 14A of the New Jersey Statutes (known as the "New Jersey Business Corpo-

ration Act"), which was submitted to the governor and Legislature in 1968 and enacted in 1969. There have been continuing improvements to Title 14A throughout the years with the aim of staying abreast of liberalizing changes being made in both the Model Business Corporation Act and in the corporate laws of Delaware, which has become the standard bearer for corporate law. The commission took on its present form as a permanent commission in the legislative branch in 1989.

The 2009-10 session of the New Jersey Legislature has been a busy and rewarding time for the commission. Seven of the bills it drafted in 2008 were passed by the New Jersey Legislature and were signed into law by the governor. Additionally, it has drafted four additional bills for consideration by the Legislature. The seven bills that have been signed into law are described below:

**1. Majority Voting.** Amendment of N.J.S. 14A:5-24 allows a New Jersey corporation to eliminate plurality voting and adopt majority voting provisions through a bylaw amendment.

**2. Resignation Upon.** Occurrence of Future Event. Amendment of N.J.S. 14A:6-3 is a companion bill to the majority voting amendment described above, and gives directors of New Jer-

sey corporations the ability to resign from the board of directors upon the occurrence of a future event, such as the failure to obtain a majority vote at any shareholders' meeting.

**3. Greater Flexibility in Use of Equity Compensation.** Amendment of N.J.S. 14A:8-1 provides greater flexibility in the use of equity compensation awards by New Jersey corporations by allowing a board of directors to empower officers to approve grants of equity compensation to employees.

**4. Enhanced Merger and Consolidation Alternatives.** Amendment of N.J.S. 14A:1-2.1 expands the types of entities with which New Jersey corporations can merge or consolidate (beyond traditional state corporations, partnerships and limited liability companies).

**5. Electronic Transmission of Notice Provision.** Amendment of N.J.S. 14A:1-8 along with the supplement to chapter 1 of Title 14A provide that any notice required or permitted pursuant to the provisions of the New Jersey Business Corporation Act (with certain minor exceptions) may be provided by electronic transmission.

**6. Expedited Filing Options.** Amendment to Section 4 of P.L. 1982, c.150 provides for one-hour and two-hour filing options for expedited over-the-counter corporation service requests at the Department of Treasury, Division of Commercial Recording. The one-hour and two-hour service options fee schedule will be established by the State Treasurer by regulation.

**7. Alternative to 10-Day Waiting Period.** Amendment of N.J.S. 14A:5-6 eliminates the 10-day waiting period for certain shareholder actions taken by written consent that do not concern mergers and acquisitions.

The commission is now focused on getting the remaining four bills from its 2009-10 agenda through the Legislature and onto the governor's desk for signature. All four bills are designed to make New Jersey a more attractive home base for corporations by granting them more autonomy in handling their internal affairs; a brief description of the proposed legislation follows:

**Corporate Opportunity Doctrine.**

The commission has prepared a new bill authorizing waiver of the corporate opportunity doctrine. The commission believes that the corporate opportunity doctrine, which requires fiduciaries to present their business opportunities to their corporations before pursuing those opportunities on their own, operates as a disincentive and makes it difficult for New Jersey corporations to attract and retain businesspersons as board members. The doctrine also can lead to uncertainty within the boardroom as to the extent to which boards must consider and reject specific opportunities pursued by one or more of their members. The modification, which takes the form of an amendment to N.J.S.A. 14A:3-1, allows New Jersey corporations to renounce the corporate opportunity doctrine, either generally in its certificate of incorporation, generally in a board resolution or specifically in a board resolution.

**Amendments to N.J. Shareholder Protection Act.** The commission has drafted amendments to the N.J. Shareholder Protection Act, N.J.S. 14A:10A-1 et seq. The current Shareholder Protection Act does not expressly provide for the situation in which a board approves a business combination with an interested stockholder that results in such stockholder beneficially owning more than 10 percent but less than 100 percent of the resident domestic corporation's voting stock. The practice that has developed has been to seek to approve all subsequent transactions at the time that the first business combination is approved. While the commission does not believe that such practice is inappropriate, it is of the opinion that the statute was not intended to compel such a practice. This amendment allows a resident corporation to approve multiple business combinations with an interested stockholder, provided that any business combination approved after the interested stockholder's stock acquisition date is approved by an independent board committee and stockholders of the corporation holding a majority of outstanding stock not owned by such interested stockholder.

The proposed amendments also amend the Shareholder Protection Act to make all New Jersey corporations sub-

ject to the act. Currently, only New Jersey corporations with principal offices or "significant business operations" in New Jersey are subject to the act. The commission believes that the amendment will provide needed clarity as to those corporations subject to the act. The amendment allows a New Jersey corporation with no principal executive office or significant business operations in New Jersey to opt out of the act by amending its bylaws within 90 days of the date of enactment of the amendments. Furthermore, any stockholder owning 5 percent or more of any corporation that becomes subject to the act as a result of the amendments is expressly exempted from the application of the act.

**Indemnification of Directors and Officers.** The commission has drafted legislation which modifies the existing limitations (N.J.S. 14A:3-5) on a corporation's ability to indemnify its directors and officers. The amendment is in response to the Delaware Chancery Court case *Schoon v. Troy Corp.*, 948 A.2d 1157 (2008). The amendment precludes a corporation from amending or eliminating the right to indemnification for an officer or director under a charter or bylaw provision after the act or omission giving right to indemnification has occurred.

**Shareholder Access to Proxy Statements.** Lastly, the commission has drafted legislation expressly allowing shareholders to include proxy materials in a corporation's proxy statement. The proposed amendments to N.J.S. 14A:5-31 authorize a corporation to stipulate in its bylaws procedures and conditions under which materials with respect to shareholder-nominated individuals will be included in proxy solicitation materials. The commission believes that this amendment is important in light of the recent trends in corporate governance allowing shareholders greater access to a corporation's proxy statement.

The commission's efforts to update and modernize the New Jersey Business Corporation Act are ongoing. Practitioners with suggested changes to the act or to any other New Jersey business statute are encouraged to contact the commission. ■