

**NEW JERSEY CORPORATE AND BUSINESS LAW STUDY COMMISSION**  
**2009 ANNUAL REPORT**

***To New Jersey Governor Christopher J. Christie and the State Legislature***

*Required by N.J.S.A. 1:14-15 (P.L. 1989, c. 163)*

April 1, 2010

## EXECUTIVE SUMMARY

### *Commission Highlights of 2009*

- ✓ Enactment into law of six pieces of legislation proposed by the Commission in 2008
- ✓ Put a major piece of legislation before the Senate Commerce Committee that will eliminate inefficiencies created by the 10-day waiting period for certain shareholder transactions
- ✓ Identified four additional sections of the New Jersey Business Corporation Act that need streamlining and updating and formulated proposals for new bills to put before the Legislature
- ✓ Commission restored to full force in February 2009 with the Governor's appointment of a new Commissioner to fill a spot left vacant since his previous designee resigned in 2008.
- ✓ Expanded use of teleconferencing for monthly meetings resulting in more efficient use of time of participants and a decrease in road traffic and highway congestion, which helped to lessen harmful greenhouse gas emissions
- ✓ Switched to paperless agendas, minutes, and legislative proposals by relying on e-mail and internet technology, thereby contributing to environmental sustainability
- ✓ Commissioners completed the Ethics Training Module and filed certifications with the Assembly Majority Office
- ✓ Formed a Liaison with the New Jersey Bar Association Business Law Section to maintain a sustained line of communication and cultivate a synergistic exchange of ideas with the aim of enacting more business-friendly legislation in New Jersey

## INTRODUCTION

The New Jersey Corporate and Business Law Study Commission

("Commission") has set out to restore New Jersey to its glory days as "the place to incorporate." Indeed, in 1902, flush with income from corporate filing fees and franchise charters, New Jersey paid off its state debt and abolished property taxes. In 1903, sixty

percent of the state's income was earned from fees charged to corporations – not surprising, considering that in that year 95% of the nation's major corporations were incorporated in New Jersey. This all came to an abrupt end when, then-Governor of New Jersey, 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 Delaware incorporation to be the most attractive alternative.

Nonetheless, the die was cast for the Commission to give Delaware a run for its money back in 1958 when its 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 Corporation Act"), which was submitted to the Governor and Legislature in 1968 and enacted into law in 1969. There were 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 post-1989 Commission has a greatly expanded role. Its task is to study and review all aspects of the New Jersey statutes, legislation, and decisions of the courts in this State and nationwide relating to business entities and the issuance of ownership

interests or securities by such entities. The Commission also studies and reviews all aspects of the laws governing non-profit corporations in this State and throughout the nation. The Commission consists of three members who are admitted to practice law in New Jersey, and who are distinguished in the fields of corporate and business law. Two members are appointed by the New Jersey Legislature and one member is appointed by the Governor.

### **Commission and Staff in 2009**

#### ***Commissioners:***

Assembly Appointment – Assemblyman Pat Diegnan

Senate Appointment - Michael T. Rave, Esq.

Governor's Appointment – Gwendolyn Yvonne Alexis, PhD, JD

#### ***Staff:***

Counsel - Peter H. Ehrenberg and Ronald H. Janis

Secretary - Ellen S. Knarr

### **RECOMMENDED LEGISLATION ENACTED INTO LAW**

In 2009, the Commission's work was greatly facilitated by having a member with direct access to the New Jersey Assembly. With Assemblyman Diegnan expediting the process of getting the Commission's bills to Legislative Services, the Commission was able to successfully shepherd the following six bills through both houses of the New Jersey State Legislature and onto the Governor's desk for signature:

1. Amendment of NJSA 14A:5-24. Assembly 2883; Senate 2246

The purpose of this amendment is to allow a New Jersey corporation to eliminate plurality voting and adopt majority voting provisions through an amendment of the corporate by-laws. Under prior New Jersey law, a corporation could only eliminate

plurality voting for director elections if that practice was provided for by its certificate of incorporation. This amendment aligns the New Jersey Business Corporation Act with the Delaware General Corporation Law and the corporate laws of a growing number of other progressive states such as New York.

2. Amendment of NJSA 14A:6-3. Assembly 2881; Senate 2284

This amendment is a companion bill to the majority voting amendment described above, and gives directors of New Jersey corporations the ability to resign from the board of directors upon the occurrence of a future event. It is anticipated by the Commission that directors will utilize this amended provision to resign from a board of directors upon failing to receive a majority of affirmative votes of the outstanding shares of the corporation at the annual meeting of shareholders. The inspiration for this legislation is Delaware General Corporation Law, Section 141(b).

3. Amendment of NJSA 14A:8-1. Assembly 2885; Senate 2245

This amendment provides greater flexibility in the use of equity compensation awards by New Jersey corporations. The amendment recognizes that equity grants are an integral part of the compensation systems of many corporations, and that it is cumbersome to require boards of directors or board committees to be involved in each specific equity grant. The bill amends Section 8-1 of the New Jersey Business Corporation Act to allow a board of directors to empower officers to approve grants of equity compensation to employees. Delaware already has such a law (Section 157(c) of the DGCL).

4. Amendment of NJSA 14A:1-2.1. Assembly 2884; Senate 2283

This amendment expands the types of entities with which New Jersey corporations can merge or consolidate (beyond traditional state corporations, partnerships and limited liability companies). The change to the definition of “foreign corporation” is modeled after Section 252 of the Delaware General Corporation Law and the changes to the definition of “other business entity” is modeled after the definition in the New Jersey Limited Liability Company Act. (See NJSA 42:2B-20.)

5. Amendment of NJSA 14A:1-8 and supplementing chapter 1 of Title 14A.

Assembly 2879; Senate 2050.

This amendment provides that any notice required or permitted pursuant to the provisions of the New Jersey Business Corporation Act (with certain exceptions) may be provided by electronic transmission. This bill is modeled after certain provisions of the Delaware General Corporation Law and reflects the current reality that much of today's business is conducted electronically.

6. Amendment to Section 4 of P.L. 1982, c.150. Assembly 2882; Senate 2049.

This amendment 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. As of February 2010, the Treasurer is still in the process of drafting the necessary regulations. Hence the fee schedule has not yet been established. Once the fee schedule is in place, New Jersey's filing service will be competitive with other states' services, including the State of Delaware.

## **LEGISLATION PUT INTO THE PIPELINE**

The Commission successfully got the following piece of legislation passed by the New Jersey Assembly and onto the floor of the Senate Commerce Committee:

- **Amendment of NJSA 14A:5-6. Assembly 2880; Senate 2244.** This amendment eliminates the 10-day waiting period for certain shareholder actions taken by written consent which do not concern mergers and acquisitions. The previous 10-day waiting period often created inefficiencies in transactions. This bill aligns the New Jersey Business Corporation Act with the Delaware General Corporation Law and the corporate laws of other progressive states.

## FINDINGS, RECOMMENDATIONS, AND WORK IN PROGRESS

**Special Business Part.** For much of 2009, the Commission has been looking into the advisability of New Jersey creating a business law court modeled after the Delaware Court of Chancery. Hence, it was with great anticipation that the Commission studied Assembly Bill no. 261, sponsored by Assemblyman David Russo (District 40). Unfortunately, the Commission sees three potential problems with the proffered Bill; to-wit:

- 1) The matters cognizable in the proposed business part are too extensive and thus defeat the purpose of having a special part devoted to business matters; the Commission would eliminate the clause in Subsection 3(a) calling for the court to handle "intellectual property matters; the termination of services to a business or an agreement not to compete; [and] employment agreements with an executive officer or manager."
- 2) Requiring the creation of twelve new judgeships poses an unnecessary budgetary hurdle for the creation of this much needed specialty court. The Commission was unanimous in its belief that existing judges who have shown acuity in commercial matters could be reassigned to this new business part.
- 3) The Commission took note of a possible inconsistency in providing that "The Special Business Part would also hear certain private actions authorized under federal law which may be heard in State court pursuant to which a federal agency regulates certain matters" and providing that the

Special Business Part lacks “jurisdiction over consumer claims matters.” This lack of jurisdiction over consumer claims could hamper the court’s ability to hear cases arising with respect to matters regulated by federal agencies such as the FDA and the FTC – matters such as the two recent labeling cases of *Altria* (FTC and “light” tobacco products) and *Wyett v. Levine* (FDA and anti-nausea drug, Phenergan) in which the U.S. Supreme Court held that the state statutory and common law claims (a consumer protection statute and common law fraud) were not pre-empted by federal law. Hence, these would seem to be just the types of consumer claims against business that should be heard in the Special Business Part. The Commission also is reserving its opinion, pending further research, on whether the ban against jury trials in the Special Business Part will motivate the plaintiff’s bar to avoid utilizing the Special Business Part at any cost.

**Corporate Opportunity Doctrine.** The Commission is formulating a new bill authorizing waiver of the corporate opportunity doctrine. Such a waiver is available under Section 122(17) of the Delaware General Corporation Law. In addition to making New Jersey more competitive with Delaware, the bill would enhance the ability of New Jersey corporations to attract hands-on entrepreneurial talent as board members.

**Amendments to NJ Shareholder Protection Act.** The Commission is entering the final stages of drafting amendments to the extant NJ Shareholder Protection Act. Commission counsel is examining the laws of Delaware and New York to ensure that

the final version of the redrafted Act compares favorably with the counterparts to this proposed legislation enacted in these neighboring states.

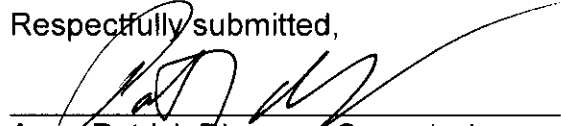
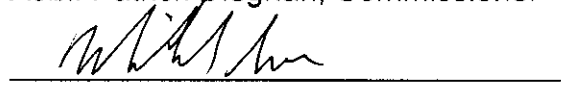
**Indemnification of Directors and Officers.** The Commission is contemplating modifying the existing limitations (N.J.S.A. § 14A:3-5) on a corporation's ability to indemnify its directors and officers. Any such modification would be structured in a way to protect justifiable reliance, a concern in light of the Delaware case of *Schoon v. Troy*.

**Shareholder Access to Proxy Statements.** The Commission is drafting a provision with respect to the circumstances under which shareholders will be allowed to solicit proxies on behalf of shareholder initiatives.

## CONCLUSION

The Commission is pleased with the progress it has made during 2009 towards accomplishing its mission of restoring New Jersey to its rightful place as the business-friendly environment par excellence.

Respectfully submitted,

  
Asst. Patrick Diegnan, Commissioner  
Michael T. Rave, Commissioner  
Gwendolyn Y. Alexis, Commissioner