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**1995 ANNUAL REPORT**  
**OF THE**  
**NEW JERSEY CORPORATE**  
**AND**  
**BUSINESS LAW STUDY COMMISSION**  
**TO THE**  
**GOVERNOR AND THE LEGISLATURE**  
**OF THE**  
**STATE OF NEW JERSEY**

January 9, 1996

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To: The Honorable Christine Todd Whitman, Governor, the Honorable Donald T. DiFrancesco, President of the Senate, and the Honorable Garabed Haytaian, Speaker of the Assembly.

The New Jersey Corporate and Business Law Study commission ("Commission") respectfully submits this Annual Report about its activities. The Commission was established in 1989 as a permanent part of the Legislative Branch by New Jersey Statutes Annotated 1:14-12. The Commission is charged with studying and reviewing statutes, legislation and decisions of the courts of New Jersey and other states relating to business entities, including business corporations, nonprofit corporations, partnerships and the issuance of ownership interests and securities and then with reporting annually to the Governor and the Legislature concerning its findings.

In accordance with that charge, we recommend that legislation be introduced in the next Session of the Legislature to address the following:

Revisions to N.J.S.A. Title 42:2B

1. 42:2B-14. Revise both subsection (a) and (b) to reflect that a limited liability company may temporarily have only one member, as provided in the revision proposed for 42:2B-48. This and the related revision will clarify that a limited liability company does not automatically lose its existence as a limited liability company if only one member remains, so long as one or more additional members is added within 90 days.

2. 42:2B-20. Revise the tax clearance requirements to authorize the Division of Taxation to adopt regulations waiving the tax clearance procedure if the surviving entity is either a

New Jersey limited liability company or a foreign limited liability company qualified to do business in New Jersey and the limited liability company enters into an assumption agreement acceptable to the Division. This will, to the extent the Division finds it acceptable, allow for a simplified merger clearance procedure while maintaining assurance that taxes due will be paid.

3. 42:2B-22. Delete the last sentence of subsection (b). This sentence currently provides that member voting (in the absence of a provision to the contrary in a limited liability company agreement), will be per capita. It was included as a "default rule" because of concerns for certain earlier comments of the Internal Revenue Service about limited liability companies. Subsequent Internal Revenue Service pronouncements have made this provision unnecessary and its continued presence in the statute raises a significant risk of conflict with 42:2B-27. Section 27 provides that voting on management decisions (in the absence of a different provision in the operating agreement) will be based upon the member's percentage interest in profits. Deletion of the last sentence from Section 22(b) will avoid the need to determine whether the subject matter of a vote is a "management" matter.

4. 42:2B-27. Add a provision that whenever a limited liability company is managed by its members, then unless otherwise provided in an operating agreement, each member shall have the authority to bind the limited liability company

including (so long as such action is approved by the members holding majority in interest) authority to file on behalf of the limited liability company under Federal and State insolvency and reorganization. This will clarify an issue related to Federal Tax Treatment of New Jersey limited liability companies. Add a parallel provision that unless otherwise provided in an operating agreement, members have no authority to bind a limited liability company which is managed by one or more managers. This addition should also expressly authorize the managers, unless otherwise provided in the operating agreement, to file on behalf of the limited liability company under Federal and State insolvency and reorganization laws. This will insure that the distinction is clear between member authority to bind the entity in a member-managed limited liability company as opposed to a manager-managed limited liability company. Revise the sentence that refers to "management, in whole or in part, of a limited liability company by a manager", to read "by one or more managers", to clarify that the limited liability company may have any number of managers.

5. 42:2B-39. Revise to modify the right to a resigning member to receive the fair value of his interest as of the date of resignation by providing a valuation rule in all cases, unless otherwise provided in the operating agreement. That valuation rule would define "fair value" in those circumstances as the lesser of: (i) the resigning member's right to share in liquidating distributions as if the limited liability company had dissolved and wound up its affairs under 42:2B-51 as of the date

of resignation, or (ii) the resigning member's share of the going concern value of the limited liability company based on the discounted present value of reasonably anticipated future distributions as if the limited liability company were to continue for 25 years.

6. 42:2B-44. Add a new subsection e to clarify that an assignee has no ability to obtain an order from a court ordering dissolution or liquidation of an limited liability company. This is consistent with the existing statute, which gives an assignee only an economic interest in an limited liability company and not any rights of management, let alone to force a termination of the entity.

7. 42:2B-45. Add a clarifying provision that a charging order is the sole remedy of a creditor of a member, so that the creditor is not able under state law to interfere with management of or force a dissolution of an entity, or to order a foreclosure sale of a limited liability company interest. The rights of a creditor of a member under Federal bankruptcy and reorganization law will, of course, remain as they are.

8. 42:2B-48. Revise this provision in two respects. First, reduce the consent requirement to continue the limited liability company from consent of all members to consent of members holding a majority in interest of the remaining members. Second, in the case where only one member remains after a dissolution event, permit the limited liability company to continue provided at least one additional member is brought in

within 90 days of the occurrence of the dissolution event. The first revision reflects increased flexibility under Federal tax law to be eligible for partnership tax treatment; the Internal Revenue Service has ruled that majority approval for continuation is sufficient. The second revision addresses the problem of automatic dissolution for limited liability companies which lose all but a last member. This is a particular risk in a family business where death may unexpectedly eliminate all but one member. The revision allows a reasonable time for reformation without loss of limited liability status. This essentially allows for a new event of dissolution, i.e. where there is a limited liability company with only one member for more than 90 days. Therefore, Section 14(a) and (b), need not reference the one member situation.

9. 42:2B-50. Correct the erroneous reference to the "Court of Chancery" by replacing it with "Superior Court."

10. New Section 42:2B-71. Add a new section requiring all domestic and foreign limited liability companies to file an annual report with the Office of the Secretary of State setting forth the name and address of the limited liability company, the name of the registered agent and, if the limited liability company is managed by managers, the name(s) and address(es) of the managers. The Section should provide that if no report is filed for two consecutive years, the certificate of a domestic limited liability company will be transferred to an inactive list maintained by the office of the Secretary of State but the

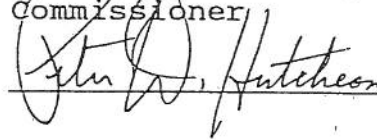
limited liability company shall remain a limited liability company and the limited liability of members, managers, etc. shall not be affected by the transfer. The name of a limited liability company on the inactive list shall (subject to any other rights that limited liability company may have to its name) be available for use by any other limited liability company (including one newly formed). In the case of a foreign limited liability company which fails to file a report for two consecutive years may have its certificate to do business in New Jersey revoked.

Conclusion.

We appreciate the opportunities to serve our State and to address the laws relating to business entitles and non-profit corporations. We hope this report is helpful to you and we look forward to assisting the Legislature as it may request in addressing the legislations we propose.


Respectfully submitted,

PETER D. HUTCHEON,  
Commissioner



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WALTER J. FESSLER,  
Commissioner



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RICHARD D. TRENK,  
Commissioner



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