

PUBLIC HEARING

before

New Jersey Legislature

Senate (and Assembly) Committees on
Revision and Amendment of Laws

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SENATE BILL NO. 884 185 W. State Street
[Revising the General Corporation Law] Trenton, N. J.

Held:
September 30, 1968
Assembly Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMITTEES PRESENT:

Assemblyman William K. Dickey [Chairman,
Assembly Committee]
Assemblyman Herbert J. Heilmann

Senator John L. Miller [Chairman, Senate Committee]
Senator John L. White

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ASSEMBLYMAN WILLIAM K. DICKEY [Chairman]: Ladies and gentlemen, I would like to call the public hearing on Senate Bill No. 884 to order.

This is a public hearing by the Senate Committee and the Assembly Committee on Revision and Amendment of Laws.

I would like first of all to introduce the members of the Senate Committee who are in attendance and also the members of the Assembly Committee. To my left is the Chairman of the Senate Committee on Revision and Amendment of Laws, Senator John L. Miller of Camden County; and next to him is a member of the Senate Committee, Senator John White of Gloucester County. To my right is Assemblyman Herbert J. Heilmann of Union County, who is a member of the Assembly Committee. My name is William Dickey. I am the Chairman of the Assembly Committee on Revision and Amendment of Laws.

The purpose of the hearing today is to give consideration to Senate Bill 884 which was introduced June 20, 1968, and has been referred to the Senate Committee on Revision and Amendment of Laws, and this is the product of a Commission which was appointed by the Legislature to study the General Corporation Law of New Jersey and to make recommendations for its revision.

I would like to call as the first witness at this hearing Mr. Alan V. Lowenstein, who is Chairman of the Commission on the Revision of the Corporation Laws.

A L A N V. L O W E N S T E I N: Gentlemen, on behalf of my fellow Commissioners, Donald B. Kipp and James A. Hession, I am very happy to present this first general revision of the New Jersey Business Corporation Law since 1875.

We have had many items of piecemeal legislation over the decades which have substantially involved the New Jersey Corporation Act - Business Corporation Act, but this is the first comprehensive revision in the entire period of over 90 years. No document is perfect and we are quite sure that the document that is being presented to you and to the citizens of this State in Senate 884 is also not perfect. But we have had the benefit of studies made of legislation of a similar character throughout the United States. More than half of the states of this Union have revised their Business Corporation Laws in the last 20 years. We have benefited from the products of those efforts. We have had the advantage of consultation with members of the Bar of this State and of neighboring states. We have consulted frequently with business leadership, particularly those who are most concerned about the fact that there has been a movement of corporations from this State, perhaps to Delaware or elsewhere where there has been a thought that the statutes were more flexible and capable of meeting modern business needs.

We feel we have produced a document which should be beneficial to the larger, publicly-held corporations now domiciled in New Jersey and those which may consider being domiciled in New Jersey, and it is also a most flexible and modern document for the small business enterprise which is in corporate form, the so-called incorporated proprietorship or incorporated partnership.

In the work of this Commission, which has now extended to 176 meetings and numerous conferences and studies made by individual Commissioners and others in the work of this

Commission, we have had the benefit of a number of persons.

I think all of us have in mind today the original Chairman of this Commission, Senator Edward J. O'Mara. We all wish he were here with us today because he made such a valuable contribution to the creation of this Commission and to the early years of its work. All of us are in his debt and I know the citizens of this State will be in his debt as a result of his contribution to this effort, now presented in Senate 884.

We have also had the help of Israel Spicer, Donald G. Marshall, Harold J. Wallum, Jr., John R. MacKay, II, and Professor Sidney L. Posel of Rutgers Law School, all of whom have given a tremendous amount of time to the work of the Commission, meeting with us regularly as we reviewed the products of our efforts between meetings.

It would be too numerous to mention to refer to the other attorneys who have been most helpful and if this Joint Committee were to see the products of the memoranda submitted to us by members of the Bar of this State and others, I think you would feel that this was a very serious and thorough job and that we had the benefit of considerable help from very responsible people.

The basic philosophy of this proposed legislation is to protect the stockholders of the larger and middle-sized corporations and at the same time provide a modern, flexible, enabling act which permits New Jersey to compete with other states in attracting industry and the use of our corporation statutes.

We gave considerable thought to presenting a separate piece of legislation on the so-called closed corporation, the

corporation which provides limited liability but which has few stockholders, such as the incorporated proprietorship or the incorporated partnership. We came to the conclusion, as did the Commissions of many other states, that it was not advisable to have separate legislation but to provide through flexibility in the revised General Business Corporation Law that we are now presenting to you opportunities for the parties interested in the small, closed corporation to prepare a certificate of incorporation and a charter which meets their needs and overcomes some of the strait-jacket provisions of our existing law as applied to the small enterprise.

It would be quite lengthy for me to try to outline to you all of the changes or even all of the important changes that have been made in this act. They are most extensive, all directed toward greater flexibility and toward recognizing the public interest and the protection of the various interests, stockholders and the public, in the work of our business corporations.

I think everyone in this room and many others throughout the State have had the benefit of a copy of the bill. The Commission has prepared comments, section by section, on the proposed bill which have just come back from the printer and presumably within a few days will be available for distribution, pointing out in these comments the changes from prior law, if any, and the sources which have led the Commission to make the proposal, sources that very frequently are the laws of neighboring or other states.

We have also utilized to a considerable extent the

Model Business Corporation Act which is not enacted verbatim in any State, but which was prepared in the '40's and '50's particularly by committees of the American Bar Association which worked most extensively in presenting a piece of legislation which could be used as a guideline for states wishing to do what we are doing here today.

I may say that we have not followed the Model Act too closely because we have been mindful of the traditions of the State of New Jersey, its case law as well as its statutory law, and the more specific needs of a state so active in the industrial field as is New Jersey.

We will present very shortly with the comments in printed form for distribution publicly a brief report of the Commission, which will cover what I have said thus far, and point out specifically some of the major changes in the legislation for guidance of attorneys and others who may wish to point up and see precisely what has happened.

At this meeting, I think the Commission would much prefer, if it is your pleasure, to respond to questions that you or anyone else may have rather than to proceed further with a detailed statement on the legislation. Thank you.

ASSEMBLYMAN DICKEY: Thank you, Mr. Lowenstein. Do any of the members of the Committee wish to ask Mr. Lowenstein any questions? [No questions.]

Mr. Lowenstein, I haven't had the opportunity to study the bill extensively, but I notice there are a number of departures from the existing Corporation Law. Do I understand under this bill that we may now have one-man corporations instead of requiring three incorporators?

MR. LOWENSTEIN: If that is what you wish, yes. You are talking about having one director - one stockholder and one director?

ASSEMBLYMAN DICKEY: Don't I understand that one person can incorporate?

MR. LOWENSTEIN: One person, right.

ASSEMBLYMAN DICKEY: Would that one person then be sufficient to execute documents for the corporation, I assume, as chief executive officer in some form?

MR. LOWENSTEIN: I believe we have a requirement that there be a president and secretary and that the secretary would certify documents, but he need not be a director or a stockholder. But I think for the purposes of recording documents in the Office of the Secretary of State or elsewhere normally you would have a secretary who would certify the authority of the president.

ASSEMBLYMAN DICKEY: Mr. Lowenstein, I also notice that there is considerable leeway granted to stockholders to waive formality of meetings, provided that all the stockholders sign such a waiver.

MR. LOWENSTEIN: That's correct.

ASSEMBLYMAN DICKEY: I haven't observed it, but is the same kind of a waiver extended in cases of directors' meetings?

MR. LOWENSTEIN: Yes, sir.

ASSEMBLYMAN DICKEY: So that for a small closely-held business, the formality of directors' meetings and stockholders' meetings can be waived if all the persons involved agree to it; is that right?

MR. LOWENSTEIN: Yes. We have done our best to minimize the paper work in the closely-held corporation. We have eliminated the necessity of meetings of incorporators in the first instance and the only type of document that really would be required in the way of minutes of meetings and waivers, etc., would be something that would be available to record the basic transactions that a corporation may enter into, but it could be done in a very simple form, without having all the notices of meetings, waivers of meetings, minutes of meetings, ballots and so forth. It would be very simple to have in the case of the so-called one-man corporation a single sheet of paper which he would sign, which would reflect the actions of that corporation really made by him.

ASSEMBLYMAN DICKEY: Do I understand, Mr. Lowenstein, that a certificate of incorporation can be filed - and without enumerating the various intended powers, making general reference to the act, itself - and that all of those powers then are by inference assumed by the new corporate entity?

MR. LOWENSTEIN: This is possible under the new law if it is adopted.

ASSEMBLYMAN DICKEY: Section 14A:3-3, "Guaranty Not in Furtherance of Corporate Purposes," is somewhat confusing to me. Can you explain that, Mr. Lowenstein?

MR. LOWENSTEIN: There has been considerable question as to whether a corporation may guarantee the obligations of an individual or another corporation if there is not a very significant business advantage to the corporation in so doing and very often we find -- Pardon me. The situation where a

corporation normally could guarantee the obligation of another corporation is where the corporation has a subsidiary which engages in business, the subsidiary does not have sufficient credit on its own and people that do business with it seek the guaranty of the parent. Now this is perfectly appropriate and legal today. Another case is where there would be a landlord-tenant relationship and there may be some desire on the part of the landlord and the landlord may insist that the tenant's obligations be guaranteed by another corporation or there may be some credit extended, but you always have to test under present law whether there is a business advantage and perhaps a substantial business advantage to the corporation issuing the guaranty through ownership or business relations.

This makes it possible by an appropriate vote of the shareholders to extend the authority of a corporation to guarantee something which may not be technically in furtherance of corporate purpose. The usual place, I believe, where it would be used is where you have so-called affiliated corporations. One man or a group of men may own four or five corporations, for example, where they may own four or five businesses of real estate or where one may be a manufacturing corporation, another one a real estate corporation or something like that, and the corporations, themselves, are not interrelated except by common stock ownership. Normally in that event, the stockholders owning all corporations may be perfectly happy to have one of their business enterprises guarantee the obligations of another of their business enterprises and this would make it possible to do so, even though the corporations, themselves,

don't necessarily have any benefit running from one to the other.

ASSEMBLYMAN DICKEY: Is the wording of this section sufficiently adequate to make sure that the corporation won't guarantee a loan, for instance, of an individual who might have considerable control of the corporation?

MR. LOWENSTEIN: I would think that there may be some instances in which that would be done, where a bank might make a loan to an individual and wish the guaranty of a corporation of which he has control. This is a very difficult field of the law, very frankly, Assemblyman, because I think we are trying in the public interest to protect the creditors of individual corporations against having their assets diverted to pay obligations that are not strictly corporate obligations.

On the other hand, we recognize the nature of business and, that is, that people do do business in various economic pockets and we also recognize that credit today is largely extended on the basis of financial statements and presumably a corporation which guarantees an obligation which is not its own would have to reflect that in a note on the financial statement and in effect notify his creditors in that form that this is what was happening.

I think in the public interest we have to weigh two factors, the advantage to permitting honest people to do business in this fashion and extend their business activities, and, on the other hand, be alert that we are not opening the door so wide to fraud on corporate creditors. It is a section that the Commission spent a great deal of time on and I dare say there could be parties who would differ with the way in which

we have handled it. We think we have come out with a sound compromise on a very delicate policy question . Perhaps Mr. Kipp -- may I introduce Mr. Kipp to the Committee -- may have some comments on this he might wish to add to mine.

ASSEMBLYMAN DICKEY: Do you care to comment, Mr. Kipp?

D O N A L D B. K I P P: I have little to add to what Mr. Lowenstein has said and, as he has already remarked, this is a touchy subject. It will, in our opinion, facilitate particularly the small corporation to get a loan from a bank where under the present law a bank would require an opinion of counsel that the loan is in the corporate interest of the guaranteeing company. It is more expensive to have to get that type of opinion and often hard for a lawyer to give that type of opinion and show there has been a perfectly sound reason for the guaranty.

ASSEMBLYMAN DICKEY: I notice under Section 14A:3-2 dealing with ultra vires transactions, that this has some relationship to what we are talking about. Apparently an act by a corporation under this section would be presumed to be proper unless there was a suit instituted in the court. Is that right?

MR. KIPP: Yes. As a matter of fact, we have virtually through this statute eliminated the defense of ultra vires, I think it is fair to say.

MR. LOWENSTEIN: Yes, and this has been true in most states today.

ASSEMBLYMAN DICKEY: Would you care to comment on your thinking on this ultra vires section?

MR. LOWENSTEIN: Well, the thought was that corporations should be free to transact business very broadly. Once you have decided that corporations can have the most extensive corporate powers - and we are not back in the nineteenth century limiting each corporation to a very small segment of the economic world -- once you have done that, the defense of ultra vires is one that is only an obstacle unless there is a public reason why a corporation should not be involved in doing something.

Now we have preserved the fact that the Attorney General can step in in the event that a corporation seeks to go into a territory that has not been covered by the Business Corporation Law and we have made it possible also for stockholders to come in and enjoin the management of a company from stepping into an area which by virtue of their charter they have said they would not go into. But we have not permitted it to be used as a defense to a claim brought against a corporation by a third party who in good faith dealt with the corporation, thinking that this was a typical business corporation, only to find that the corporation was setting up a technical defense that prevented the payment of what was considered to be a valid business obligation.

ASSEMBLYMAN DICKEY: Mr. Lowenstein, I noticed in the General Powers section of the bill, 14A:3-1, that under paragraph (h) a general corporation now is permitted to lend money. Does this in any way conflict with the Banking Laws of this State or the laws dealing with lending institutions or savings and loans?

MR. LOWENSTEIN: No, I don't consider that the power to lend money is broad enough to include the power to engage in the banking business. But all corporations under certain circumstances may very well lend money and they do today. They may loan money to employees for limited purposes. They may loan money to affiliated corporations. They may go into a business venture with someone in which part is a capital investment and part is loan for temporary purposes. But if the corporation were to hold itself out to be a lender to the public in a broad way, it would be violating the Banking Act and I don't consider this an inconsistency here.

ASSEMBLYMAN DICKEY: Do you think this section needs to specify particularly that there is a limitation on this particular corporate power?

MR. LOWENSTEIN: It would be very difficult to attempt to put limitations because you never know what the particular circumstance might be and I think it would be quite limiting and without any real benefit.

ASSEMBLYMAN DICKEY: What I mean is this: Should we say that this is not intended to extend the power to transact banking business or the business of savings and loans or lending institutions?

MR. LOWENSTEIN: Well, Mr. Assemblyman, the very outset of the section that you mentioned, at the top of page 15, section 14A:3-1, subsection (1), says: [Reading] "Each corporation, subject to any limitations provided in this act or any other statute of this State, or in its certificate of incorporation, shall have power. . ." And we considered that that limitation

there was a red flag that you can't go into the banking business or do a lot of other things merely because of this specification of rather broad powers here.

ASSEMBLYMAN DICKEY: Very good. Now I notice we have a section dealing with Contributions by Corporations. I assume that that is in compliance with the Internal Revenue Code.

MR. LOWENSTEIN: Well, the Internal Revenue Code from time to time can be amended or the regulations changed. This is in conformance with the existing law of New Jersey and it follows a very significant case that went to our Supreme Court here in New Jersey. And I think it is merely a spelling out what is the present law. But whether or not a particular charitable contribution from time to time will meet the standards for deductibility under the Internal Revenue Code really will depend upon that Code and the regulations under it.

ASSEMBLYMAN DICKEY: Mr. Lowenstein, with reference to the requirement of filing an annual report with the Secretary of State, I notice that in addition to the right of the Secretary of State to bring an action for a penalty under the Civil Penalties Law, this bill will permit the filing of a lien, having the effect of a judgment of the court. Would you care to comment about that provision and why it is necessary to give that extended authority to the Secretary of State?

MR. LOWENSTEIN: Are you referring to Section 14A:4-5?

ASSEMBLYMAN DICKEY: Yes, Mr. Lowenstein, I am - paragraph (3), about the middle of the paragraph, page 25.

MR. LOWENSTEIN: I don't wish to delay you, but I want to just check our comments on that particular section. The thought

I had, and I just wanted to be sure that I am accurate in stating it, is that I don't think this provision is new. I think it is a restatement of existing law and I am just trying to be doubly sure that this is true.

MR. KIPP: Could I comment briefly on this and I might not be able to satisfy you completely. First, let me say, gentlemen, among the many different groups with whom we have discussed the provision at length, the Secretary of State was very much in with us. We conferred with him. We have adopted some changes he wanted made and some provisions he wanted made.

This provision for a lien I don't think is in the old act, but it is in substitution of a provision in our present law which disqualifies directors in case of a failure to comply with this statute. We felt that was far too excessive a penalty. The present law says all the directors of any such domestic corporation who shall wilfully refuse to comply with the provisions hereof, shall be ineligible for election, and we felt there might be some reason for not filing an annual report and we shouldn't just disqualify directors. Therefore, in consultation with the Secretary of State's Office, we substituted this other provision which does provide for the docketing -- the issuance of a certificate by the Secretary of State and thereupon a docketing of the penalty, the same as a judgment.

That might not be the most satisfactory way of handling it, but we did think it would impose some sanction on the corporation and yet not make directors ineligible.

ASSEMBLYMAN DICKEY: Do you think there should be some limitation of time upon the Secretary of State before he can

enter a judgment by default?

MR. KIPP: Well, in the first place, sir, as you will see from reading that, there is no penalty - [Reading] "No corporation shall be subject to penalty if it shall, within 30 days after such written demand, file the reports. . ." So they do get that 30-day period of grace and we felt they should be able to take care of it in that time.

MR. LOWENSTEIN: May I say, I believe the Secretary of State is a little concerned that we may have weakened, rather than strengthened, the enforcement power of this section. He very properly pointed out that for years many corporations never filed these annual reports and that it was only after the strengthening through penalty a few years ago that we have approximately 75 per cent fulfilment of the statute now. And I think there was some question as to whether by making it more liberal, we had handicapped the Secretary of State in getting as complete fulfilment of this requirement.

Here again, my own thought as an individual, is that there are a number of sections of this bill that I am sure could still be improved. But I think what we ought to do is try to live with this law for one year and in the meantime gather the suggestions for improvement. I think we have avoided any drastic errors thus far by having consulted with so many different parties. But I am sure that there are individual sections which in the course of a year it will become apparent should be modified in some respect.

ASSEMBLYMAN DICKEY: Are there any other members of the Committee that have questions to ask of Mr. Lowenstein?

SENATOR WHITE: May I ask this question: Have you given any consideration in the same section 14A:4-5 to giving some discretion either to the Secretary of State or to the Attorney General - I would assume the Secretary of State - for a situation, for instance, where a husband has been the sole owner of a corporation for a number of years and he passes away and following that his widow is completely unaware of the business affairs, let's say, for another period of five, six or seven years. I am thinking of a very living case right at the moment. There is no discretion for waiving penalties and I have been told that where the penalty is imposed, it must be paid and the one case at issue, I think, goes back about 15 years or something like that. And when you accumulate the filing fees and the penalties, it is just something that no reasonable person could live with. Is there any possibility of any discretion in here to waive penalties and perhaps just allow the filing fees to remain?

MR. LOWENSTEIN: Senator, may I suggest that your question be answered by Commissioner James Hession who is now with us and who was the member of the Commission that took the primary responsibility for consulting with the Secretary of State on this particular section. I think I know the answer, but I am sure he will answer it better.

MR. HESSION: Senator, I want to apologize. I understood this hearing was scheduled for eleven o'clock this morning.

ASSEMBLYMAN DICKEY: Do you want to come up to the microphone, please.

Will you state your full name, Mr. Hession.

J A M E S A . H E S S I O N : My name is James A. Hession. In all honesty I do not recall the question ever having been raised, certainly not by the Secretary of State in our discussion with him with respect to the penalty clauses under the annual report requirements.

I am mindful of a case that was decided by Judge Goldmann recently where an effort was made to attempt to vacate a judgment for good cause shown and I think that the court interpreted the statute, and properly so, in a fashion that fulfilled the interest of the State to have current reporting information. I think that on balance the interests of the State and of the businesses of the State and the people of the State are most advantaged by having the penalty clause really without any area of discussion . In a particular case, I think almost every law might be accompanied by some hardship. But the Secretary of State certainly has a discretion with relation to what is left for him under the revision, namely and ultimately, filing a certificate which is tantamount to a judgment in the Superior Court. I think that would be the complete answer. I don't understand that the Secretary of State, for example, issues that certificate today on the very first opportunity that is available to him.

ASSEMBLYMAN DICKEY: Under present law, he is not authorized to do that.

MR. HESSION: Under present law, the Secretary of State may issue a certificate. If you are referring to section 14A:4-5 (3), the Secretary of State today may file a certificate in the Superior Court, issue it to the Clerk of the Court, that

the corporation is subject to a penalty. And in the revision, that much of the penalty aspect of current law has been retained in toto. It is almost a Chinese copy of the present provision. This does, in the revision, exclude the other aspect of the penalty, I think it is with relation to the directors who are in office who wilfully or negligently fail to file those reports.

SENATOR WHITE: Yes, but suppose you have a typical case where the 30-day notice is given to the sole owner of the corporation and he does nothing about it, then passes away and, as I say, his widow comes along sometime later and all of a sudden now, having known nothing about it before, she has succeeded to his interest in the corporation. She is now faced perhaps with five years at \$200 per year, which would be \$1,000, plus \$10 per year filing fee, which is \$50. Yet she is in effect an innocent bystander to the whole thing.

MR. HESSION: She may be an untutored bystander. I question the extent to which she is innocent. Under this provision, the Secretary of State is required to give this notice and, meeting the issue presented by your question, I think you would have to assume by hypothesis that this widow is in receipt of a communication from the Secretary of State's Office, which says in effect that annual report has not been filed - you have seen the forms that he sends out - and there is a very bold legend, properly so, on them. And such a person, I think, has got to, in connection with the conduct of corporations, consult counsel or even the Secretary of State's Office.

SENATOR WHITE: I understand that fully, but my question is this: The notice went to the husband. He didn't see fit to

do anything about it and he passed away. Now the Secretary of State comes along and says, under the law, which is correct, I am obligated to impose this penalty. And the wife says, "Gee, I didn't know anything about it. Now all of a sudden you want us to pay \$1,000 plus the filing fees for whatever number of years are involved." Should any consideration in your opinion be given to giving either the Secretary of State or some other official discretion in waiving the penalty if he believes from her testimony or affidavit that she had no personal knowledge whatever - she had no connection with the corporation until her husband passed away?

MR. HESSION: In my judgment, Senator, the answer to your question is in the negative, as I understand the law at the moment, particularly in relation to that opinion of the Appellate Division that involved a lawyer who had been less than diligent, I gather, from the opinion with respect to following the notices from the Secretary of State and complying with the law. And when the judgment was thus entered under the equivalent today, he at some point in time made an application to the court to vacate the judgment for good cause shown. The court held he hadn't shown good cause. This widow could make an equivalent application and it would seem to me to vest in the judicial authorities, the discretion that exists at the moment.

SENATOR WHITE: Yes, but isn't it true there that the court was following the statute as it was at the time, whereas we now have the opportunity of changing the ground rules and changing the statute.

MR. HESSION: I see your point. I see your point.

SENATOR WHITE: I am not quarreling with the court whatever. I am sure that the court's decision was proper under the then existing law. But I am simply saying: Shouldn't some consideration be given - and I am thinking out loud now - I just haven't formulated this entirely within my mind - to a hardship case or, as I say again, allowing discretion where the facts warrant the exercise of discretion?

MR. HESSION: In principle, I have no problem with that. In principle, I have none.

ASSEMBLYMAN DICKEY: Any other questions of this witness?
[No questions.]

Mr. Lowenstein, I can't seem to put my finger on it, but do I understand that under this bill bondholders would be given certain voting rights at stockholders' meetings or is that an optional feature? I am just trying to recall from my study of the bill some time ago.

MR. LOWENSTEIN: That is an optional feature which carries over an unusual, but desirable feature in our minds of the existing law and, that is, that a corporation can with the approval of its stockholders, of course, have an issue of bonds which provides for the bondholders as a class to have representation on the board. Usually only stockholders have representation on the board and there are times when bondholders have a very substantial stake in a corporate enterprise and may want the provision for this and this makes it possible. But this is not new law.

ASSEMBLYMAN DICKEY: This is an optional feature?

MR. LOWENSTEIN: Oh, yes, completely. We have had the

situation - I have used it myself as a practicing attorney - where two individuals owned a business enterprise, one reached retirement age and was bought out by the other on the installment plan, receiving installment notes or bonds extended to be paid out over 10 or 15 years. He still had a very substantial stake in the enterprise and naturally felt he would like to know what was going on during the pay-out period. This made it possible to provide that the holders of those bonds or installment notes could have representation on the board.

ASSEMBLYMAN DICKEY: Thank you.

Do you have anything further you wish to present, Mr. Lowenstein, at this time?

MR. LOWENSTEIN: No, thank you, except that we are available as a resource, if you would like us to, in response to questions that may come from those present today.

ASSEMBLYMAN DICKEY: We would appreciate it if you would stay with us while the other witnesses testify, you and Mr. Kipp and the other members of the Commission.

MR. LOWENSTEIN: Thank you.

ASSEMBLYMAN DICKEY: Mr. Kipp, do you have anything to add?

MR. KIPP: I don't think so, Mr. Dickey.

ASSEMBLYMAN DICKEY: Mr. Lowenstein, we will need your desk for the next witness.

The next witness is Mr. Glen Miller of Johnson and Johnson. Will you state your full name, Mr. Miller, and your address.

G L E N B . M I L L E R , J R . : My name is Glen B. Miller, Jr. I am the Secretary of Johnson and Johnson, New Brunswick, New Jersey.

Our company was incorporated under the laws of the State of New Jersey in 1887. There has been no general revision of the Business Corporation Law in the intervening 81 years.

I understand that a number of amendments to S 884 may be offered and considered. We have no particular objection to or support for any of these amendments. Our purpose is to urge support for the over-all bill itself and to urge that any amendments which may be considered do not delay its passage.

S 884 is the result of 10 years of careful and painstaking work by the New Jersey Corporation Law Commission. The bill will eliminate red-tape. It will modernize and update our Business Corporation Law. It will enable New Jersey to hold on to the corporations that it has and to attract new corporations. We strongly urge its passage. Thank you.

ASSEMBLYMAN DICKEY: Thank you. Are there any questions?
[No questions.]

Mr. Hamilton. Will you state your full name and address, Mr. Hamilton.

W I L L I A M N . H A M I L T O N : Yes. Thank you, Assemblyman. My name is William N. Hamilton, 224 Sunset Avenue, Hightstown, New Jersey.

I would like to be the voice of dissent today. There basically is nothing new in the principle of 14A, proposed 14A, because the principles embodied in it were fought for decades in past Legislatures, going back in the eighteen hundreds. And if

you look back into past history of New Jersey corporations, you will see that the first corporation was chartered in 1791 by a special act of the Legislature and that these special charters granted by the Legislature continued until 1875 until a new Constitution prohibited such action. Now during this period New Jersey was not without General Corporation Laws because there were nineteen General Corporation Laws enacted between 1845 and 1875. Nevertheless, these special acts of the Legislature were the rule and not the exception and they continued to be the rule until the Constitution of 1875, of course, prohibited them.

Now the seekers of these special acts wanted the very same thing that the proponents of this bill want today. They wanted special privilege. This is why there is nothing new in 14A because it seeks the same special privileges that the individuals who had these special charters for their corporations wanted. In short, it provides for unlimited privilege without any liability whatever.

Now this battle brewed in the Legislature for decades and your predecessors in the Legislature on both sides of the aisle as well as some Governors were involved in this fight and the big fight was over limited versus unlimited liability. One group wanted to afford protection to creditors where they could see that dishonesty and another word used, as we look back in New Jersey history, humbuggery, would result if we didn't afford this protection.

The other group found that any regulation was simply onerous and they wanted bills to contain merely privileges.

What we have today in the present Title 14 is a compromise between those two views because it does afford certain privileges, but it also provides for certain responsibilities. Essentially what it provides in the present Title 14 -- it recognizes that shrewd men would pervert the right into wrong and to use a quotation by one of your predecessors in the 1800's, it would prevent engines for swindlers to plunder with.

Now I am afraid that the proposed 14A would legitimize fraud and this is why I strongly oppose it. Essentially what 14A does is to try to do, as a corporation, by extending this mantle of corporate privilege, what an individual can't do himself or a group of individuals can't do themselves if they be, we'll say, partners, a particular group.

I think 14A has two particular serious defects. One of these defects concerns capital stock and the other defect concerns insolvency. Now I am sure that many people in this room are shareholders. I happen to be a shareholder of various corporations. Perhaps you gentlemen on the Committee are also shareholders. I don't think that today many people, and I certainly don't, have any quarrel with the general concept of unlimited liability that a corporation provides. But I paid for my stock that I held. I am sure that you paid for yours. And there were transfer agents and registrars and stock certificates that were issued.

Now I put this proposition to you: Suppose a person doesn't pay for his capital stock. Suppose stock certificates don't even exist. What then?

Under what we have in proposed 14A, the creditors would simply suffer because there is no penalty in proposed 14A for non-payment. All of the privileges in 14A are for the insiders and we know that insiders will take advantage if they are given this advantage.

If we compare 14A with the present Title 14, we find that the present Title 14 compels payment if the capital paid is insufficient to meet the debts and obligations of the corporation. This isn't really a penalty at all, for it merely compels a person to do what he should have done in the first place. I ask you a question: What could be fairer than the present provision that is now embodied in Title 14? But the proposed 14A simply drops this provision completely; it omits it. There is not one single provision in 14A that actually compels in any realistic way for the payment of capital stock.

If we consider the most minor infraction perhaps in this State, I imagine most people would pick overtime parking. Yet there is a penalty provided for parking overtime. But in this bill there is no penalty for the most basic characteristic of a corporation for nonpayment of capital stock.

The second item that I have serious objection to and would like to invite your attention to is this issue of insolvency. Your predecessors and past legislators who put together what is now the present Title 14 realized that insolvency was a very dangerous period for creditors because this was a period when insiders could show favoritism and, of course, the favoritism would be strictly to themselves.

The present Title 14 prescribes guidelines to be followed

during this period and I think these guidelines are very fair. One of the things that the present Title 14 provides is that any conveyances made during the period of insolvency are null and void and, in fact, the act of February 16, 1929, entitled, "An Act to prevent frauds by incorporated companies," specifically covered this issue of insolvency and it said that when a conveyance is made during a period of insolvency, this was recognized as a fraud and that this conveyance would be null and void.

Now 14A establishes a completely different standard than the present Title 14. It says that a conveyance during a period of insolvency will be permitted if there is fair consideration paid. This essentially carries forth what we have most unfortunately in the present Title 25, a course which applies to individuals as well as corporations.

However, we have to keep in mind that when we have particularly these closed corporations, as the very title of this act suggests and prior testimony here today indicates, one of the purposes of this bill is to provide for rights and privileges to insiders. We always know that insiders have a lot due them by the corporation so that all they have to do is to apply the amounts that have been due them as predecessor debts against what is considered the consideration and, of course, under proposed 14A it would be valid.

I think that there are other objections to this bill. I think they are the two most serious ones. I think in toto I would say that the prime objection in principle to this bill is that it confers privileges without responsibility. It simply

omits the penalties in present Title 14.

Now once you confer privileges without responsibility, it automatically results in irresponsibility. The history of the world and the history of human nature has proven this.

I think the whole tenor of proposed 14A is best simplified in the very first sentence in 14A:3-2, and I think especially the first eight words of that particular section are most important and they say, and I quote: "No act of a corporation. . . shall be invalid. . ." Of course, it goes on to say more. But essentially what it says after that is that regardless of the fact whether the corporation had the power to make this act or whether they didn't, the act nevertheless is valid. This is something that you and I as individuals in a business or you and I as partners in a business wouldn't have the right to do. Yet, as a one-man business under this act, incorporated, we would have the power to do a lot of acts that we wouldn't have the power to do under ordinary circumstances.

I think that what we will have here as a result is unbridled power. I think the rights of the creditors will be trampled. I think also the rights of the small shareholder will be trampled.

There is a provision, for example, in proposed 14A that provides if essentially a small shareholder owning only a small minority of the stock wishes to challenge the corporation, that he will be forced to put up the reasonable attorney fees before the suit will even be recognized by the court. I think this is a most onerous provision. I think it is typical of what is embodied here in these first eight words of 14A:3-2.

I want to point out that although my interest is primarily with the creditors, I think this would also be damaging to the small shareholder. I think it would also be damaging really to the large corporation because we know that the large corporation - we had a gentleman testifying from a very responsible and very recognized corporation here in this State - any large corporation operating legitimately, no one would hesitate to do business with because they know they will get paid. But I think with the special privileges granted to the small corporation in this act, the large corporation will suffer because essentially the large corporation is also a creditor of the small corporation.

So I think from the standpoint of the damage this will do to creditors and to small shareholders, that this bill should not be given passage in the Legislature and I strongly urge its defeat.

There has been mentioned here today about the advantages in the Delaware law. I think the primary advantages in other states, if corporations have a tendency to gravitate to them, are going to be taxes and, of course, this isn't a matter covered by 14A at all.

I think if these unlimited privileges are given to corporations without any restraint whatever and without any responsibility whatever, there is bound to come a time when pressures are going to be made upon the Federal government to step in with legislation, that Congress will simply take some of the rights which are not inherent in the states out of their hands and give it to the S.E.C. because of the abuses that

legislation, such as proposed 14A would result in.

In summary, I think that the proposed 14A is a bill that does not adequately consider creditors. I don't think it adequately considers the small shareholder and I think for this reason it should be defeated. Thank you for the privilege of appearing.

ASSEMBLYMAN DICKEY: Thank you, Mr. Hamilton. Any questions? [No questions.]

Thank you very much, Mr. Hamilton. You may want to stay. I think Mr. Lowenstein will want to respond to your comments.

MR. LOWENSTEIN: Gentlemen, as I understand it, there are essentially three points that Mr. Hamilton is making. The first point that he is referring to is the fact that our present statute, Title 14, has a provision in it in section 14:8-16 which requires a filing in the office of the Secretary of State of a certificate of payment of capital stock and we have omitted that section. We have omitted it because in our belief it has been a meaningless section for years because the business community over the course of the years as industry has developed has never relied on the certificates filed.

Keep in mind that a corporation which starts out with, say, \$10,000 of capital, may borrow from a bank or may grow so large over a period of years, it may have a net worth of \$200,000 by retaining earnings. The credit it obtains is on its net worth, not the original amount of capital that was paid in.

This certificate of payment of capital stock has come to be a trap for the unwary attorney and corporation who forget to file their certificate and immediately expose their officers to personal liability for all of the debts of the corporation. There have been one or two cases where a company has become insolvent where, say, 10 or 20 years earlier they added to their capital but forgot to file the certificate. Years later the circumstances of corporation are such that they became insolvent and then somebody went after them for personal liability because somebody forgot to file the certificate.

Our point is that this is not the way credit is extended in the modern world. It is not extended on the basis of the certificate of payment of the capital stock filed in the office of the Secretary of State. Credit is extended largely on the basis of financial statements, which can be obtained either through Dun and Bradstreet or similar sources, from banks or directly from the corporations, themselves, and the original, paid-in capital is usually only a small factor in the net worth of a corporation when it seeks credit. We felt this is a trap which should be eliminated without any loss to the protection of the public.

On the question of the provision on insolvency, Mr. Hamilton is referring to the fact that a provision of our State law, which is now known as section 14:14-2, which dates back to 1829, as he very properly pointed out, has been largely replaced by sections which follow more closely the Bankruptcy Law. What has happened - and I am sure your Committee is not

interested in a lecture on insolvency -- but what happened is we had no Federal Bankruptcy Act in effect prior to 1898 and the states passed laws in the 1820's and thereafter to prevent frauds on creditors and these statutes were used to go after people in the small corporation who transferred assets out of their retail store to relatives or others and then left themselves without assets and a creditor came along and had no way to recover payment for what was owed to him if he was a supplier, let us say, to the retail store.

This is very interesting history, but since 1898, the law of insolvency has largely been determined by the Bankruptcy Act which itself went through a most extensive revision in 1938 and which is constantly going under revision, and those of you who are attorneys know that daily our Federal courts are interpreting the Bankruptcy Act and we have case law and statutes that go into volumes.

Now it is true that there are some insolvency proceedings instituted in the State courts for small enterprises which never reach the Bankruptcy Court and we had in mind, as closely as possible, adopting the equitable principles that have applied for years in the Federal courts in interpreting the Bankruptcy Act.

We have not omitted provisions which relate to frauds on creditors and in sections 14A:14-10 and the succeeding section, succeeding sections actually, and thereon, there are rather extensive provisions on fraudulent transfers, and we even have gone into a new preference section which is found in 14A:14-14, etc. Now we think we have brought in the benefit of decades of

experience under the Bankruptcy Law into our State courts for those few cases of small enterprises where there is an insolvency proceeding in the State court which is not removed to the Federal court. And I am sure many of you are familiar with the fact that there is ample provision for insolvency proceedings started in the State court to be moved directly into the Federal court wherever there is a reason for doing so. We now really provide that this will not be necessary for the smaller enterprise.

Now section 14:14-2 frankly was another trap. It provided from 1829 on that a transfer of assets made while insolvent in the so-called equity sense, inability to meet debts as they mature out of available assets - that any such transfer was ab initio void and not voidable and, therefore, you could come in and recover and this was a trap. About two or three years ago this section was amended by this Legislature to give protection against this type of a raid and the section has been much more effective since then. But it was the opinion of the Commission that the 1829 law really had served its purpose and that it was more important to follow the equitable principles developed with a great deal of skill in the bankruptcy courts and apply them in the State court. It does not leave the creditors of New Jersey small business enterprises vulnerable to fraud or misuse. If anything, I think this law, if it is enacted, will give them even more protection.

The third point made by Mr. Hamilton dealing with ultra vires transactions - he talked about "No act of a corporation and no conveyance or transfer of real or personal property

shall be invalid by reason of the fact that the corporation was without capacity or power to do such act. . ." That is section 14A:3-2 of the proposed bill.

We have already discussed that. I see no reason why that should be considered a danger to creditors of corporations because there is specific reference in there that in any proceeding brought by receiver, trustee or other legal representative, suit could still be brought in the event that it should be determined that there was some improper reason a corporation did something that was improper, and that protection is still provided in insolvency proceedings to a receiver or a trustee.

All this does, 14A:3-2, is eliminate what we consider an outmoded defense of ultra vires because if you are able to put in your original certificate of corporation that you can perform any business function and exercise all the powers of any business corporation of the State, subject, of course, to limitations, you cannot do banking and other business for which there is specific legislation, then there is no reason why somebody should be able to come after you on the ground that somebody forgot to phrase the power clause adequately. But, as I said, if there is any basis in an insolvency proceeding for going after the corporation, this is reserved under sub-paragraph (b).

ASSEMBLYMAN DICKEY: Mr. Lowenstein, Mr. Hamilton makes the point, I believe, that there are many obligations called for under this bill by corporations or their officers, but there are no penalties if they don't perform them.

MR. LOWENSTEIN: Well, presumably, if anybody believes that he has been injured in any fashion, whether he be a stockholder or a creditor or the Attorney General if nobody else chooses to act, there is ample provision in our equity courts to go in and enjoin the action. We do not believe that we are going to be operating a corporation program in this State without a judicial system and the danger of the older laws or the handicap of the older laws is that if you attempt to legislate very rigid limitations on how a corporation can conduct its business, you may be hamstringing the 95 per cent of the corporations who are proceeding legitimately for the benefit of the public in order to hope that you can catch by legislation the fellow who is dishonest and is conducting his business improperly. Our thought is that, just as now, really the relief against the dishonest man is in the courts and we do not believe that this statute in any way handicaps - in some cases, it helps - the creditor or the stockholder who feels that he has been treated unfairly in some way.

ASSEMBLYMAN DICKEY: Mr. Lowenstein, you say your remedy is in the courts, but isn't equity litigation expensive and time consuming? Is there a need for any civil penalties or criminal penalties in this law?

MR. LOWENSTEIN: We see no reason other than the penalties that we have already discussed for failure to file documents with the State because truthfully this is really an enabling act. I think, at the expense of taking another minute or so, I should say that the concept that this Commission has followed, as has been true of commissions in all other states

to my knowledge in the last 20 years, is that you do not attempt through your General Business Corporation Act to impose the regulatory features that were once considered appropriate for this legislation. Today anti-trust regulations and anti-monopoly provisions have moved really into the area of the Federal government. Today the question of disclosure of information for publicly-held companies and the nature of accounting reports to be issued to stockholders in publicly-held companies - this is largely covered again through the Securities and Exchange Commission and Federal legislation.

Labor legislation in the 19th century sometimes was passed, directed to corporations, and today I think we know that Wage and Hour legislation, collective bargaining matters - to a considerable extent these matters are now in the Federal jurisdiction, and you can go on with this.

What we are trying to do now is provide an enabling act which enables the honorable corporations to prepare a certificate of incorporation which gives them the flexibility to conduct their business, leaving to the Federal legislation in some areas and occasionally state legislation in others where it isn't specifically dealing with corporations, to provide the public policy through regulatory statutes.

We have made it possible, however, and I think this is very important, particularly for the small corporations, for the small corporations to write their own rules and regulations as to how they want to conduct business, and including some very substantial restrictions. For example, if there are three or

four stockholders who are really forming a business partnership, we have made it very simple for them to say, "We must act by unanimous vote or by the vote of three of the four of us," whereas this has not been easily done in the past under present law. We have made it possible, in other words, to require a greater voting right and greater voting requirements than the statute presently provides if this is what they want to do. We have said that if the three or four individuals going into partnership want to put into their certificate of incorporation and into their charter regulations as to how they shall manage their business -- in the past the courts have frequently said, "This is a matter for the Board of Directors; this is not something that you as stockholders can write into the law." -- we now make it possible to write management limitations and to put these right into the charter.

But I do think that from the point of view of regulation of broader public policy, whether it be in the disclosure of information to public stockholders or in anti-monopoly or questions of competition, etc., these are matters to which a great extent have moved into the Federal field and I think also you gentlemen as well as ourselves as Commissioners have to recognize that in the state of our law today in this country, if we want to enact a rigid corporation law, you gentlemen have the right to do so and may do so, but then you will find that the corporations will choose to by-pass New Jersey. We almost have a Gresham's law in the sense that those who plan to organize a corporation, even if it is going to do business in New Jersey, have a perfect right to go to Delaware or any other state if they

choose, so long as they qualify to do business in this State, if that is where they are going to do business, and so long as they pay our taxes and don't do something that the Legislature has said generally is against the law. But I think we must look upon this legislation as enabling legislation and ask ourselves: Have we enough protection in this statute to protect the stockholder of the large and small corporation against inproprieties of management and have we enough protection for the creditor of both the large and small corporation to be sure that his rights are not going to be handled to his detriment? I think the answer is that we have these things.

ASSEMBLYMAN DICKEY: Are there any questions by members of the Committee? [No questions]

I will call as the next witness Elmer J. Bennett.

E L M E R J. B E N N E T T: Gentlemen of the Committee, my name is Elmer J. Bennett. I am a member of the law firm of Carpenter, Bennett and Morrissey, with offices at 744 Broad Street, Newark, New Jersey. My firm is engaged to a considerable extent in the practice of corporate law and has been for many years, and I personally have devoted a considerable amount of my time and attention to the practice of corporate law.

We represent a number of public corporations listed on national exchanges and a considerable number of closed corporations. We, therefore, have had considerable experience with respect to corporations existing and operating under the present law, which is, of course, basically the law of 1896 as amended from time to time.

I would like to urge upon you gentlemen the great importance of adopting this revision without further delay. In my judgment and the judgment of my partners, this revision is desperately needed. The law as it now exists is a matter of a patch upon patch upon patch. It's been amended and supplemented, revised in specific areas, and as a result it's ambiguous in many ways; it's uncertain; it's difficult to understand, and it puts corporations in a business straitjacket. I am not, of course, referring now to dishonesty. This must be dealt with in other ways. But the legitimate needs and aspirations of business corporations

cannot be reasonably attained in today's economic climate under the existing law.

Several of our corporate clients have made an analysis of this proposed revision and compared it with the old law and they have compared it with the Delaware law. They have concluded that this revision is an excellent job and they would like to have it adopted as promptly as possible. As a matter of fact, several of our clients have advised us, after having compared this with the Delaware law, that they would stay in New Jersey if this was adopted without delay, otherwise they would find it necessary to move to Delaware, as many corporations already have.

Of course, as Mr. Lowenstein pointed out, the fact that they cannot incorporate here or will not incorporate here does not give us any protection, because they can incorporate where they will and do business in New Jersey nevertheless.

Therefore, in conclusion I would urge this Committee to report favorably on Senate Bill No. 884 and I would urge this Committee to take every measure possible to expedite the prompt adoption of Senate 884.

Thank you, gentlemen.

ASSEMBLYMAN DICKEY: Are there any questions by members of the Committee? [NO questions].

Thank you, Mr. Bennett.

Mr. McCay? (No response)

Mr. Francis Thomas.

F R A N C I S W . T H O M A S : Mr. Chairman,
my name is Francis W. Thomas. I'm a member of the law
firm of Stryker, Tams and Dill with offices at 744 Broad
Street, Newark, New Jersey. Like Mr. Bennett, our firm has
been connected with corporate law for many, many years. We
represent both nationally listed corporations and closed
corporations. I have had the unfortunate privilege of
participating in some of the corporations that have left
New Jersey, some of the large corporations. Although there
were various elements which were taken into consideration,
in the cases I have participated in it was primarily because
of our archaic corporation laws.

I think the Commissioners have done an excellent job
in revising this law. We went over it with many of our
clients, particularly the preliminary draft, and they were
very complimentary about it. The final draft I have gone
over; there have been many changes, changes that have been
suggested, some of them by committees on which I served,
and I think that has improved the draft from the pre-
liminary draft.

I have a number of clients, bar clients, that have
been following this law. We have been promising them a
modern corporation law for years. A number of them have
advised me that if this law is enacted they think they can
live with it and stay in New Jersey, but they have about
reached the limit of their patience. So I hope, and I urge
the Committee and the Legislature to enact this law as soon

as possible.

Undoubtedly there are going to be some points of the law that are going to have to be amended. Any new law involves that. It is my understanding that the revision of the New York Law and the revision of the Delaware Law involved bills later in which they had amendments, and I would suggest, if possible, that the Commissioners be requested to continue for a period after this bill is enacted and that they consider the amendments. I have some amendments that I would like to see passed but they are nowhere near as important as getting this bill on the books.

I think that is about all I have to say.

ASSEMBLYMAN DICKEY: Thank you very much.

Senator Miller, have you any questions?

SENATOR MILLER: Yes. Mr. Thomas, you indicated that quite a number of your clients had left the State, and you mentioned generally because of the archaic laws which are presently existing. Do you know specifically if there was a particular area of the law that was the motivating factor for their leaving?

MR. THOMAS: It was the uncertainty of the law. Every time they wanted to take a corporate action which they knew other corporations were taking because they were organized in other States, they would come to our office or other offices and they would find, "well, this isn't covered in our act. They might or might not be able to do it, but we think that you have a risk involved," and

there was just too much uncertainty.

One of the very big advantages of this law, as I see it, is they define their terms and they define standards. They protect in this law not only the big corporations - they give them a tool which they can operate and make money for their stockholders. They also give the stockholders the power to restrict the authority of their management and their directors. It gives the small corporations the power to restrict their management. I don't see how anybody could read this act and say that it does not give every phase of corporate law the power to protect themselves - the stockholders and creditors also.

ASSEMBLYMAN DICKEY: Thank you. Are there any questions?

ASSEMBLYMAN HEILMANN: With reference to corporations leaving the State, was that just recently or was it over a period of time?

MR. THOMAS: It has been relatively recent. One of them is the United States Steel Corporation which was, I believe, about four years ago, and one of them was the International Harvester Company, which was I believe about three years ago. I'm just guessing; I might be a little wrong. The current ones -- several corporations, or members of the management have told me that there are groups, and they are pressed within their organizations and they say "Let's go to Delaware. That's the modern corporation law." But these people have been holding them back and saying "We've got a corporation law or we're about to get a corporation law in

New Jersey that will be modern" and have been preventing the corporation from going to Delaware.

Now there's a substantial expense involved in the large corporation moving to another State, and it's to their advantage not to move unless there's a real reason for moving.

ASSEMBLYMAN HEILMANN: Would some of the reasons for moving be because they get inducements on tax ratables?

MR. THOMAS: At the time of the United States Steel and the International Harvester Company there was a tax advantage in going to Delaware. The reason for that tax advantage was principally because our business corporation franchise tax allocated to New Jersey 40 per cent of the intangible property of corporations even though that property had a situs outside of New Jersey. That provision has now been eliminated from our law, so that I believe there is very little tax advantage that I know of at the present time.

But I will go back to answer your question a little more definitely. With my experience, although there was a tax advantage in these corporations, that was only one of the minor items and did not compare with the question of uncertainty they faced under this law.

Thank you.

ASSEMBLYMAN DICKEY: Thank you very much, Mr. Thomas.
Mr. Edwin Large.

E D W I N L A R G E: My name is Edwin Large. I am a member of the law firm of Large, Scammel and Dansizer, 117 Main Street, Flemington.

The records of the Secretary of State's Office list me as the Registered Agent for various corporations which are located in Flemington as to their registered office. Some of these are somewhat significant nationally. These include American Tobacco Company, Borden, Eastman Kodak, International Salt, Liggett and Myers, Quaker Oats, Republic Steel, Standard Oil.

I would like to emphasize, gentlemen, that I have not discussed this hearing with any of these corporations. I am not authorized to speak on behalf of any of these corporations. I am not General Counsel for any of these corporations; I am the Statutory Registered Agent.

I can say for sure that there will be some moves out of the State of New Jersey unless this new act is in effect as of January 1st. I do not mean by that that I have in mind any specific corporation. I have not been advised by any specific corporation of any intention to move, but I do know that the managements are very seriously considering it, the managements of various ones of these.

One thing that I think should be emphasized as of this particular time is this: This is a day of merger and diversification. I think that many of your corporate managements want to be in a position to move if the opportunity presents itself. That means that although they may have nothing of particular interest at this moment

they nevertheless are looking and being looked at and want to be in a position legally to take advantage of an opportunity if it presents itself. And for that reason, I think it's incumbent upon us to create an atmosphere in which these organizations can legitimately operate.

As has been pointed out, if we don't somebody else will; somebody else already has. I think the State of New Jersey is in a position to suffer commercially rather badly if we do not enact the product which these very capable gentlemen have worked so hard to produce.

Thank you.

ASSEMBLYMAN DICKEY: Thank you, Mr. Large.

Are there any questions by members of the Committee?

[No questions]

I will call Mr. Vincent Biunno.

V I N C E N T B I U N N O: Mr. Chairman and Members of the Committee: My name is Vincent Biunno. I am an attorney with offices at 550 Broad Street, Newark. .

Before proceeding with a discussion of position on Senate Bill 884, it may be helpful to describe the program of the group whose views I will express. In December 1967, printed copies of a preliminary draft of the new revision were distributed along with a companion volume of comments by the Commissioners. These two volumes encompassed 348 pages of single space type on letter-size paper. They were carefully reviewed, compared with the existent statutes, pertinent decisions, laws of other States, and like material, including the Model Corporation Act, first published in 1960 by the American Bar Foundation.

As you might imagine, such an undertaking is a considerable one. It was accordingly thought that a more effective review would be possible if a working committee of knowledgeable experts was formed, and an ad hoc group was organized, and I was privileged to serve as its chairman. In that capacity I was mainly responsible for assigning the work, reviewing and analyzing the many detailed comments that we received and reducing them to a form that could be submitted to the Commission as a document that would reflect the combined views of the members in a convenient way.

Referring to the bill itself, it was the unanimous view of the members that the preliminary draft was by and large an excellent piece of work. Of necessity, others would have written it differently, but the Committee concentrated mainly on substance rather than form.

The first conclusion arrived at then was that the preliminary draft was sound and that every effort should be made to help the Commission to complete its final review and make any needed corrections in time to permit introduction when the Legislature reconvened in March after the budget recess. This Committee accordingly completed its work in early February and sent its report to the Commission. This consisted of 10 pages of suggestions going to matters of substance, and four pages of technical corrections. That report was accompanied by a brief statement of policy, some excerpts of which are worth noting here.

The Committee observed, Number 1, that the draft was excellent and made many positive and badly needed improvements.

Number 2, it considered it of the utmost importance that the revision be introduced and enacted promptly. This was based upon the fact that New Jersey had suffered and would continue to suffer a considerable disadvantage in respect to other States having modern corporation laws. While exact details were not available because of the privileged nature of the data, it was known to the Committee that in many cases New Jersey companies had been persuaded not to incorporate in other States, only on the expectation that a modern revision would be enacted soon.

Third, the Commission was urged to limit its changes to such absolute essentials as it might receive and to arrange for introduction of the bill at an early date. The Ad Hoc Committee submitted in its report a total of 33 suggestions and, of these, 64 have been included in the final version now pending in the Senate.

It is urged now that the Legislature act on this bill upon its return in November. The prompt enactment of this bill is important because it is one way of saying, and many other ways are needed, that New Jersey holds a receptive and welcome attitude toward the establishment of new enterprises and the growth of existing ones. The existence of such an attitude and atmosphere is one of the most important factors taken into account when business decisions on questions of this kind are made. It reflects its existence in a great variety of ways, and it is essential that it be given great consideration.

What holds hope of solution to New Jersey's problems is a pattern of laws that encourages a rate of growth of business enterprises at a level that will provide the aggregate revenues needed without raising rates and without adding new taxes. New Jersey needs growth in its economy and in its employment. It needs to build a surplus balance as between productivity and consumption. It needs to attract a higher ratio of business enterprise in relation to total ratables. These things must be accomplished by constructive steps, such as by the enactment of this revision.

There are many other areas that need attention too in this same sense. There are laws which needlessly, and without being obliged to be included, have provisions which create burdens, create uncertainty, create problems, which could be eliminated without in any way affecting adversely the basic purpose of the law. These other areas also need correction. And so I would urge that this present revision be regarded as a first step toward the rebuilding of an atmosphere and attitude of welcome to new business enterprise and to the growth of existing enterprise.

Thank you very much.

ASSRMBLYMAN DICKEY: Senator Miller, do you have a question?

SENATOR MILLER: May I just ask one question in this particular area for my own edification. In your opinion, from your observation in recent years, how would you say that New Jersey has fared with neighboring States and other States competitively - I mean, corporatewise, existing corporations - have they been leaving us or have we been getting an increase in the number of

corporations coming into the State numerically, etc.?

MR. BIUNNO: Well, I would say that the question should be oriented to business in general so as to include other forms of business enterprise. Some of these problems that induce enterprises to locate in one State or another are independent of whether it happens to be a corporation or not. I would say that New Jersey in general has not enjoyed the growth it could have. I know of a number of areas where specific proposals were submitted to help encourage this sort of thing, and I'm sorry to say that those suggestions have fallen on deaf ears.

SENATOR MILLER: Well, your opinion, so far as the over-all act - are there any particular areas that this act would correct or would make more equitable, any specific areas that you think are the major areas that would be a determining factor to corporations making their decision as to whether to stay or to come into this State?

MR. BIUNNO: Well, the major value of this revision is that it provides for flexibility and certainty. The one condition that is most unacceptable in operating a business is uncertainty.

SENATOR MILLER: And this would be a general uncertainty, as I believe Mr. Thomas stated -

MR. BIUNNO: It would be difficult to pick any particular one, because each company has different problems and different interests but when they run into constant uncertainty, this adds to the general atmosphere. They meet other people who have businesses in other States and they discuss these things,

and they exchange views and they soon learn that these problems don't exist elsewhere where modern corporation laws do exist. It is this atmosphere that, I am trying to get across, is important, and the enactment of a modern corporation law is one important way of getting at the construction of this attitude and atmosphere.

SENATOR MILLER: Well, what I'm concerned with or what I'd like to know is: Are there any specific areas where this over-all revision, by correcting the over-all picture, will correct a specific type of problem that a company may be having at the present time?

MR. BIUNNO: Well, it will correct a great many and a specific one would be of value to a particular company.

ASSEMBLYMAN DICKEY: Senator White?

SENATOR WHITE: No questions.

ASSEMBLYMAN DICKEY: Assemblyman Heilmann?

ASSEMBLYMAN HEILMANN: No questions.

ASSEMBLYMAN DICKEY: Are there any other witnesses who wish to testify at this hearing? Will you come forward, please.

W I L L I A M L. K I R C H N E R: Mr. Chairman and Members of the Committee: I am William L. Kirchner, Jr. I reside at New Providence, New Jersey, 29 Pine Court.

ASSEMBLYMAN DICKEY: Are you still a Commissioner of the Waterfront Commission?

MR. KIRCHNER: No, Mr. Chairman.

ASSEMBLYMAN DICKEY: Mr. Kirchner was former counsel to the Governor, as I recall.

MR. KIRCHNER: Yes, sir.

I am here today in my capacity as Chairman of the New Jersey State Bar Association's Corporate Law Section to report to you gentlemen the full and strong support of that section for Senate Bill No. 884, the proposed Title 14A Revision of the New Jersey Statutes dealing with corporations generally.

It is not necessary, I am sure, for me to point out to legislators the importance to our State and its economy of a climate and environment in which business can prosper and to which it will be drawn. It is a fact that concern for the establishment of a strong, vital economic climate - in all its many aspects - is before the Legislature constantly.

Yet the state and content of our Business Corporation Statute is an important aspect of the over-all problem - and it is likewise a fact that we have fallen behind in this respect to many other states, including some of our immediate neighbors. I would observe that we have not always been behind. As a consequence, we have lost in increasing numbers both large and small corporations we were proud to call New Jersey companies - and

lost with them their valuable contribution to New Jersey's economic health. Equally disturbing, governmental and private sector efforts to stimulate the interest of new and foreign corporations in locating in New Jersey have been seriously hampered by the competition of states with modernized and less technically burdensome corporation laws.

Regard for these circumstances prompted the Corporate Law Section to follow closely, since our section was formed in May of 1966 - the work of the Corporation Law Revision Commission. I am pleased to acknowledge that our interest and concern was accorded the fullest possible cooperation by the members of the Commission. Thus, at our winter meeting in November of 1966, we received a preview of the proposed changes for study and comment. For our November 1967 meeting, the Commission provided us with a preliminary draft of the proposed Title 14A, along with comments of the Commission; and at our annual meeting in May 1968, Commissioners Hession and Lowenstein, together with Harold J. Wallum (on behalf of Commissioner Kipp) honored us with an interesting, in depth exposition of the changes contemplated by the Revision and submitted themselves fully to the question of Section members.

For our part, the then Section Chairman, George H. Callahan, appointed a subcommittee headed by Clive S. Cummis to go over the draft submitted and make a report to the Section which would equip it to recommend to the Bar Association an appropriate position during the Legislature's consideration of the Revision.

That subcommittee concluded that the Commission's final work product was one that lawyers could reasonably recommend be adopted by the Legislature and one that would be in the public interest. The subcommittee, therefore, recommended that the proposed act be strongly supported by the Bar.

It is in response to that recommendation that I appear here today to urge your favorable consideration of Senate Bill No. 884. Its enactment will move New Jersey back to the position of leadership with a modernized statute as flexible as any in the country.

Thus equipped to provide new advantages to our existing corporations and new - and entirely valid - inducements to those of other states which might be considering a move, our State will assume a strong competitive posture in the market place for corporate locations. In doing so, we will generate broadened economic activity benefiting directly all our citizens as participants in the State's commercial health and as taxpayers.

I am sure you members of the Committee will agree with me that these are compelling reasons for speedy enactment of this legislation.

Thank you.

ASSEMBLYMAN DICKEY: Are there any questions?

[No questions.] Thank you very much.

Is there anyone else who wishes to testify?

W I N S T O N E . H O B B S : My name is
Winston E. Hobbs, Assistant Vice President of the Corporation
Trust Company. I wrote to the Chairman asking for permission
to appear. I would like to say that the Corporation Trust
Company invented Registered Agents under the name Principal
Agent, Principal Office, here in the State of New Jersey.
Our New Jersey company has operated for many years in New Jersey
furnishing offices for corporations. These offices have been
the base for extended business operations all over the United
States, but unfortunately the very matters which have been
discussed earlier by previous speakers have occurred and the
State of Delaware, as most everyone knows, has enjoyed in
recent years a predominance of interest. This has not meant
that the Corporation Trust Company has lost any interest in
the State of New Jersey. It is our privilege to work with
Mr. Hession and others on the Commission in trying to provide
background material which would assist them in their studies.

I am here for a very specific thing. As I said, we
invented the idea of Registered Agent and Registered Office.
Under the New Jersey law as it presently exists, it is required
that the companies maintain duplicate stock ledgers at the
registered or principal office as it is now called, and I am
here to suggest that the Commission either immediately or in
a technical changes law might want to consider going further
than they have in eliminating this requirement of the law.

This was very carefully considered when Delaware revised
its law a year and a half ago and they determined that the

duplicate ledgers maintained at the principal offices - and when I am speaking of principal offices, I am speaking of registered offices which are merely technical offices and are not to be confused with business offices of the company - actually served no practical purpose. I could illustrate this by a situation at 15 Exchange Place, where roughly a thousand odd corporations call 15 Exchange Place their home and where nineteen companies have fully complied with this law, which is a rather ridiculous percentage. Others do make passing compliance by filing lists, etc., but the practical fact is that nobody ever comes there to see them. And this was true in Delaware. For many years, large sums of money were spent by companies maintaining duplicate records in registered offices, and it was a complete economic waste.

This is an expensive thing. It may not sound very important to you gentlemen, but anything of this nature which has no economic reason represents a drag and would be one more small factor in anyone's making a choice or selection of jurisdiction.

I believe that the Commission did consider abolishing it altogether but they took a half-way position of eliminating corporate persons who were registered on national exchanges or maintained transfer agencies within the State. But this left a gap of persons who might otherwise be required to maintain such records in their registered office and those who neither had transfer agents or were publicly owned, and on the national exchanges.

I would like to propose to you gentlemen that in lieu of maintaining this antiquated provision in your law in modified form that it be either abolished entirely, as Delaware has done, or at a minimum to merely require that the address of the custodian of the stock records be found at the registered office and be required to be maintained there. This is a solution that some of the states, who feel that they should be able to find some information at the registered office, have utilized, and it's a very easy thing to comply with and inexpensive and would not be a burden. It would mean that anyone seeking information at the registered office would be able to find the name of the custodian of the stock books of the corporation.

That concludes what I was particularly interested in. There is one other factor which applies to registered agents and I wish to assure you that we don't have any immediate plans, unless they redevelop the area around 15 Exchange Place in Jersey City and tear down 15 Exchange Place. But there is a good provision which is injected into the law which permits a blanket change of agent. This is of more interest actually to companies which have large numbers of subsidiaries or to substantial law firms who have a number of corporate clients who utilize their offices as the registered or principal office of their corporate clients.

The fee schedule which relates to a blanket change, we feel is burdensome and unrelated to the actual cost that would be incurred by the Office of the Secretary of State in making changes on his records in the event that a law firm or large

company moved its office. Actually it would be to the advantage of the Secretary of State to encourage this type of certificate, since it would cut down on the paper work considerably and would enable him to have up-to-date records as to these addresses, and it's the easiest way to make these changes. So I would propose that instead of the present fee, which is in the law, which roughly approximates as if they were filing separate certificates, a flat fee of \$25, say, for the use of such certificate be incorporated and then a relatively minor charge per company, which could be in the neighborhood of a dollar or something of that sort.

At present in terms of our own operation, a change would run us something like twenty thousand dollars, which is a rather substantial fee to have to pay if we should move.

As I say, this is nothing needed to us and is of much more concern to other persons who will be moving as time goes on, long before we will ever have to move. But this is completely out of focus in terms of what is charged for a similar maneuver in other States, and to this extent would represent an adverse factor in the minds of some persons who might otherwise stay if we reconsidered the law.

Thank you, gentlemen.

ASSEMBLYMAN DICKEY: Thank you. I notice on page 135 of the proposed bill that the filing fee is \$5.00 for a change of address of registered office, and for a change of address of both the registered office and registered agent, the fee is \$10.

MR. HOBBS: That isn't the one that I am speaking of. It's the blanket certificate which enables you to file one certificate, or the registered agent to file one certificate for all the companies he represents as registered agent. Five dollars per company - that's what I'm talking about. You see this includes not only domestic but foreign corporations and we have something over 4,000 of those.

ASSEMBLYMAN DICKEY: Wouldn't that constitute a rather strong burden on the Secretary of State's office to process those changes?

MR. HOBBS: It doesn't cost them \$5.00 per company if you come in a single certificate. As a matter of fact, in most states this is handled informally rather than by a formal certificate and there is no charge. We do on occasion send staff in to help them with the changes that are required in a relatively small office. But I'm not saying there should be no fee per company, but I think \$5.00 per company is high, and something, I would say, in the nature of a dollar per company, recognizing that since you are using a multiple certificate there should be some flat \$25, or something, per certificate to keep people from avoiding the single fee by utilizing something at a dollar per company which might otherwise lead to avoidance of fees.

ASSEMBLYMAN DICKEY: Are there any questions from members of the Committee? [No questions]

MR. LOWENSTEIN: Gentlemen, the first suggestion made by Mr. Hobbs with regard to the keeping of records at the office of the Registered Agent is one that he has called

to the attention of the Commission. As he properly said, we did grant release for the corporations that are listed on the Securities Exchange. We certainly want to consider more fully the suggestion that he has made, and that is that we broaden it even more completely so that there is no need to maintain any list of stockholders at the office of the Registered Agent. But I'm sure the members of the Committee recognize that this should not be done too quickly unless we are satisfied that it is in the public interest.

The absence of any demand on the Corporation Trust Company for lists of that sort may possibly be due to the fact that because that is in the statute at present, corporations voluntarily offer it and there is no need to go to the office of the Registered Agent. But if it is not offered and is not available in New Jersey, there are possibilities that attempts to reach such lists might involve going into the courts of other states.

As a single Commissioner - I don't think I speak necessarily for my fellow-Commissioners on this point - I'm not sure I would like to adopt Mr. Hobbs' recommendation fully.

May I suggest this, though: All three members of the Commission would like to see this be one of the subjects that is reserved for further consideration, not prior to the hopeful adoption of this law, but if we should come back in a year with other changes which we truthfully believe are also of a more limited nature.

ASSEMBLYMAN DICKEY: Mr. Taylor.

D O N A L D P. T A Y L O R: Mr. Chairman, gentlemen, my name is Donald P. Taylor. I am an attorney of this State in the office of the General Counsel of Merck & Company at Rahway, New Jersey.

We have reviewed this bill, which I understand has been some eleven to twelve years in the making. We think this is a good bill. We think it's long overdue. We think it will make New Jersey competitive with other States - notably Delaware and New York, to name two.

I am sure that the Commission will agree that the bill is not a perfect document. These things seldom are. However, we think whatever imperfections there may be in this bill should not mean that the adoption of this bill should be deferred. On the contrary, we think the bill should be passed and any technical changes should be made afterwards to correct anything that seems to be appropriate.

Thank you.

ASSEMBLYMAN DICKEY: Thank you very much, Mr. Taylor.

Are there any questions by members of the Committee?

[No questions]

Are there any other witnesses? Seeing no other witnesses, we want to thank Mr. Lowenstein. Are there any further comments you want to make, Mr. Lowenstein?

MR. LOWENSTEIN: Just one thought, gentlemen. Since the introduction of Senate Bill 884, the Governor has signed into law Chapter 168 of the Laws of 1968, which became

effective July 16, 1968. This was formerly Assembly Bill 463. The subject matter of this bill is incorporated in Senate 884. That being so, there is no need to continue Chapter 168 of the Laws of 1968 beyond the effective date of this act. I would, therefore, suggest that all that is necessary in order to clear the decks and preserve the substance of the new legislation which nobody opposes to my knowledge, is to add to proposed Section 14A:16-3, which is the repealer section on the very last page of the pamphlet, page 138. Just add at the very bottom: "P.L. 1968, c. 168" and that will accomplish that purpose.

ASSEMBLYMAN DICKEY: Are there any other measures adopted by the Legislature at this session that you are aware of, that might conflict with this proposed bill?

MR. LOWENSTEIN: I checked this morning and this is the only one that I am aware of.

SENATOR WHITE: What was that chapter number?

MR. LOWENSTEIN: Chapter 168, of 1968. Assembly 463.

ASSEMBLYMAN DICKEY: Mr. Lowenstein, I believe the Governor did sign another measure that permitted the one-man type of corporation.

MR. LOWENSTEIN: I believe that this was signed earlier.

MR. KIPP: September 3rd, I think.

MR. LOWENSTEIN: Then maybe that ought to be included too. I was not aware that that had been signed.

ASSEMBLYMAN DICKEY: If you will give me a citation on it, we will include that also.

MR. LOWENSTEIN: Thank you.

ASSEMBLYMAN DICKEY: Are there any other witnesses who wish to be heard? If not, again I want to thank those witnesses who have testified and particularly the members of the Study Commission, Mr. Lowenstein, Mr. Kipp, and Mr. Hession, and I will declare the public hearing now closed.

Thank you.

[H E A R I N G C O N C L U D E D]

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