

**NEW JERSEY CORPORATE AND BUSINESS LAW STUDY COMMISSION
2010 ANNUAL REPORT**

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

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

October 1, 2011

EXECUTIVE SUMMARY

Commission Highlights of 2010

- ✓ Enactment into law of legislation proposed by the Commission to eliminate the 10-day waiting period for shareholder actions taken by written consent, where mergers and acquisitions are not involved
- ✓ Commission proposed five pieces of legislation, three of which are in the process of being submitted to the Legislature. The proposed legislation covers an array of business-related issues ranging from proxy access for shareholders to conversion rights for corporations and other entities
- ✓ Commission opened a dialogue with the Director of the Administrative Office of the Courts with respect to the creation of a New Jersey Supreme Court Task Force to explore the need for a Business Court in New Jersey
- ✓ July 12, 2010, edition of the *New Jersey Law Journal* contained an expansive article on the Commission entitled "Getting Down to Business: The Work of the State's Littlest Commission."
- ✓ Commission expanded its support staff with the addition of a third experienced business lawyer, making available to it the advice and counsel of three senior attorneys from two of the nation's leading law firms -- Lowenstein Sandler PC and Day Pitney
- ✓ Throughout the year, the Commission and the membership of the Executive Board of the New Jersey Bar Association Business Law Section engaged in a synergistic exchange of ideas about ways to enhance the business climate of New Jersey, culminating in a joint meeting in December at which a main agenda item was identifying the steps necessary to improve the accessibility of New Jersey courts to commercial litigation

INTRODUCTION

For the New Jersey Corporate and Business Law Study Commission (the "Commission"), 2010 was a year of starts and stops much akin to what was going on in the economy. On the positive side, given our mission of enhancing the business climate in New Jersey, our task was made easier by a federal regulatory environment that has taken note of the need to ease the regulatory burden on business in order to give our economy the boost that it needs. One indication of this emerging federal sensitivity to the chilling effect on industry growth of heavy-handed regulation is a recent D.C. Circuit Court of Appeals decision holding that the U.S. Securities and Exchange Commission (the "S.E.C.") had been "arbitrary and capricious in promulgating Rule 14a-11" to implement new proxy access rules that would have resulted in a new expense to publicly traded companies. Under the ill-fated Rule, listed companies would have been required to include shareholder initiated materials in their annual proxy mailings to their shareholders. Another indication is the recent decision of the Environmental Protection Agency ("EPA") to give our battered auto industry some breathing room in terms of lowered emissions standards and increased fuel efficiency for vehicles.

On the other hand, a negative side effect of a more circumspect federal approach to regulation is that it slows down the work of the Commission which is forced to closely monitor the mood of the State Legislature in order to submit proposed legislation at the most opportune time in terms of having it actively considered by the Legislature. In this vein, the forced S.E.C. withdrawal of Rule 14a-11 has created an ideal environment for the Commission to press for action on the Commission's proposed amendment to the

New Jersey shareholder access statute (N.J.S.A. 14A:5) which was introduced in the New Jersey Senate in December 2010.

Commission and Staff in 2010

Commissioners:

Assembly Appointment – Assemblyman Pat Diegnan

Senate Appointment - Michael T. Rave, Esq.

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

Staff:

Counsel - Peter H. Ehrenberg, Ronald H. Janis and Jeffrey M. Shapiro

Secretary - Ellen S. Knarr

RECOMMENDED LEGISLATION PENDING AND ENACTED INTO LAW

In 2010, a bill recommended by the Commission became law thereby eliminating the 10-day waiting period previously required for shareholders to take action on matters for which they had written consent. As long as the action does not involve mergers and acquisitions, the amended statute (N.J.S.A. 14A:5-6) does away with the waiting period in these written consent situations. This law demonstrates the Commission's success in eliminating procedural hurdles in the statutes that serve no purpose other than to delay taking agreed-upon actions. Moreover, the amendment affected by this law serves to align the New Jersey Business Corporation Act with the Delaware General Corporation Law and the corporate laws of other progressive states that compete with New Jersey in terms of maintaining an attractive legal environment for business.

The Commission drafted and shepherded the following pieces of legislation through both houses, getting them on the Governor's desk for signature in the coming year:

1. **The Corporate Opportunity Doctrine.** Amendment of N.J.S.A. 13A:3-1. (Assembly 3253; Senate 2492). This bill authorizes waiver of the corporate opportunity doctrine. In addition to making New Jersey more competitive with Delaware, the bill enhances the ability of New Jersey corporations to attract high-level entrepreneurial talent to their boards.
2. **Indemnification of Directors and Officers.** Amendment of N.J.S.A. 14A:3-5 (Assembly 3254; Senate 2493). This bill modifies existing limitations on a corporation's ability to indemnify its directors and officers. (The bill was drafted to provide protection for directors and officers who have justifiably relied on being indemnified.)

Work in Progress

The Commission has continued its practice of consulting the Model Business Corporation Act (MBCA) and surveying laws governing business entities in other states, with special emphasis on those laws that tend to attract commercial interests to an area by keeping at a minimum the number of laws that preempt corporate self-determination. Good corporate governance is facilitated by the ability of a corporation to develop its own corporate culture; and to do this, it needs to have a certain level of independence in creating, establishing, and maintaining the desired board/management/shareholder dynamic. Frequently, the Commission finds itself mining the laws of Delaware and New

York for progressive law revisions that are designed to grant corporations autonomy in running their internal affairs. During 2010, the Commission's outreach and research has resulted in drafting the following new legislation:

1. **Amendments to NJ Shareholder Protection Act.** (N.J.S.A. 14A:10A-3-5). The amendments were introduced in the Senate in December (S2494) and pending language changes will be moved for a vote.
2. **Amendments to Shareholder Access Statute** (N.J.S.A. 14A:5). The amendments were introduced in the Senate in December (S2495).
3. **Amendments to Shareholder Derivative Suits Statute** (N.J.S.A. 14A:3-6). Drafting complete and bill pending submission to the Division of Legislative Services.
4. **Amendment to Remote Participation Statute** N.J.S.A. 14A:5-2 and 5-4). Drafting complete and bill pending submission to the Division of Legislative Services.
5. **Amendment to Conversion Statute.** This bill will permit conversion of corporations and other entities into different entities without the need to go through the merger process. Drafting complete and bill pending submission to the Division of Legislative Services.

COMMISSION NETWORKING ACTIVITIES

The Commission has established a working relationship with the Business Law Section of the New Jersey State Bar Association. Throughout the year, the

Commission and members of the Executive Committee of the Business Law Section have exchanged ideas on the advisability of New Jersey creating a business law court. At a joint meeting of the Commission and the Board of Directors of the Business Law Section in December 2010, a conversation evolved about administrative alternatives to creating a designated business law court. Many of the seasoned litigators who participated in this conversation noted the wealth of business acumen that exists among Equity judges in New Jersey and speculated about an administrative reassignment of these judges to a Special Part of the Superior Court devoted solely to commercial matters.

The idea of a Supreme Court Task Force to investigate both the administrative and legislative alternatives for creating a business court was discussed at the December joint meeting. In this vein, the Commission made contact with the Director of the Administrative Office of the Courts and is scheduled to meet with him and members of his staff early next year.

Finally, the Commission is taking steps to increase its visibility in the New Jersey legal community. An important step towards making the work of the Commission known was an article that appeared in the *New Jersey Law Journal* in July 2010 ("Getting Down to Business: The Work of State's Littlest Commission"; 201 N.J.L.J. 214, at 38 [July 12, 2010]). The article detailed the history of the Commission from its creation and set forth the legislative accomplishments of the Commission during 2009 when six of the bills it proposed became law.

CONCLUSION


During 2010, the Commission has continued its steady gait towards enhancing the business environment in New Jersey. It is very optimistic that the lines of communication that it has opened up with leaders of the Business Bar and the Administrative Office of the Courts will strengthen its ability to establish New Jersey as the friendliest state for business between the Pacific and Atlantic Oceans.

Respectfully submitted,

Asm. Patrick Diegnan, Commissioner



Michael T. Rave, Commissioner



Gwendolyn Y. Alexis, Commissioner