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STATE OF NEW JERSEY

REPORT OF

CORPORATION LAW REVISION COMMISSION

and

COMMISSIONERS' COMMENTS

to

PROPOSED REVISION

of the

GENERAL CORPORATION LAW

of

NEW JERSEY

(ASSEMBLY, No. 4264)
(ASSEMBLY, No. 4266)
(ASSEMBLY, No. 4267)

February 1, 1986*

*with changes through March 1, 1987

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FINAL REPORT
OF THE
CORPORATION LAW REVISION COMMISSION

February 1, 1986*

To the Governor and the Members of the New Jersey Legislature:

This is the final report of the Corporation Law Revision Commission. The Commission is pleased to annex to this report proposed amendments to the "New Jersey Business Corporation Act" (Title 14A of the New Jersey Statutes), affecting 58 sections of the Act and proposing 12 new sections, a repealer section and an effective date section, together with the Commission's Comments regarding the proposed changes or additions. In addition, the Commission has prepared and included with this report a proposed complete revision of Chapter 1 of Title 56 of the Revised Statutes, Business and Partnership Names, as a companion bill. Although that statute does not fall precisely within its mandate, the Commission believes that the provisions of R.S. 56:1-1 *et seq.* should be made consistent with the comparable and related provisions of N.J.S. 14A:2-2.1 (Corporate Tradenames).

Background

The original Corporation Law Revision Commission was created in 1958 to modernize New Jersey's corporation laws, P.L. 1958, c. 10 (C. 1:14-1 *et seq.*). That Commission submitted the proposed "New Jersey Business Corporation Act" to the Governor and members of the Legislature in accordance with its mandate. That Act was enacted as Chapter 350 of the Laws of 1968 and became effective on January 1, 1969. The Commission thereafter submitted several proposed amendments to Title 14A, all of which were adopted. The present Commission was created by an amendment to Chapter 14 of Title 1 of the Revised Statutes, P.L. 1977, c. 66 (C. 1:14-9 *et seq.*), which reconstituted the Corporation Law Revision Commission with the same mandate as the original Commission:

> It shall be the duty of the Corporation Law Revision Commission to study and prepare a revision or revisions of the statute laws of this State relating to business corporations as stated in Title 14 of the Revised Statutes and, if deemed advisable by the commission, as stated in other titles of the Revised Statutes, and the statutes enacted prior and subsequent thereto relating to business corporations, for enactment by the Legislature, if it shall so determine. It shall be the purpose of such revision or revisions to modernize the corporation laws of this State so as to embody principles and procedures representing the best in modern American statutory law applicable to business corporations in general, to eliminate ambiguities, outmoded procedures

*with changes through March 1, 1987

and conflicting, overlapping and redundant provisions, and to present statutes applicable to business corporations, in a logical, clear and concise manner.

The Commission has had approximately 60 all-day meetings. At those meetings the Commission considered several hundred proposals for amendments to the "New Jersey Business Corporation Act" from members of the Bar of this State and several other states, as well as from members of the academic community. Nearly all of the suggestions were thoughtful and constructive and greatly assisted the Commission. In addition, the Commission paid careful attention to the recent revision and amendments to the Model Business Corporation Act and to the laws of other states.

In December 1983, the Commission circulated an exposure draft of proposed amendments and thereafter received a number of comments from members of the Bar of this State, other states, and counsel to several major corporations domiciled in New Jersey. The comprehensive comments from the Corporate and Business Law Section of the New Jersey State Bar Association were particularly helpful to the Commission. The Commission made a number of changes to the proposed revisions in the exposure draft in response to those comments.

Proposed Amendments

Many of the proposed amendments are of a housekeeping nature, eliminating ambiguities or clarifying or refining existing provisions in Title 14A of the New Jersey Statutes. The Commissioners' Comments accompanying each section generally describe the changes, which need not be repeated here. Two proposed changes are, however, worthy of special mention: first, a provision has been added, permitting directors to have two or more votes (N.J.S. 14A:6-7.1); and, second, the archaic notion of stated capital and the related concept of par value have been eliminated, as reflected in a number of proposed changes to Chapter 7, particularly added sections N.J.S. 14A:7-8.1 and N.J.S. 14A:7-14.1. The latter proposal is consistent with recent amendments to the Model Business Corporation Act (Model B.C.A.). See "Changes in the Model Business Corporation Act—Amendments to Financial Provisions," 34 Bus. Lawyer 1867 (1979). See also Model B.C.A. (1984) §6.40.

The Commission did not review or comment upon "The Professional Service Corporation Act," P.L. 1969, c. 232 (C. 14A:17-1 *et seq.*) or the "Corporation Business Activities Reporting Act," P.L. 1973, c. 171 (C. 14A:13-14 *et seq.*). Neither is a part of the "New Jersey Business Corporation Act," although each has been codified within Title 14A of the New Jersey Statutes. In addition, the Commission did not effect any revisions to Chapter 14 of Title 14A of the New Jersey Statutes (Insolvency, Receivers and Reorganizations) because of uncertainty with respect to the status of the new federal bankruptcy law.

Acknowledgment

The Commission acknowledges the invaluable assistance in the preparation of these comprehensive proposed amendments of Ronald H. Janis, Esq., Secretary to the Commission, and of William F. Campbell, Esq., a consultant to the Commission. Many other attorneys from New Jersey and elsewhere provided the Commission with a number of valuable comments.

JOHN R. MACKAY 2ND, *CHAIRMAN*
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COMMISSIONERS' NOTE

Various citations to our statutes are cited herein as "N.J.S.A.," "N.J.S.," "R.S.," or by "C." number. The "N.J.S.," "R.S.," and "C." number citation may be read interchangeably as "N.J.S.A."

PART I

COMMISSIONERS' COMMENTS TO PROPOSED REVISION OF "NEW JERSEY BUSINESS CORPORATION ACT" (Assembly, No. 4267 of 1987)

Source or Reference

N.J.S. 14A:1-2

COMMISSIONERS' COMMENT TO 14A:1-2.1

Section 14A:1-2 has been repealed, rewritten and re-enacted as Section 14A:1-2.1 to provide clarity and to avoid internal reference problems.

The definitions of capital surplus, earned surplus, insolvent, net assets, stated capital and surplus have been deleted. Chapter 7 has been completely revised to eliminate the concept of stated capital and consequently these definitions are now superfluous. The definition of treasury shares has been modified to reflect the optional status of such shares.

This section has been further amended by adding new definitions of the word "act" and the word "resolution." The definition of the word "act" has been included to ensure that the use of that term in an amendatory or supplementary provision will be construed to refer to the entire "New Jersey Business Corporation Act" and not merely to the amendatory or supplementary act itself, unless the context otherwise requires. The addition of a definition of "resolution" was included to eliminate any inference that the use of the word "resolution" in Title 14A mandates the adoption of a formal resolution, rather than merely indicating that the action was authorized or approved by the board. The authorization or approval of the action should, of course, be reflected either in minutes or in an appropriate written consent.

COMMISSIONERS' COMMENT TO 14A:1-6

A new subsection 14A:1-6(7) and revised paragraph 14A:1-6(1)(b) provide that the effective filing date for recorded documents relates back to the time of their receipt by the Secretary of State. Under former practice, documents were stamped, dated and deemed filed only when the Secretary of State processed the documents. Consequently, because of an occasional backlog in the Secretary of State's office the effective date of an incorporation, merger or other corporate action had been delayed for a few days or sometimes up to several weeks. While the Commission hopes that the Secretary of State will continue to keep such backlogs at a minimum, these amendments alleviate some of the problems caused by any resulting delay.

The changes were accomplished by adding a new subsection, 14A:1-6(7), to require the Secretary of State to stamp documents with the date and time of their receipt and by revising paragraph 14A:1-6(1)(b) to provide that the date and time of the "Received" stamp will be deemed to be the filing date when any document is accepted for filing. If the document is rejected by the Secretary of State for any reason, the filing date will relate back only to the time the corrected document is returned to the Secretary of State. Under subsection 14A:1-6(7) documents will be given a second "Received" stamp if the original is "resubmitted" after having been rejected. Under paragraph 14A:1-6(1)(b) the latest "Received" stamp will be deemed the filing date for any document that is stamped more than once. However, if a document is erroneously rejected or if for any other reason the latest "Received" stamp inaccurately reflects the "Filed" date, the Secretary of State shall, upon request, insert the correct "Filed" date.

Paragraph 14A:1-6(1)(c) has been revised to extend from 30 to 90 days the maximum delayed effective date for any filed document which effectuates a corporate change. An identical change has been made in other sections which permit a delayed effective date for a specific document. See subsections 14A:2-7(2), 14A:9-4(5), 14A:9-5(6), 14A:10-4.1(2) and 14A:10-5.1(4). In requesting a delayed effective date, the person filing the document may request a time of day, as well as a date, when the document shall become effective, and the document will become effective at the time and date so specified. The Commission is aware that sections of the statute use the term "date" or "time" with respect to delayed effective periods. Under this revision, as under prior law, a person filing a document always has the option of specifying both a day and a time.

Subsection 14A:1-6(3) was deleted because it was no longer necessary.

Subsection 14A:1-6(6) makes it clear that a filed or published document may list either the home or business address of an individual in response to any requirement that an address be provided. See Sections 14A:2-3(2), 14A:2-7(1)(g), 14A:2-7(1)(i), 14A:4-5(1)(c), 14A:9-5(4)(a), 14A:13-8(1)(d) and 14A:13-9(1). This provision previously was contained in subsection 14A:4-2(4). That subsection has now been deleted. The change in location of this provision was made because conceptually this provision belongs in Chapter 1.

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COMMISSIONERS' COMMENT TO 14A:1-8

Section 14A:1-8 has been amended to specify that any notice required or permitted to be served by mail can be served by personal delivery to the person to whom it is directed. See, for example, Sections 14A:2-8 and 14A:4-4(2).

Source or Reference

P.L. 1982, c. 150, ss.3, 4 (C. 52:16A-37, C. 52:16A-38)

COMMISSIONERS' COMMENT TO 14A:1-9

A new subsection 14A:1-9(3) has been added to cross-refer to Sections 3 and 4 of P.L. 1982, c. 150 (C. 52:16A-37 and C. 52:16A-38). These sections, the language of which was originally drafted by the Commission for inclusion in Section 14A:1-9, provide for expedited telephone service and over-the-counter service. The Commission believed that since these provisions had been enacted in Title 52, it made little sense to transfer them to Title 14A. The Commission believed a statutory cross-reference to these provisions was sufficient to alert practitioners to their existence.

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COMMISSIONERS' COMMENT TO 14A:1-10

A new section has been added which permits the Secretary of State to accept for filing documents transmitted by means of a telecopier. The section is intended to extend the benefits of modern technology to the filing of corporate documents. However, the section is permissive: it merely authorizes the Secretary of State to establish a system for telecopy filings; it does not obligate the Secretary of State to do so. The section will be implemented when it is financially and administratively feasible for the Secretary of State to set up a telecopy system.

COMMISSIONERS' COMMENT TO 14A:1-11

This new section provides for the preclearance of documents to be filed with the Secretary of State. Under former practice, the Secretary of State declined to review documents prior to their official filing because there was no statutory authority to do so. This new section requires the Secretary of State to preclear documents if requested to do so and authorizes the Secretary of State to charge a fee for this service. The fee is set forth in Chapter 15.

Model B.C.A.	§4.01(a)(
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Source or Reference

Model B.C.A.	§4.01(a)(1); §4.01(b)(rev. 1984)
Del. G.C.L.	§102(a)(1)
N.Y. B.C.L.	§301(a)(1)

COMMISSIONERS' COMMENT TO 14A:2-2

As revised, paragraph 14A:2-2(1)(b) authorizes the Secretary of State to adopt the modern practice in rejecting names only if they will be confused for administrative purposes in the Secretary of State's office. This practice is identical to the practice in Delaware and the language of the revision is derived from the Delaware statute. See Del. G.C.L., §102(a)(1). The revision to the Model Business Corporation Act also adopted the Delaware language. See Model B.C.A. (1984 revision), §4.01(b). Corporations are empowered to use trade names by statute and by common law without limitation as to whether such trade names are similar to other filed names. Consequently, the only meaningful test for the Secretary of State's office with respect to rejecting a corporate name is the test of whether the name is distinguishable upon the Secretary of State's records. Corporations still have the option of enjoining someone for an unfair trade practice in using an identical or similar name. However, the private parties will now resolve such disputes in the courts, instead of in the Secretary of State's office, which never had the administrative facilities to undertake such a task. In order to avoid bureaucratic disputes over whether names are distinguishable for administrative purposes, the Secretary of State should publicly disseminate guidelines on this issue.

To parallel the recent revisions to Title 15A, the revision requires that names of for profit and non-profit corporations be distinguished.

Paragraph 14A:2-2(1)(b) also makes it clear that this section grants no proprietary rights to a corporate name. The prior language prohibited the use of a name that was "the same as, or confusingly similar to, another corporate name." Because of this language, practitioners often regarded the statute and the practices of the Secretary of State in rejecting similar names, as giving a corporation a proprietary right to its name. However, protection for proprietary rights to a corporate name is afforded elsewhere, most importantly by federal trademark law. See, e.g., Gottlieb, "Corporate Name 'Clearance'—Potential Trademark Trouble Spot," 33 *Bus. Law.* 2263 (1978).

New paragraph 14A:2-2(1)(d) retains the basic concepts embodied in prior law, requiring a corporate name to indicate that the entity is a corporation, but brings New Jersey law into line with the provisions of §4.01(a)(1) of the Model Business Corporation Act. Prior law mandated that a corporate name include "a New Jersey corporation," "incorporated," "inc.," "corporation," or "corp." It did not permit the use in a corporate name of the word "company" or "limited" or the abbreviations for either. The Model Business Corporation Act and this revision to paragraph 14A:2-2(1)(d) permit the use of these forms of corporate identification. The official Comment to §4.01 of the Model Business Corporation Act states: "While the words

'company' and 'limited' are commonly used by partnerships or limited partnerships, and therefore do not uniquely indicate corporations, their use is widespread and is continued since it creates no discernible harm." The revision also permits the use of words or abbreviations in another language that connote corporateness. Both the Delaware statute and the Model Business Corporation Act so provide. See Del. G.C.L. §102(a)(1); Model B.C.A. (1984 revision) §4.01(a)(1).

New paragraph 14A:2-2(1)(d) expands on prior law insofar as it brings foreign corporations within the requirement that they have the necessary words indicating corporate identification in their names. The equality of treatment for foreign and domestic corporations which was lacking in Section one of P.L. 1977, c. 59 (C. 14A:2-2a), being repealed in this Act, was a logical extension in the Commission's view. If a foreign corporation was incorporated without such words, it may add such words for use in New Jersey when it qualifies to do business in this State. The language and the concept with regard to permitting foreign corporations to qualify by adopting necessary words for use in this State are taken from the New York Business Corporation Law. See N.Y. B.C.L. §301(a)(1).

Paragraph 14A:2-2(2)(a) has been amended to simplify the language which specifies that no existing domestic corporation or presently qualified foreign corporation is obligated to change its name to conform to this amendment. The last sentence of this paragraph was deleted only because it is surplusage.

Subsection 14A:2-2(3) has been amended to change the word "fictitious" to "assumed" in response to criticism that the word "fictitious" implies bad motive. See the Comment to Section 14A:2-2.1. The Commission was of the view that "assumed" provides a more accurate description of the substitute name.

Subsection 14A:2-2(4) has been amended to reduce the time during which the name of a dissolved corporation is "reserved." The Commission was of the view that a longer period is unnecessary. If for some reason a dissolved corporation wants to protect its name further, it would be possible to reserve the name as permitted in Section 14A:2-3.

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COMMISSIONERS' COMMENT TO P.L. 1977, c. 59 (C. 14A:2-2a, C. 14A:2-2b)

P.L. 1977, c. 59 (C. 14A:2-2a and C. 14A:2-2b) is being repealed since the contents of these sections are now contained in paragraphs 14A:2-2(1)(d) and 14A:2-2(2)(a).

COMMISSIONERS' COMMENT TO 14A:2-2.1

The terminology of Section 14A:2-2.1 has been revised. Under prior law a business name used by a corporation, other than its actual corporate name, was referred to as a "fictitious" name. That word suggested to some persons that the use of such a name was false or misleading. To correct this, the terminology has been changed to "trade" name. A similar change was also made in subsection 14A:2-2(3) where the term "fictitious" name had also been applied to a name adopted for use in this State by a foreign corporation when its actual corporate name was unavailable. The terminology in subsection 14A:2-2(3) has been changed to "assumed" name.

Subsection 14A:2-2.1(3) has been revised to require the Secretary of State to notify a corporation using a trade name of the expiration of the registration of the name. The Secretary of State already does this, although presently not required to do so.

Subsection 14A:2-2.1(3) also has been revised to permit a corporation to terminate a trade name registration if the corporation ceases to use the trade name prior to the expiration of the five-year term of the registration, or of any renewal. The Commission was of the opinion that termination certificates should be permitted in order to give corporations an opportunity to provide public notice of the cessation of the use of a trade name. The filing is permissive, not mandatory. As stated in paragraph 14A:2-2.1(4)(a), the registration creates no rights to use the name; therefore, there is no obligation to terminate the registration. Since the registration creates no rights, the Commission rejected a proposal to permit assignments of the registration.

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COMMISSIONERS' COMMENT TO 14A:2-3

The Commission revised Section 14A:2-3 to provide a procedure for the renewal of reserved names. Heretofore there was no procedure for the renewal of reserved names, although there is a procedure for the renewal of registered names under Section 14A:2-5. The Commission believed the inconsistency should be remedied.

COMMISSIONERS' COMMENT TO 14A:2-7

Subsection 14A:2-7(2) has been changed to extend the maximum delayed effective date from 30 to 90 days and reflects similar changes made to parallel provisions, as explained in the Comment to revised Section 14A:1-6.

Paragraph 14A:2-7(1)(c) has been amended to delete unnecessary references to stated capital, a concept which has been eliminated. See Section 14A:7-8.1.

New subsection 14A:2-7(3) is carried forward as a result of the enactment of P.L. 1987, c. 35 on February 4, 1987.

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COMMISSIONERS' COMMENT TO 14A:3-3

Section 14A:3-3 has been amended to require a unanimous vote of all shareholders entitled to vote to authorize a corporate guarantee which is not in furtherance of the direct or indirect business interests of the corporation. Prior law required a two-thirds vote. New subsection 14A:3-3(2) has been added to make it clear on the face of the statute that this section does not operate to diminish whatever rights the creditors of the corporation might have, particularly those rights granted by the federal bankruptcy laws. See Rosenberg, "Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware," 125 *U.Pa.L.Rev.* 235 (1976).

The Commission substituted the words "direct or indirect business interests" for the words "corporate purposes" to make it clear that this language is directed toward actual business interests of the corporation and not the concept of corporate purposes, which because of historical usage brings to mind the purposes clause of the certificate of incorporation. See Note "The Corporate Guaranty Revisited: Upstream, Downstream, and Beyond—A Statutory Approach." 32 *Rutgers L. Rev.* 312 (1979). The qualifying phrase "or those of any subsidiary, joint venture or other enterprise in which it has an interest" has been eliminated as unnecessary because of the inclusion of the language "indirect" business interests.

The vote required to authorize a guaranty which does not directly or indirectly further the business interests of a corporation was changed from two-thirds to unanimous in order to ensure that this statutory provision is not construed to permit a controlling shareholder to use the power granted in this section for his personal benefit over the protests of minority shareholders. The Commission determined not to grant voting rights to non-voting shareholders when the corporation considers whether to authorize such a guaranty.

This section was originally included in the "New Jersey Business Corporation Act" to facilitate corporate credit transactions. Its purpose was to enable banks and other lenders to be reasonably confident of the legality of a corporate guaranty if the prescribed steps were taken. As the Comment to the original section noted, it was not intended to deprive minority shareholders of rights they otherwise would have, nor to interfere with the law of fraudulent conveyances or other statutory or common law provisions or doctrines protecting creditors' rights. The Commission believes that these amendments are consistent with that original intent.

The Commission considered at length the fact that banks and other lenders have historically been concerned about the validity of corporate guaranties. Paragraph 14A:3-1(1)(g) expressly empowers corporations to give guaranties. Consequently, a good faith determination by the board of directors that a proposed guaranty is in furtherance of the direct or indirect business interests of the corporation should enjoy the presumption of validity provided by the business judgment rule. Resort to Section 14A:3-3 should not be necessary to validate a guaranty which the board determines in good faith is in furtherance of the corporation's business interests.

COMMISSIONERS' COMMENT TO 14A:3-4

Subsection 14A:3-4(1) has been amended to state clearly that a corporation may contribute property of any nature for a charitable purpose. Prior law permitted the contribution of "sums" which many practitioners interpreted to mean that a corporation could only make cash contributions. Whether or not that interpretation was correct, a corporation should not be restricted in the manner of making charitable contributions.

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COMMISSIONERS' COMMENT TO 14A:3-5

This section has been amended to add a new definitional paragraph, 14A:3-5(1)(f), to make it clear that indemnification is applicable to corporate agents acting on behalf of employee benefit plans and that indemnification may extend to excise taxes imposed upon such persons pursuant to the provisions of law applicable to employee benefit plans, provided such persons meet the standards prescribed by this section.

The recent amendments to Section 14A:3-5 effected by P.L. 1987, c. 35 on February 4, 1987 are included.

COMMISSIONERS' COMMENT TO 14A:4-2

Subsection 14A:4-2(4) was deleted because the substance of the provisions now appears in subsection 14A:1-6(6), which the Commission believed was a more appropriate place for this provision.

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COMMISSIONERS' COMMENT TO 14A:4-4

Subsection 14A:4-4(2) has been amended to provide that the notice of resignation required to be given by a registered agent shall advise the corporation of the penalties which will be imposed if the corporation fails to appoint a new registered agent. The Commission is concerned that corporations sometimes do not appoint a new registered agent after the resignation of a former agent and it believes that a specific notice from the resigning registered agent that a substantial penalty will be imposed may reduce this problem.

A new subsection 14A:4-4(4) provides that the notice of penalty given by a resigning agent pursuant to subsection 14A:4-4(2) shall have the same force and effect, and be in lieu of, the written demand required to be made upon the corporation by the Secretary of State pursuant to subsection 14A:4-3(4). Consequently, the corporation would be subject to a $200.00 penalty as provided in subsection 14A:4-3(4) if it did not appoint a new registered agent within 30 days after the notice of resignation.

The resignation notice may be delivered by hand. See Section 14A:1-8.

Source or Reference

R.S. 54:11-2

COMMISSIONERS' COMMENT TO 14A:4-5

Subsection 14A:4-5(1) has been amended so that both domestic corporations and foreign corporations will be required to provide the address of their main business or headquarters office. The Commission believes that this information will assist the Secretary of State in communicating with a corporation when its registered agent has died, resigned, or otherwise ceased to function. For the same reason, any corporation which has offices in New Jersey will have to list its principal New Jersey office on the annual report.

Paragraph 14A:4-5(1)(d) has been deleted because it is no longer useful to the Secretary of State. Under prior law, the annual report was triggered by the corporation's annual meeting. Since this is no longer true, requesting the date of the annual meeting is an anachronism.

Subsections 14A:4-5(5) and 14A:4-5(6) have been added to provide the Secretary of State with the authority to revoke the certificate of incorporation of a domestic corporation or certificate of authority of a foreign corporation if the corporation does not file annual reports for two consecutive years. The Commission believes this penalty will provide the Secretary of State with a more meaningful sanction for failures to file annual reports. Any delinquent corporation will receive 30 days' notice before its certificate will be revoked. These provisions are based upon parallel provisions in R.S. 54:11-2 which requires the Secretary of State to revoke a corporation's certificate of incorporation or certificate of authority for a failure to pay franchise taxes.

Subsection 14A:4-5(7) has been added to provide a procedure for reinstating a corporation, the certificate of incorporation or certificate of authority of which has been revoked for a failure to file annual reports. The corporation will be reinstated if it pays all fees and fines and no cause exists for revoking the corporation's certificate of incorporation or certificate of authority under the State's taxing statutes.

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Source or Reference

Del. G.C.L. §219(a)

COMMISSIONERS' COMMENT TO 14A:5-8

Subsection 14A:5-8(1) has been amended to reflect technological advances by permitting a shareholder list to be reproduced by means of microfilm, a visual display terminal connected to the transfer agent's data processing equipment, or any other equipment permitting a visual display. The purpose of this change was to permit large corporations to eliminate the need to reproduce expensive and unnecessary lists at a shareholders' meeting.

As a result of this amendment, several other changes were also made. First, the requirement for a "certification" of the shareholder list was eliminated for various reasons, including the difficulty of certifying a computerized data base. Furthermore, the certification was viewed as an unnecessary document; by way of example, the Delaware statute does not require it. See Del. G.C.L. §219(a). Second, since there may be mechanical or electrical problems with a visual display terminal during a meeting causing it to temporarily become inoperative, the requirement that the list be available "during the whole time" was changed to require only that it be available for reasonable periods.

This subsection has also been amended to provide that a shareholder's right of inspection of the voting list at any meeting of shareholders is subject to the requirement of a proper purpose. The Commission was concerned that access to voting lists might be abused by persons seeking commercial mailing lists (or for some other improper purpose) and believed that the privacy of shareholders should be protected wherever possible from intrusions unrelated to proper corporate functioning.

COMMISSIONERS' COMMENT TO 14A:5-12

Subsection 14A:5-12(1) has been revised to clarify existing law by specifying that the super-majority voting provisions may be applied to the election of directors. The Commission was concerned that subsection 14A:5-11(1) might have been misconstrued to imply that the super-majority voting provisions may not be used with respect to the election of directors, despite the language in the introductory clause of subsection 14A:5-24(3).

Subsection 14A:5-12(1) has also been changed to make it clear that a unanimous vote requirement is proper. The Commission's revisions in this regard do not change preexisting law.

Model B.C.A. §7.21(b)(
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Source or Reference

Model B.C.A. §7.21(b)(rev. 1984)
Del. G.C.L. §160(c)

COMMISSIONERS' COMMENT TO 14A:5-13

Section 14A:5-13 has been revised to eliminate the reference to treasury shares. It is expected that the revisions to Sections 14A:7-16 and 14A:7-18 will limit the use of treasury shares, except, for example, when a corporation reacquires its shares and the selling shareholder retains a security interest in the shares as collateral for the corporation's obligation to pay the purchase price. In such a situation, the corporation could not vote the shares, although if the parties so provided, the selling shareholder or some other person may vote the shares.

The Commission retained the prohibition which bars the voting of shares held by a domestic or foreign corporation that is itself controlled by the corporation issuing the shares. The purpose of the prohibition is to prevent management from using a corporate investment to perpetuate itself in power. However, New Jersey law has been changed from the "plurality" test to the "majority" test because of the uncertainty involved in determining a "plurality." The Delaware statute and the Model Business Corporation Act apply the circular holdings prohibition only against "majority" owned corporations. Del. G.C.L. §160(c); Model B.C.A. (1984 revision) §7.21(b).

Source or Reference

Model B.C.A.	§7.22(d)(rev. 1984)
N.Y. B.C.L.	§609
Del. G.C.L.	§212

COMMISSIONERS' COMMENT TO 14A:5-19

The amendments to subsection 14A:5-19(1) eliminate the three-year limitation on the duration of a proxy. The three-year rule conflicted with the law in effect in almost all other jurisdictions. As under prior law, a proxy which does not expressly state a longer duration shall be valid only for 11 months.

The Commission added in subsection 14A:5-19(1) the statement that the grant of a later proxy revokes all earlier revocable proxies. Although this rule merely restates existing common law, the Commission believed it was useful for the rule to be expressly stated in the statute. The Commission also added the common-law concept that when a shareholder is present at a meeting and votes by a written ballot, this action revokes any proxy. Because of advances in technology, the Commission also expanded the concept of a telegram proxy to include any means of electronic communication which results in a writing.

The Commission was of the view that the case law interpreting "a proxy coupled with an interest" has remained uncertain and on occasion confusing. New subsection 14A:5-19(3) makes it clear that a proxy may be coupled with an interest in either the shares themselves or in the corporation and thereby reflects general corporate law and Delaware law. See Del. G.C.L. §212. This new subsection also identifies five specific instances where the grant of an irrevocable proxy would be appropriate. This listing is drawn largely from §609 of the New York Business Corporation Law, which is similar to §7.22(d) of the Model Business Corporation Act (1984 revision).

New subsection 14A:5-19(4) deals with the problem of a transfer of shares after the grant of an irrevocable proxy. A holder without actual knowledge of the existence of the irrevocable proxy may revoke it unless the existence of the irrevocable proxy had been noted on the certificate. This principle merely reiterates existing law. *Cf.* subsection 14A:7-12(2).

The Commission notes that a voting agreement pursuant to subsection 14A:5-21(1) does not necessarily create an irrevocable proxy; but such a result now may be accomplished by an additional provision in the voting agreement requiring the grant of an irrevocable proxy otherwise valid under this section.

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COMMISSIONERS' COMMENT TO 14A:5-21

Subsection 14A:5-21(1) has been amended to provide that voting agreements shall be specifically enforceable. This provision has been added to reject expressly the holding in the Delaware case, *Ringling Brothers-Barnum and Bailey Combined Shows v. Ringling*, 53 A.2d. 441 (Del.Sup.Ct. 1947). The Commission does not believe that this new sentence changes existing New Jersey law, but felt that its addition would provide greater certainty.

The Commission considered and rejected a proposal that subsection 14A:5-21(2) be amended to state explicitly that the provisions of this subsection do not constitute the exclusive method for deviation from statutory norms with respect to management by the board. The Commission was satisfied that the language of paragraph 14A:1-1(3)(b) made such a change unnecessary. That subsection provides that one of the underlying purposes of the Act is

> "to provide a general corporate form for the conduct of lawful business with such variations and modifications from the form so provided as the interested parties in any corporation may agree upon, subject only to over-riding interests of this State and of third parties. . . ."

This statutory provision, adopted in 1968 as part of original Title 14A, is consistent with well-established New Jersey equitable principles. See, e.g., *Whitfield v. Kern*, 122 N.J. Eq. 332, 346-47 (E. & A. 1937); *Breslin v. Fries-Breslin Co.*, 70 N.J.L. 274, 281-83 (E. & A. 1904); *Martland Holding Co. v. Egg Harbor Commercial Bank*, 123 N.J. Eq. 117, 122 (Ch. 1938).

COMMISSIONERS' COMMENT TO 14A:5-28

Section 14A:5-28 was amended to make it clear that the shareholder's right of access to the shareholders list is conditioned upon his having a proper purpose. The Commission was particularly concerned about a shareholder obtaining a mailing list to sell it or use it for a purpose otherwise unrelated to the business of the corporation.

The Commission also amended this section to modify the rule that a New Jersey corporation must make its books and records available in New Jersey. The Commission believed that it would not unduly burden a shareholder to require him to journey to any place where the corporation regularly keeps a copy of its books and records, provided these books and records are kept at either its principal office, its registered office, or the office of its transfer agent. However, the Commission recognized the need not to restrict a Court's power to order the production of corporate records in this State.

The Commission also amended this section to permit corporate records to be in "readable" form so that a visual display by a computer terminal would be sufficient.

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Source or Reference

R.S. 14:8-17

COMMISSIONERS' COMMENT TO 14A:5-29

Section 14A:5-29 has been revised to codify the preemptive rights which are applicable to shareholders of pre-1969 corporations.

Subsection 14A:5-29(3) now sets forth the normal preemptive rights of shareholders in pre-1969 corporations, as well as post-1969 corporations which elect to have preemptive rights.

Prior to this revision, the preemptive rights of shareholders of pre-1969 corporations were set forth in R.S. 14:8-17, which had been repealed. The Commission was of the view that the rights contained in R.S. 14:8-17 were different in only minor or technical respects from the rights spelled out in subsection (3) with one exception: under subsection 14A:5-29(3) shareholders have preemptive rights only with respect to the issuance of additional shares of the same class, but under R.S. 14:8-17 preferred shareholders also had preemptive rights with respect to the issuance of any class of senior preferred stock. Since under paragraph 14A:9-3(1)(d) holders of any class of stock are entitled to a mandatory class vote upon the creation of a new class of stock with senior rights or preferences, the Commission was of the view that the impact of this change upon the holders of preferred stock would be minimal.

The language changes in new subsections 14A:5-29(1) and 14A:5-29(2) succinctly reflect the New Jersey law with regard to preemptive rights, which is that the denial of preemptive rights is the corporate norm for post-1969 corporations while the granting of preemptive rights is the norm for pre-1969 corporations.

The deletion of references to treasury shares in subsection 14A:5-29(1) and in paragraph 14A:5-29(3)(a) reflects the abolition of stated capital throughout the Act.

Source or Reference

Model B.C.A. §8.01(b)(rev. 1984)
Del. G.C.L. §141(a)

COMMISSIONERS' COMMENT TO 14A:6-1

This section was revised to reflect the fact that corporations are managed by their officers with the board providing supervision and overall direction. This change brings New Jersey law into conformity with the laws of other jurisdictions. See Del. G.C.L. §141(a); Model B.C.A. (1984 revision) §8.01(b).

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COMMISSIONERS' COMMENT
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Section 14A:6-3 has been revised to incorporate the new provisions of subsection 14A:6-4(2) relating to the election of directors upon the occurrence of events specified in the certificate of incorporation for a period that may end before the next annual meeting. This change merely clarifies existing law.

This section has also been amended to divide it into two paragraphs so that it would be easier to locate the second paragraph dealing with the resignation of directors.

COMMISSIONERS' COMMENT TO 14A:6-4

Section 14A:6-4(2) has been amended to make it clear that the certificate of incorporation may grant shareholders of a class or series the right to elect one or more directors upon the happening of certain specified events, for example, default by the corporation of its obligation to pay dividends on preferred shares. The certificate of incorporation may also provide that the term of office of such specially elected directors may terminate at a particular date or upon some specified event (such as the curing of the preferred dividend default) even though this may cause the directors' term of office to end before the next annual meeting.

Model B.C.A. §§8.05(d)
Del. G.C.L. §223(a)(1

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Model B.C.A. §§8.05(d); 8.10(a)(2)(rev. 1984)
Del. G.C.L. §223(a)(1)

COMMISSIONERS' COMMENT TO 14A:6-5

Section 14A:6-5 has been revised to permit the board to fill directorships occurring by reason of an increase in the authorized size of the board, unless the certificate of incorporation or the by-laws deny the board this power. Under the prior law which distinguished between "vacancies" and newly created directorships, the norm was that only shareholders could fill newly created directorships, unless the certificate or a by-law adopted by the shareholders provided otherwise.

This change makes New Jersey law parallel to Delaware law and the Model Business Corporation Act. See Del. G.C.L. §223(a)(1) and Model B.C.A. §8.10(a)(2) (1984 revision).

New Jersey law remains clear that vacancies and newly created directorships, including those occurring on a staggered board, can only be filled by the board through the next annual meeting. This rule is the same as set forth in §8.05(d) of the Model Business Corporation Act (1984 revision).

Subsection 14A:6-5(3) was rephrased to state the existing law that shareholders have an inherent right to fill vacancies if the board does not fill the vacancies.

Source or Reference

Model B.C.A. §8.08(a)(rev. 1984)
Del. G.C.L. §141(k)

COMMISSIONERS' COMMENT TO 14A:6-6

Subsection 14A:6-6(1) has been amended to change the corporate norm to permit shareholders to remove directors "without cause" unless the certificate of incorporation prohibits such removal. Under prior law, shareholders could not remove directors "without cause" unless the certificate of incorporation authorized it. Both the Delaware General Corporation and the Model Business Corporation Act provide for a corporate norm in which shareholders may remove directors without cause. See Model B.C.A. §8.08(a) (1984 revision) and Del. G.C.L. §141(k). Like the equivalent Delaware provision, new paragraph 14A:6-6(2)(d) reverses the corporate norm to protect directors from removal without cause if directors have been classified. The purpose of such classification usually is to afford protection against a complete change in all directors in a single year and such a purpose would be frustrated if directors could be removed without cause.

Subsection 14A:6-6(2) also has been amended to reflect the fact that the greater voting requirements may be applied to the election of directors. See Section 14A:5-12 and the Comment thereto.

Finally, subsection 14A:6-6(5) has been revised to make it clear that the subsection does not prevent a court from undoing any act of the board undertaken after removal or suspension of a director. The subsection merely is intended to validate good faith acts of the board taken while a director was suspended or removed, but not to validate acts taken by a fraction which had wrongfully suspended a director to further its interests during a corporate struggle.

N.J.S. 14A:6-7
Del. G.C.L. §141(d)

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N.J.S.	14A:6-7
Del. G.C.L.	§141(d)

COMMISSIONERS' COMMENT TO 14A:6-7.1

Section 14A:6-7 has been repealed, rewritten and re-enacted as Section 14A:6-7.1 to provide clarity and to avoid internal reference problems.

Section 14A:6-7.1 was revised from Section 14A:6-7 to permit the certificate of incorporation to authorize the election of directors with more than one vote. The Commission believed that the results achieved by this change are often accomplished by less desirable means. For example, a controlling shareholder may elect his own nominees—often "dummy" directors who will always vote with him. This approach is not desirable since such stand-in directors are required to exercise the same degree of care as any other directors. See *Francis v. United Jersey Bank*, 87 N.J. 15 (1981). Delaware has a similar provision. See Del. G.C.L. §141(d).

In making this change, the Commission faced the issue of whether to limit the change to closely-held corporations. The Commission determined not to limit the change because it felt other mechanisms, such as the rules of the stock exchanges or the Securities and Exchange Commission, would control inappropriate uses of the multiple vote provision in publicly traded companies. In addition, the Commission saw an example of an appropriate use for the power in publicly-traded corporations. In a corporation where a class of preferred stock is given increased representation on the board in the event of a dividend or other default, increasing the voting rights of a preferred director could replace the need to elect additional directors.

The right to elect directors with more than one vote may be exercised by holders of shares of any class or series or by all shareholders at any annual or special meeting. Also, the number of votes which such director is entitled to cast must be specified in the certificate of incorporation or by the shareholders electing the director.

If a director with more than one vote dies, resigns, is removed, or otherwise ceases to be a director, and the board appoints a new director to fill the vacancy, the newly appointed director will be entitled to only one vote, unless the certificate of incorporation otherwise provides. A special shareholders meeting may be called to elect a new director, in which case the newly elected director would have the same number of votes as his predecessor.

There are provisions throughout the "New Jersey Business Corporation Act" which assume that each director is entitled to only one vote. Subsections 14A:6-7.1(3) and (4) have been revised to reflect the possibility of directors with more than one vote. However, rather than revising all other provisions of a similar nature, the last sentence of subsection 14A:6-7.1(2) was added to change the meaning of such other provisions when a director has more than one vote.

Under subsection 14A:6-7.1(1) the corporate norm will continue to be one vote per director unless the certificate of incorporation specifies otherwise.

Subsection 14A:6-7.1(3) was revised from Section 14A:6-7 to make the minimum quorum requirement for the board or any committee one-third of the votes in every situation.

The Commission debated the advisability of amending subsection 14A:6-7.1(5) and Section 14A:5-6 to state that shareholder and director consents could be combined on one form. The Commission was of the opinion that an amendment was unnecessary because the current law permits the use of such a combined form, particularly in light of the liberal construction mandate embodied in subsections 14A:1-1(2) and 14A:1-1(3).

Model B.C.A. §8.31(a)

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Model B.C.A. §8.31(a)

COMMISSIONERS' COMMENT TO 14A:6-8

Section 14A:6-8 has been revised to make it clear that a transaction is not voidable solely because of a director conflict if any one of the following conditions are met: (i) the transaction was fair at the time it was authorized; (ii) disclosure was made to the directors of the conflict and disinterested directors approved; or (iii) disclosure was made to the shareholders and the shareholders approved. This section was not and is not intended to provide a procedure to validate transactions in which a conflict of interest is present. Instead, it is intended to reverse the former common-law rule that such transactions were void or voidable solely on account of the conflict of interest.

The one case dealing with this provision, *Scott v. Multi-Amp Corp.*, 386 F. Supp. 44, 66-69 (D.N.J. 1974), construed the word "or" in the prior statutory provision in the conjunctive, rather than the disjunctive, thus requiring the statutory criterion of "fairness" in every case. This revision to Section 14A:6-8 reflects what the Commission viewed to be a better reading of the section. This section is similar to and the language change is derived from, Section 8.31(a) of the Model Business Corporation Act.

The Commission considered but rejected the concept of limiting the shareholder vote to "disinterested shareholders." In rejecting the "disinterested" vote rule, the Commission did not intend to limit in any way the evolving concepts of the fiduciary duty of controlling or majority shareholders. Instead, the Commission thought it appropriate that this concept be developed on a case by case basis by equity courts.

The Commission deleted the last proviso in subsection 14A:6-8(3) dealing with shareholder approval for director compensation because it was unnecessary. Shareholders always have the option of requiring shareholder approval for director or officer compensation.

COMMISSIONERS' COMMENT TO 14A:6-10

Subsection 14A:6-10(3) has been revised to give each director the right to participate in board or committee meetings by telephone if there are appropriate facilities reasonably available. The subsection has also been revised to make it clear that a director participating by telephone need not participate in the entire meeting.

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Source or Reference

Del. G.C.L. §143

COMMISSIONERS' COMMENT TO 14A:6-11

Section 14A:6-11 has been revised to authorize loans to directors as long as the disinterested directors in good faith believe that the loan meets the statutory requirement that it be "of benefit to the corporation." The section was also revised to make it clear that officers need not be employees to receive a corporate loan.

These revisions, which permit directors, officers and employees to receive corporate loans by board action alone, make New Jersey law parallel to Delaware law. See Del. G.C.L. §143. Under prior New Jersey law, loans to employees or officers who were also directors were permissible only under a shareholder approved employee benefit plan or pursuant to a provision in the certificate of incorporation or in a by-law approved by the shareholders.

This section should not be interpreted to prevent a corporation from making loans to persons who are not directors, officers or employees. Paragraphs 14A:3-1(1) (g) and (h) generally authorize a corporation to loan money without restriction.

The section has also been revised to eliminate language which authorized a loan under this section for the purpose of permitting a director, officer or employee to purchase shares of the corporation with the loan proceeds. This language is now unnecessary since subsection 14A:7-5(1) has been amended to permit shares to be issued for promissory notes.

COMMISSIONERS' COMMENT TO 14A:6-14

Subsection 14A:6-14(2) was revised to expressly state that directors may rely upon written reports of committees of the board. The Commission also divided Section 14A:6-14 into two subsections with subdivisions in the second subsection to make it more readable.

Section 14A:6-14(3) is carried forward from the recent amendment effected by P.L. 1987, c. 35.

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COMMISSIONERS' COMMENT TO 14A:6-16

Subsection 14A:6-16(1) was amended to eliminate the implication that the removal of an officer for cause would prejudice his contract rights. Whether or not a removal for cause would prejudice an officer's contract rights depends on the terms of the contract.

The concept of appointed officers was deleted to conform to the 1973 amendments to Section 14A:6-15 which eliminated the concept in that section.

COMMISSIONERS' COMMENT TO 14A:7-3

Subsection 14A:7-3(7) has been revised to delete the reference to treasury shares.

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Source or Reference

Model B.C.A. §6.21(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:7-4

Subsection 14A:7-4(1) was amended to delete references to par value and to authorize the issuance of shares in accordance with a formula or at not less than a minimum price fixed by the board of directors. This more flexible approach to the problem of consideration for the issuance of shares is generally derived from §6.21 of the Model Business Corporation Act (1984 revision).

Subsection 14A:7-4(2) was amended to delete references to par value and to state more explicitly that the certificate of incorporation may reserve to the shareholders the right to fix consideration for the issuance of shares.

Former subsections 14A:7-4(3), (4) and (5) have been deleted. Subsection 14A:7-4(3) specified the consideration for the issuance of treasury shares; subsection 14A:7-4(4) specified the consideration for the issuance of a share dividend; and subsection 14A:7-4(5) concerned the consideration for the issuance of shares upon conversion or in an exchange. Abandonment of the concepts of stated capital and treasury shares rendered these provisions no longer meaningful.

Subsection 14A:7-4(6) was amended. The new language was adopted from new §6.21(e) of the Model Business Corporation Act (1984 revision). The Commission believed the new language better expressed the state of the law.

COMMISSIONERS' COMMENT TO 14A:7-5

Subsection 14A:7-5(1) has been revised to permit corporations to issue shares for personal notes or future services. It thereby reverses the prior policy that obligations of a subscriber and future services cannot constitute "valid consideration" for the issuance of stock. The prior rule impaired flexible policies on stock issuance.

This revision in no way absolves the board of its responsibility to its shareholders to determine the fair present value of the obligation of a subscriber or other person, or of the future services of an employee and to weigh whether such value is adequate consideration for the issuance of shares. In the case of an obligation of a subscriber or other person, factors which would seem to be relevant would be the time of payment, the interest rate payable and the credit standing of the subscriber or other person. In the case of future services, factors which would seem relevant are the importance to the corporation of the services to be rendered, whether there is an agreement, the extent to which the agreement may be enforceable, and the extent to which the sale of shares is subject to conditions or subject to repurchase options.

By the use of the phrase "future services," the Commission intends to cover situations both where the employee's stock award is conditioned on his employment continuing for a stated period and situations where there is no express period of "future service." Consequently, the stock award could take many forms, including an award to a current employee who is expected to stay on, an award pursuant to a written employment contract or an award pursuant to a contract which makes the award contingent upon future service.

In connection with this revision, a new sentence has been added to subsection 14A:7-5(1) to make it clear that stock bonuses may be granted to new employees.

Under the revision to subsection 14A:7-5(1), shares will be fully paid in all instances where the consideration specified has been received. For example, shares issued for future services will be fully paid upon receipt of the promise of performance of future services; shares issued for a promissory note will be fully paid when the promissory note is executed and delivered. The board of directors may wish to provide for specific remedies for the recapture of such shares in the event that there is a breach of the promise. For example, the corporation may wish to retain in escrow shares issued for the promise of performance of future services until such time as those future services are performed. An escrow arrangement would not indicate that the shares had not been fully paid, but rather would provide the corporation with a means of recapturing the shares in the event there was a breach of the promise to perform.

Del. G.C.L. §151(b)

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Del. G.C.L. §151(b)

COMMISSIONERS' COMMENT TO 14A:7-6

Subsection 14A:7-6(3) has been revised and subsection 14A:7-6(4) has been eliminated to permit corporations with more than 25 shareholders to issue securities redeemable at the option of the holder. The 25 shareholder limitation was subject to manipulation to eliminate redeemable shares. The Commission determined that there is no need to restrict the availability of shares redeemable at the option of the holder to closely held corporations. The Delaware General Corporation Law permits all corporations to issue shares redeemable at the option of the holder. See Del. G.C.L. §151(b).

Subsection 14A:7-6(3) has also been revised to permit a corporation to provide for shares redeemable at the option of the holder in its certificate of incorporation by a normal majority vote or whatever other percentage vote the certificate of incorporation may require. Once such redeemable shares are issued, however, the rights of the holders of such shares concerning redeemability may not be changed except with the unanimous consent of such holders.

Source or Reference

Model B.C.A. §7.24(c)(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:7-7

Subsection 14A:7-7(1) has been revised to delete references to treasury shares. It also has been revised to change the language in the last sentence, consistent with the revision to subsection 14A:7-4(3), and §7.24(c) of the Model Business Corporation Act (1984 revision).

Subsection 14A:7-7(2) which dealt with rights and options issued to employees has been deleted. The first sentence dealing with Chapter 8 plans was no longer relevant because of the deletion of substantial portions of Chapter 8. The second sentence, which imposed a 1% limitation on the amount of options which could be granted for any class of shares without shareholder action, was also deleted because it limited the board's flexibility and served no useful purpose.

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N.J.S.	14A:7-8
Mass. Bus. Corp. Law	Ch. 156B, §61
Model B.C.A.	§6.21(rev. 1984)
G.C.L.	§205

COMMISSIONERS' COMMENT TO 14A:7-8.1

Section 14A:7-8 has been repealed, redrafted and re-enacted as Section 14A:7-8.1 to provide clarity and to avoid internal reference problems.

This section has been completely revised from Section 14A:7-8 to lay the foundation for the elimination of stated capital. It should be read in conjunction with Section 14A:7-14.1, dealing with distributions to shareholders. The former section concerning the determination of stated capital of a corporation has been deleted in its entirety. The Commission is of the view that the presence or absence of stated capital is not relied upon by creditors. Furthermore, the Commission believes that stated capital does not serve its asserted purpose of creditor protection because stated capital may be nominal in amount and therefore affords no substantial protection. Under prior law when stated capital became an obstacle to any corporate action, techniques existed which, when followed by the skillful corporate practitioner, permitted circumvention of the concept's limited protections.

The Commission considered giving some substantive content to the concept of stated capital, for example by returning to the requirement of minimum capitalization but rejected this since it would raise the cost of incorporation to the small businessman and discourage the use of New Jersey for incorporation by multi-state businesses.

The Commission was of the view that the concept of stated capital should be eliminated since it created little in the way of benefit to creditors and presented a danger of unforeseen liability to the directors of a corporation which had not had the benefit of legal counsel and which subsequently experienced an insolvency. In addition, the concept of stated capital is confusing to most businessmen when applied to no par stock.

Finally, the abandonment of the concept of stated capital is consistent with the financial provision changes of the Model Business Corporation Act (1984 revision). See 34 *Bus. Lawyer* 1867 (1979).

Section 14A:7-14.1 prohibits a distribution to shareholders where a corporation is or would be insolvent. Thus, the elimination of stated capital does not eliminate creditor protection. Rather, it harmonizes that protection with federal bankruptcy laws, state receivership provisions, and the actual expectations of creditors and ordinary businessmen.

Subsection 14A:7-8.1(1) establishes as the corporate norm no par value for shares and no stated capital. Subsection 14A:7-8.1(2) permits a corporation in its certificate of incorporation to override the norm by providing for par value shares and stated capital. However, the

mere presence in a certificate of incorporation (whether filed before or after these amendments) of a statement that the shares have a par value or there is a specified stated capital or any other capitalization requirement, will not impose any restrictions found in the prior law. Specifically, new Section 14A:7-14.1 is the only restriction on distributions unless other restrictions are set forth in the certificate of incorporation. Subsection 14A:7-8.1(3) establishes a nominal par value for shares and stated capital to avoid penalties under the taxing statutes of other states. This subsection is based upon California law. See G.C.L. §205.

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COMMISSIONERS' COMMENT TO 14A:7-9

Section 14A:7-9 has been revised to eliminate references to stated capital since that concept has been eliminated. Subsection 14A:7-9(6) has been eliminated as unnecessary because of the stated capital changes.

Source or Reference

N.J.S. 12A:8-101 *et seq.*
Model B.C.A. §§6.25(d); 6.26(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:7-11

Section 14A:7-11 has been revised to permit corporations to use uncertificated shares. This concept is adopted from §6.26 of the Model Business Corporation Act (1984 revision).

While the use of uncertificated shares is authorized by the revision to Section 14A:7-11, the rights, duties and obligations of the issuers of, and persons dealing with, uncertificated shares are governed by Article 8 of the Uniform Commercial Code, N.J.S. 12A:8-101 *et seq.* In 1977 the National Conference of Commissioners on Uniform State Laws proposed revisions to Article 8 of the UCC specifically to deal with the concept of uncertificated securities.

The Commission strongly recommends that New Jersey adopt the 1977 Revisions to Article 8 in addition to revising Section 14A:7-11.

Subsection 14A:7-12(2) has also been revised to insure the validity of a transfer restriction on uncertificated shares.

Subsection 14A:7-11(1) has also been revised to eliminate the requirement that a share certificate bearing a facsimile signature be countersigned by the transfer agent or registrar. This change is consistent with §6.25(d) of the Model Business Corporation Act (1984 revision). The subsection has also been revised to eliminate the requirement that certificates be signed by two officers. This requirement, when taken together with subsection 14A:6-15(2), required corporations to have at least two individuals serve as officers.

The reference to Section 14A:8-3 in subsection 14A:7-11(4) was deleted because of the changes to Chapter 8 repealing Section 14A:8-3. The definition of "fully paid" has been expanded. See Section 14A:7-5.

Model B.C.A. §6.27(b)(rev

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Source or Reference

Model B.C.A. §6.27(b)(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:7-12

Section 14A:7-12(2) has been revised merely to coordinate it with the ability to use uncertificated shares. The particular language of the change is taken directly from §6.27(b) of the Model Business Corporation Act (1984 revision). See subsection 14A:7-11(6).

Source or Reference

N.J.S.	14A:7-14
Model B.C.A.	§1.40(6); 6.40 (rev. 1984)

COMMISSIONERS' COMMENT TO 14A:7-14.1

Section 14A:7-14 has been repealed, redrafted and re-enacted as Section 14A:7-14.1 to provide clarity and to avoid internal reference problems.

Section 14A:7-14.1, revised from Section 14A:7-14, imposes a common rule applicable to all types of distributions to shareholders, including both dividends and share repurchases.

Prior law prohibited dividends and share repurchases which impaired stated capital or which rendered a corporation insolvent in the equity sense (i.e., being unable to pay its debts as such debts mature). Subsection 14A:7-14.1(2) continues the equity insolvency test and makes it applicable to all distributions. Although the language of the equity insolvency test was reworded, the Commission intended no substantive change.

The surplus test imposed by prior law has been abandoned in favor of a balance sheet insolvency test. The balance sheet test has more practical significance. When a corporation's liabilities exceed its assets, businessmen have traditionally assumed that distributions to shareholders may have legal consequences, or be prohibited. The test regarding impairment of stated capital was one which had little inherent meaning for most businessmen.

Subsection 14A:7-14.1(1) defines "distribution" as any transfer of money or other property by a corporation to its shareholders, and expressly includes dividends, share repurchases and redemptions. The definition also includes an "indirect transfer," for example, a subsidiary's repurchase of a parent's shares. The Commission determined that a broad and open-ended definition would better protect creditors. This definition finds its source in §1.40(6) of the Model Business Corporation Act (1984 revision).

Subsection 14A:7-14.1(3) addresses the practical issues which a balance sheet test raises. Generally accepted accounting principles will provide a safe harbor. However, the Commission determined that the use of any particular accounting standard which is reasonable under the circumstances also should be sufficient. Finally, since the Commission was aware that under generally accepted accounting principles balance sheets may substantially understate market values, additional flexibility is provided to permit a distribution when a fair valuation of the corporate assets indicates that its assets exceed its liabilities.

Subsection 14A:7-14.1(4) determines the time at which directors must measure compliance with the distribution tests of subsection 14A:7-14.1(2). A dividend must meet the insolvency tests at the time the dividend is declared, not when it is paid (unless the dividend is to be paid more than 120 days after it is declared). With respect to other distributions, the insolvency test must be met at the time of the first significant irrevocable event concerning the distribution. An important practical consequence of this provision is that payments to a former shareholder under an obligat equity and a balance sheet sense, corporation be insolvent at the tim

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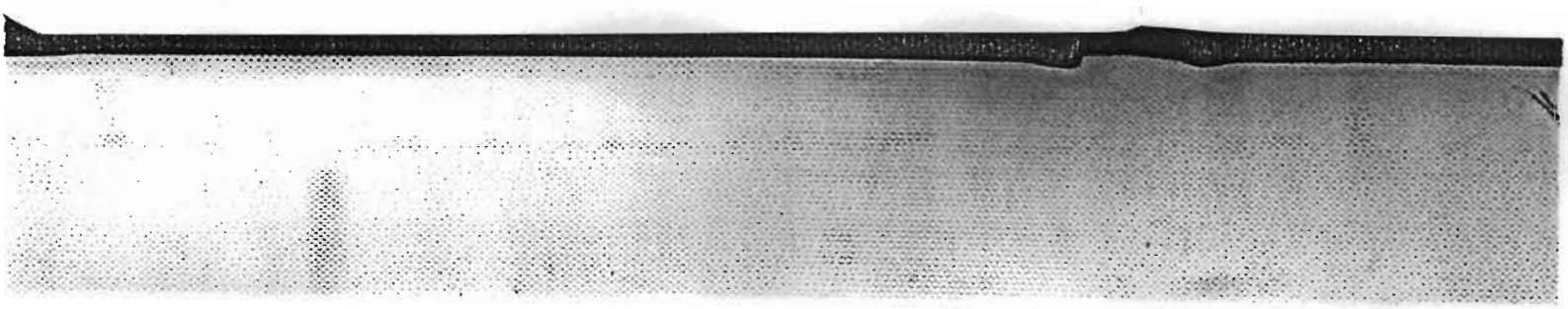
Subsection 14A:7-14.1(5) recognizes that corporations often issue notes or other debt obligations in connection with distributions especially share repurchases. Under this subsection the creation of such debt is proper and may be secured by assets of the corporation.

Section 14A:7-14.1 is based upon §6.40 of the Model Business Corporation Act (1984 revision). The Comments to §6.40 of the Model Act are extensive and may be useful in the interpretation of this section. One major divergence is that the Model Act requires that the liquidation preference accorded preferred shareholders be treated as if it were a debt in applying the balance sheet test. This view confuses creditor protection with the rights of senior equity holders and is not consistent with prior New Jersey law.

COMMISSIONERS' COMMENT TO 14A:7-15

Subsection 14A:7-15(1) now contains the authorization to pay all types of dividends on shares. It combines prior subsection 14A:7-14.1(1) which authorized the payment of dividends in cash, in bonds, in property or in the shares or bonds of other corporations, with prior subsection 14A:7-15(1) which authorized stock dividends.

The language of subsection 14A:7-15(5), has been clarified but no substantive change has been made. Subsections 14A:7-15(2), (3), (4) and (6) have been deleted. These subsections which related to the treatment of treasury shares and stated capital upon a share dividend are no longer necessary because of the elimination of the concept of stated capital.



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COMMISSIONERS' COMMENT TO 14A:7-15.1

Section 14A:7-15.1 has been revised to set forth a common rule governing share dividends, share divisions and share combinations. Prior law sometimes treated these actions with minor but confusing differences. For example, prior law distinguished between stock dividends and share divisions by requiring the filing of a certificate for a share division or combination while a share dividend required no certificate.

Revised Section 14A:7-15.1 limits the distinctions between share dividends, share combinations and share divisions. Among other things, the revised section permits board authorized share dividends, share divisions and combinations to affect authorized but unissued shares in exactly the same way as such actions affect the outstanding shares. This change is embodied in the new restriction in paragraph 14A:7-15.1(2)(b) that a board approved stock dividend or stock split may not increase the percentage of authorized shares that remains unissued and the change in subsection 14A:7-15.1(5) that a combination must reduce the authorized shares by the same percentage by which the outstanding shares are reduced.

The authority of the board to effect a share division, dividend or combination without shareholder approval is continued so long as the rights and preferences of the holders of outstanding shares of any class or series will not be adversely affected and so long as the percentage of authorized but unissued shares is not increased. It should be noted that under prior law and the current law this provision empowers the board to amend the certificate of incorporation so that the rights of preferred holders will not be adversely affected, for example by an identical split of preferred shares.

Subsection 14A:7-15.1(3) now provides that a filing is required only when an amendment to the corporation's certificate of incorporation is made in connection with a share dividend, division or combination.

Source or Reference

N.J.S. 14A:7-14
Model B.C.A. §6.31(a)(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:7-16

Section 14A:7-16 has been revised to reflect the changes made in Section 14A:7-14 (repealed, redrafted and re-enacted as Section 14A:7-14.1) with regard to limitations on shareholder distributions and to reflect the elimination of stated capital.

Subsection 14A:7-16(1) continues to authorize a corporation to acquire its own shares. The subsection no longer contains the authorization found in prior law to sell or dispose of shares which have been repurchased since all reacquired shares now automatically revert to the status of authorized but unissued shares and cannot be held out as treasury shares. See Section 14A:7-18. The terminology of the section was changed from purchase or redeem to "acquire" to make it consistent with §6.31(a) of the Model Business Corporation Act (1984 revision). No change was intended by this new terminology.

Former subsection 14A:7-16(2) was deleted as unnecessary. It permitted distributions out of stated capital to eliminate fractional shares, to compromise indebtedness owed to the corporation or to pay dissenting shareholders.

Subsection 14A:7-16(5) continues to prohibit repurchases of stock at more than the redemption price. The restriction against equity insolvency repurchases in prior law was deleted because this restriction is now contained in Section 14A:7-14.1.

Subsections 14A:7-16(8) and 14A:7-16(9) are new. Subsection 14A:7-16(8) authorizes a corporation to grant a security interest in reacquired shares to secure the payment of the repurchase price. It merely clarifies existing law in this regard. Subsection 14A:7-16(9) authorizes share repurchase agreements with payment conditioned upon the solvency of the corporation. It will permit a buyout of a major shareholder at a price which would otherwise render the corporation technically insolvent so long as each payment is deferred until such time as the corporation can make a lawful distribution.

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COMMISSIONERS' COMMENT TO 14A:7-17

This section, which required a notice to shareholders if distributions or dividends were made from stated capital or capital surplus, has been eliminated. The Commission was of the view that the notice requirement served no useful purpose once the stated capital concept was eliminated. See repealer section 71 of "AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

Source or Reference

Model B.C.A. §6.31(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:7-18

The revisions to subsection 14A:7-18(1), which had dictated under what circumstances reacquired shares were cancelled, together with the deletion from subsection 14A:7-16(1) of the language regarding the right to sell reacquired shares, are intended to eliminate the unnecessary fiction of treasury shares. The concept of treasury shares had its source in the maintenance of the stated capital of a corporation upon a share repurchase of par value stock. The abandonment of stated capital renders this fiction unnecessary. As there is no difference in fact between the issuance of additional shares and the sale of "treasury shares," there is now no difference in law. This subsection is similar to §6.31 of the Model Business Corporation Act (1984 revision).

Under subsection 14A:7-18(1), a corporation may elect to retain treasury shares, and any treasury shares held as of January 1, 1987 will remain treasury shares unless cancelled. The latter provision was intended not to upset the status quo existing on the date of these amendments. Treasury shares may serve important functions apart from stated capital.

Subsection 14A:17-18(2) has been revised to delete the requirement of filing a statement of cancellation. The statement of cancellation was unnecessary if the shares were retained as "treasury shares." When shares were cancelled, the requirement often was ignored. The Commission believed no public policy is served by notice of cancellation. This subsection does, however, continue a corporation's obligation to amend its certificate of incorporation to reduce its authorized shares when it cancels shares which cannot be reissued.

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COMMISSIONERS' COMMENT TO 14A:7-19 and 14A:7-20

These sections have been deleted because of the elimination of the concept of stated capital. See repealer section 71 of "AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

COMMISSIONERS' COMMENT TO 14A:8-1

Chapter 8, dealing with employee benefit plans, has been revised to eliminate all existing restrictions on the adoption of employee benefit plans, including those providing for the issuance of shares, and to provide instead that any such plan may be adopted by the corporation through appropriate action by the board, a committee of the board, or appropriate officers. The Commission determined, after careful consideration, that the restrictive provisions of Chapter 8 operated far more as a hindrance to business corporations than as a safeguard against potential abuses by insiders.

Section 14A:8-1 has been amended to eliminate the limiting reference to Section 14A:8-2 and to add a subsection (3) which specifies that plans may be adopted in the same manner as other actions of the corporation are adopted or authorized. The Commission was of the view that corporations should be free to adopt plans for the benefit of their employees in the same manner as other corporate actions of similar consequence are adopted or authorized. It should be noted that pursuant to Section 14A:6-9 a committee of the board could also initially adopt a plan providing for the issuance of stock.

Sections 14A:8-5 and 14A:8-6 have been repealed but have been redrafted and re-enacted as Sections 14A:8-2.1 and 14A:8-3.1, respectively, for purposes of reallocation and renumbering. The remaining sections of Chapter 8 have been deleted as unnecessary.

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COMMISSIONERS' COMMENT TO P.L. 1969, c. 102, s.12 (C. 14A:8-1.1)

P.L. 1969, c. 102, s.12 (C. 14A:8-1.1) has been deleted as unnecessary. See Comment to Section 14A:8-1. See repealer section 71 of "AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

COMMISSIONERS' COMMENT TO 14A:8-2

Section 14A:8-2 has been deleted as unnecessary. See Comment to Section 14A:8-1. See repealer section 71 of "AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

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COMMISSIONERS' COMMENT TO 14A:8-3

Section 14A:8-3 has been deleted as unnecessary. See Comment to Section 14A:8-1. See repealer section 71 of "AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

COMMISSIONERS' COMMENT TO 14A:8-4

Section 14A:8-4 has been deleted as unnecessary. See Comment to Section 14A:8-1. See repealer section 71 of "AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

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Source or Reference

N.J.S. 14A:8-5

COMMISSIONERS' COMMENT TO 14A:8-2.1

Former Section 14A:8-5 has been repealed, redrafted and re-enacted as Section 14A:8-2.1. See Comment to Section 14A:8-1. See repealer section 71 of "AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

Source or Reference

N.J.S. 14A:8-6

COMMISSIONERS' COMMENT TO 14A:8-3.1

Former Section 14A:8-6 has been repealed, redrafted and re-enacted as Section 14A:8-3.1. See Comment to Section 14A:8-1. See repealer section 71 of "AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

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COMMISSIONERS' COMMENT TO 14A:9-1

Section 14A:9-1 was revised primarily to delete subsection (3). Former subsection 14A:9-1(3) involved the filing of certificates evidencing the reduction of stated capital and such certificates are no longer necessary in light of the abandonment of stated capital.

Paragraph 14A:9-1(2)(c) was revised merely to clarify the language.

COMMISSIONERS' COMMENT TO 14A:9-2

Section 14A:9-2 has been amended merely to clarify existing law by replacing the phrase "the effective date of this act" with "January 1, 1969."

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COMMISSIONERS' COMMENT TO 14A:9-4

Section 14A:9-4 has been revised to delete subsection 14A:9-4(4), which dealt with statements of reduction of stated capital. Such statements are no longer necessary in the light of the elimination of the concept of stated capital.

The last sentence of subsection 14A:9-4(5), which provided for the reduction of stated capital, was deleted.

The time period within which a certificate of amendment might be prefiled was enlarged from 30 to 90 days.

COMMISSIONERS' COMMENT TO 14A:9-5

Subsection 14A:9-5(6) has been revised to enlarge the period of time in which a restated certificate of incorporation may be prefiled from 30 to 90 days.

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COMMISSIONERS' COMMENT TO 14A:10-1

Section 14A:10-1 was revised to specify that where a merger effects changes in the surviving corporation's certificate of incorporation, a restated certificate of incorporation may be filed as a separate additional document together with the certificate of merger. This amendment merely clarifies existing law. Under prior law there was no specific authorization for the Secretary of State to accept a restated certificate of incorporation as part of the certificate of merger certificate, although the Secretary of State did accept such joint filings to accommodate the efficient administration of the corporation laws.

Source or Reference

Model B.C.A. §11.03(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:10-3

Subsections 14A:10-3(2) and (3) have been amended to change the words "the effective date of this act" to "January 1, 1969." These amendments do not change existing law, but merely make it easier to determine the date to which reference is made.

Subsection 14A:10-3(4) has been amended to raise from 20% to 40% the amount of voting and participating stock which must be issued to trigger the voting rights of a surviving corporation's shareholders. This threshold was increased to make it consistent with Section 14A:10-12, which requires the issuance of 40% of the voting and participating stock to trigger a shareholder vote upon any other type of acquisition.

Subsection 14A:10-3(4) has also been amended to change the test from 20% of the number of common shares of the surviving corporation to both 40% of the voting shares and 40% of the participating shares. This amendment prevents avoiding the intention of this subsection by the use in a merger of special classes of preferred stock which might have substantial voting or participating rights. The text of paragraphs 14A:10-3(4)(b), (c), and (d) were taken from §11.03 of the Model Business Corporation Act (1984 revision).

Finally, subsection 14A:10-3(4) has been amended to include an explicit requirement that the shareholdings of the shareholders of the surviving corporation not be disturbed. See new paragraph 14A:10-3(4)(b). The Commission was of the view that such a requirement would have been read into the present statute by our courts and that the addition of this new paragraph is a clarification, rather than a change.

N.J.S. 14A:10-4

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Source or Reference

N.J.S. 14A:10-4

COMMISSIONERS' COMMENT TO 14A:10-4.1

Section 14A:10-4 has been repealed, redrafted and re-enacted as Section 14A:10-4.1 to provide clarity and to avoid internal reference problems.

Subsection 14A:10-4.1(1) has been revised from Section 14A:10-4 to add the requirement that the certificate specify the names of the merging or consolidating corporations and the date or dates of approval by the shareholders of each corporation of the plan of merger or plan of consolidation.

Subsection 14A:10-4.1(2) has been revised from Section 14A:10-4 to extend from 30 to 90 days the maximum delayed effective date for a certificate of merger. This change is consistent with parallel changes to similar provisions as explained in the Comment to Section 14A:1-6.

Source or Reference

N.J.S. 14A:10-5

COMMISSIONERS' COMMENT TO 14A:10-5.1

Section 14A:10-5 has been repealed, redrafted and re-enacted as Section 14A:10-5.1 to provide clarity and to avoid internal reference problems.

Subsection 14A:10-5.1(3) has been revised from Section 14A:10-5 to require the certificate to specify the name of the surviving corporation and the name or names of the merged corporations as well as the date of approval by the board of the parent corporation of the plan of merger.

Subsection 14A:10-5.1(4) has been revised from Section 14A:10-5 to extend from 30 to 90 days the maximum delayed effective date for a certificate of merger filed under Section 14A:10-5.1. This change reflects parallel changes to similar provisions as explained in the Comment to Section 14A:1-6.

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COMMISSIONERS' COMMENT TO 14A:10-7

Section 14A:10-7 is being amended to eliminate internal references to Section 14A:10-4 and Section 14A:10-5 because these have been repealed, redrafted and re-enacted as Section 14A:10-4.1 and Section 14A:10-5.1, respectively. The internal references to the new sections have been inserted in the appropriate places in Section 14A:10-7.

COMMISSIONERS' COMMENT TO 14A:10-11

Paragraphs 14A:10-11(1)(c) and (d) were revised to delete the reference to the "effective date of this act" and insert instead "January 1, 1969."

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Source or Reference

Model B.C.A. §11.03(b)(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:10-12

Section 14A:10-12 has been revised to make its language consistent with the revised language in subsection 14A:10-3(4). Both of these sections specify when shareholders of a corporation have rights on an acquisition where their corporation will be the surviving entity. These two sections have been revised to make them identical in form and substance. As the Comment to Section 14A:10-3 explains, the particular language of the revision was taken from §11.03 of the Model Business Corporation Act (1984 revision).

Source or Reference

P.L. 1969, c. 118, ss.1-15 (C. 17:9A-355 *et seq.*)
Model B.C.A. §11.02(rev. 1984)

COMMISSIONERS' COMMENT TO 14A:10-13

New Section 14A:10-13 has been added to permit a corporate acquisition by means of a share exchange. Under prior law, in order for one corporation to acquire another corporation and continue to hold the acquired corporation as a separate subsidiary, it was necessary for the acquiring corporation to form an acquisition subsidiary and merge the acquired corporation with or into the acquisition subsidiary. The new section simplifies the procedure by permitting the acquiring corporation to acquire all of the stock of the acquired corporation by means of a mandatory exchange if the exchange is approved by the requisite number of shareholders of the acquired corporation. From a substantive point of view, this section is similar to a merger utilizing an acquisition subsidiary. In addition, to provide flexibility, this section also permits the acquisition to be limited to a single class or series.

The section is derived in part from the Model Business Corporation Act (1984 revision) which in Chapter 11 and §11.02 provides for the same procedure. Similar provisions exist in New Jersey banking laws and also served as a basis for drafting this section. See P.L. 1969, c. 118, ss.1-15 (C. 17:9A-355 *et seq.*).

This section is meant to work as the parallel merger provisions work. Each board of directors adopts a plan of exchange, setting forth the information required under subsection 14A:10-13(2). The plan of exchange is then submitted to shareholders of the acquired corporation for a vote and is adopted if approved by the same vote as a merger would require.

Subsections 14A:10-13(6) and (7) merely set forth the results of an exchange, just as the results of a merger are set forth in Section 14A:10-6.

Subsection 14A:10-13(8) makes it clear that, notwithstanding the lack of a specific reference in Chapter 11 to a plan of exchange, shareholders of an acquired corporation have exactly the same rights of dissent in a plan of exchange as such shareholders would have in a merger.

The law of the state of incorporation of the acquiring corporation will govern whether shareholders of the acquiring corporation will vote on the acquisition. This section does not require the vote of the shareholders of the acquiring corporation because as a general matter a corporation does not need the consent of its shareholders to acquire stock in another corporation. Under Section 14A:10-12, shareholders of a New Jersey acquiring corporation would have the right to vote upon and dissent from a plan of exchange if the plan called for the acquiring corporation to issue a number of voting or participating shares which were greater than 40% of its outstanding voting or participating shares.

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COMMISSIONERS' COMMENT TO 14A:11-1

Section 14A:11-1 is being amended to eliminate an internal reference to Section 14A:10-5 because this section has been repealed, redrafted and re-enacted as Section 14A:10-5.1. The internal reference to the new section has been inserted in the appropriate place in Section 14A:11-1.

COMMISSIONERS' COMMENT TO 14A:11-2

Section 14A:11-2 is being amended to eliminate internal references to Section 14A:10-5 because this section has been repealed, redrafted and re-enacted as Section 14A:10-5.1. The internal references to the new section have been inserted in the appropriate places in Section 14A:11-2.

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COMMISSIONERS' COMMENT TO 14A:11-3

Section 14A:11-3 is being amended to eliminate an internal reference to Section 14A:10-5 because Section 14A:10-5 has been repealed, redrafted and re-enacted as Section 14A:10-5.1. The internal reference to the new section has been inserted in the appropriate place in Section 14A:11-3.

COMMISSIONERS' COMMENT TO 14A:12-1

Subsection 14A:12-1(1) has been revised to reflect the addition of Section 14A:12-4.1, permitting simplified dissolutions for corporations without assets and the addition of subsection 14A:4-5(6) authorizing the dissolution of a corporation which fails to file its annual reports for two years.

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Source or Reference

P.L. 1973, c. 367 (C. 54:50-14)

COMMISSIONERS' COMMENT TO 14A:12-4.1

New Section 14A:12-4.1 permits a corporation without assets to dissolve without paying any filing fees or obtaining a tax clearance certificate from the Division of Taxation. See P.L. 1973, c. 367 (C. 54:50-14).

Under prior law, such a corporation was unable to dissolve unless its shareholders were willing to contribute the additional funds necessary to pay the fees and taxes involved, which often would be substantial.

As a consequence of the provisions of prior law, such corporations rarely effected their own dissolution. Instead, the corporation let itself be dissolved by the State through a forfeiture of its certificate of incorporation for non-payment of its state taxes. The procedure necessary to forfeit a certificate of incorporation is expensive for the State, involving a number of mailings by the Division of Taxation and the Secretary of State and a number of internal communications.

This section is designed to create an alternative to the costly forfeiture procedure in a significant number of cases. It permits a corporation without assets to effect its own dissolution, without paying any fees or taxes, by filing a simple certificate of dissolution, certifying, under penalty of perjury, that the corporation has no assets, has ceased doing business, and has not made any distributions to its shareholders within the last 24 months. Moreover, this section permits the certificate of dissolution to be filed on behalf of the corporation by an officer without any action by the board of directors or shareholders in circumstances where the persons comprising those two bodies are unwilling or unable to participate in the procedural steps necessary to authorize the dissolution.

The structure of this section parallels Section 14A:12-2, which authorizes dissolutions without fees or tax clearance certificates for corporations which never commenced business. This section provides three methods for the corporation to authorize a dissolution, two of which are derived from existing sections in Chapter 12. See Section 14A:12-3 and Section 14A:12-4. The third procedure, where a corporate officer authorizes the dissolution, is new.

This section will not permit corporations to evade any state tax liabilities that would otherwise be paid. Under Section 14A:12-19, a corporation may not be completely liquidated and have its assets distributed to its shareholders unless provision is made, among other things, for the payment of all fees, taxes and other expenses. Section 14A:6-12 imposes personal liability on directors who distribute assets to shareholders without paying taxes. As a result, if new Section 14A:12-4.1 is used to avoid a tax liability the corporation could afford to pay, the corporation's directors will become personally liable for the tax.

COMMISSIONERS' COMMENT TO 14A:12-7

Subsection 14A:12-7(8), which permits a court ordered purchase and sale of stock, has been revised in two respects:

(a) The revision permits any shareholder who is a party to a proceeding brought pursuant to Section 14A:12-7 to move to purchase, or to have the corporation purchase, shares owned by any other shareholder who is a party to that proceeding. Previously, the statute permitted this to be done only by a shareholder or shareholders owning 50% or more of the stock of the corporation with respect to a shareholder or shareholders who were parties plaintiff in the proceeding.

(b) The purchase price to be paid in the event of a mandatory sale may be paid over a period of time in cash, notes, or other property. Previous law had required that the price be paid entirely in cash within thirty days after the determination of fair value.

The Commission was concerned that Section 14A:12-7 is not operating as effectively as it might to assist in the resolution of internal disputes because of the existing limitations that only a plaintiff's shares may be mandatorily purchased at fair value and that the purchase price must be paid all in cash.

Although the revisions will permit a court to order the sale of the stock of a shareholder who did not initiate an action under this section and ultimately to provide for payment to that shareholder on extended terms, the Commission was satisfied that a court would exercise its discretion in such a fashion only when equity and economic necessity compel such a result.

The revision to paragraph 14A:12-7(8)(e) contemplates that the court will take into account the interrelationship of economic factors involved when providing for extended terms of payment, including the amount of principal, the rate of interest, the quality of collateral, and the time for payment.

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P.L. 1961, c.

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New Section 14A:1-10 authorizes transmitted by telecopy or other meth been added to authorize the Secretar services, in addition to any other fee re with Section one of P.L. 1961, c. 137 that payment be made by means of a of State.

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Source or Reference

P.L. 1961, c. 137, s.1 (C. 52:16A-11.1)

COMMISSIONERS' COMMENT TO 14A:15-4

New Section 14A:1-10 authorizes the Secretary of State to accept for filing documents transmitted by telecopy or other methods of electronic communication. Section 14A:15-4 has been added to authorize the Secretary of State to establish reasonable fees for such filing services, in addition to any other fee required for filing the particular document. In accordance with Section one of P.L. 1961, c. 137 (C. 52:16A-11.1), the Secretary of State may require that payment be made by means of a prepaid deposit account maintained with the Secretary of State.

COMMISSIONERS' COMMENT TO REPEALER SECTION 71 OF

"AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

N.J.S. 14A:1-2 (See Commissioners' Comment to Section 14A:1-2.1);

N.J.S. 14A:6-7 (See Commissioners' Comment to Section 14A:6-7.1);

N.J.S. 14A:7-8 (See Commissioners' Comment to Section 14A:7-8.1);

N.J.S. 14A:7-14 (See Commissioners' Comment to Section 14A:7-14.1);

N.J.S. 14A:7-17 (See Commissioners' Comment to Section 14A:7-17);

N.J.S. 14A:7-19 and N.J.S. 14A:7-20 (See Commissioners' Comment to Sections 14A:7-19 and 14A:7-20);

N.J.S. 14A:8-2 through N.J.S. 14A:8-6 inclusive (See Commissioners' Comment to Sections 14A:8-2 through 14A:8-4, 14A:8-2.1 and 14A:8-3.1);

N.J.S. 14A:10-4 (See Commissioners' Comment to Section 14A:10-4.1);

N.J.S. 14A:10-5 (See Commissioners' Comment to Section 14A:10-5.1);

P.L. 1977, c. 59 (C. 14A:2-2a and C. 14A:2-2b) (See Commissioners' Comment to P.L. 1977, c. 59 (C. 14A:2-2a and C. 14A:2-2b));

P.L. 1969, c. 102, s.12 (C. 14A:8-1.1) (See Commissioners' Comment to P.L. 1969, c. 102, s.12 (C. 14A:8-1.1)).

COMMISS

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"AN ACT revising the law con
'New Jersey Business Corporation A
additional sections to Title 14A of
of law in connection therewith."

This act shall take effect on the
after enactment.

This effective date is designed
this legislation.

:OMMENT

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s, amending and supplementing the
of the New Jersey Statutes, enacting
tutes, and repealing various sections

ion 14A:1-2.1);
ion 14A:6-7.1);
ion 14A:7-8.1);
tion 14A:7-14.1);
tion 14A:7-17);
s' Comment to Sections 14A:7-19 and

Commissioners' Comment to Sections
1);
tion 14A:10-4.1);
tion 14A:10-5.1);
mmissioners' Comment to P.L. 1977,

ners' Comment to P.L. 1969, c. 102,

COMMISSIONERS' COMMENT TO SECTION 72 EFFECTIVE DATE OF

"AN ACT revising the law concerning corporations, amending and supplementing the 'New Jersey Business Corporation Act' being Title 14A of the New Jersey Statutes, enacting additional sections to Title 14A of the New Jersey Statutes, and repealing various sections of law in connection therewith."

This act shall take effect on the first day of the calendar month following the 90th day after enactment.

This effective date is designed to give corporations sufficient time for compliance with this legislation.

PART II

COMMISSIONERS' COMMENTS TO PROPOSED AMENDMENTS TO P.L. 1982, c. 150 (Assembly, No. 4266 of 1987)

COMMISSIONERS' COMMENT
TO
P.L. 1982, c. 150, s.3 (C. 52:16A-37)

Section 3 of P.L. 1982, c. 150 (C. 52:16A-37) has been revised merely to correct typographical errors and to change the reference from fictitious name to trade name to conform to a change in terminology in Section 14A:2-2.1.

COMMISSIONERS' COMMENT TO P.L. 1982, c. 150, s.4 (C. 52:16A-38)

Section 4 of P.L. 1982, c. 150 (C. 52:16A-38) has been revised merely to change the reference from fictitious name to trade name to conform to a change in terminology in Section 14A:2-2.1, and to authorize the Secretary of State to accept any filing on an expedited basis.

COMMISS

EFF

"AN ACT concerning certain s
in relation to various corporations a

This act shall take effect on the
after enactment.

This effective date is designed to
with this legislation.

COMMENT

(C. 52:16A-38)

has been revised merely to change the orm to a change in terminology in Section o accept any filing on an expedited basis.

COMMISSIONERS' COMMENT TO SECTION 3 EFFECTIVE DATE OF

"AN ACT concerning certain services provided by the Office of the Secretary of State in relation to various corporations and amending P.L. 1982, c. 150."

This act shall take effect on the first day of the calendar month following the 90th day after enactment.

This effective date is designed to give the Secretary of State sufficient time for compliance with this legislation.

PART III

COMMISSIONERS' COMMENTS TO PROPOSED REVISION OF CHAPTER 1 OF TITLE 56 OF THE REVISED STATUTES (TRADE NAMES) TO BE KNOWN AS CHAPTER 1A OF TITLE 56 OF THE REVISED STATUTES (BUSINESS TRADE NAMES) (Assembly, No. 4264 of 1987)

COMMISSIONERS' COMMENT TO TITLE 56, CHAPTER 1A OF THE REVISED STATUTES

The Trade Names Statute, Chapter 1 of Title 56 of the Revised Statutes, has been completely revised as Chapter 1A of Title 56 of the Revised Statutes to modernize the sections and to eliminate ambiguities. Under the prior law, which was adopted before the turn of the century, New Jersey sole proprietorships which used the phrase "& Co." or "company" and general partnerships, unless the names of *all* general partners were included in the name of the partnership, were required to file a trade name certificate with the county clerks and to appoint the county clerks as agents for service of process. These provisions, which the Commission believed were often ignored, are no longer grounded in sound public policy and do not present a rational scheme.

The new Business Trade Names Statute, Chapter 1A of Title 56 of the Revised Statutes, creates a uniform system for the filing of trade names, other than corporate trade names which are covered by N.J.S. 14A:2-2.1 of the "New Jersey Business Corporation Act." Generally, under the new statute, any non-corporation doing business for profit in this State is required to file if it does business under a name different from the names of the owners of the business. The text of new R.S. 56:1A-1 and R.S. 56:1A-2 is designed to present clear rules for when a "trade name" filing is required and, consequently, the rules are defined slightly differently for each category of business organization.

The Commission took the view that the primary purpose of this statute was to collect, in one easily accessible location, all of the trade names under which businesses were conducting themselves in this State. Consequently, this revision requires that the filing be made with the Secretary of State and that all filings be kept together in an index with corporate and nonprofit trade names. Furthermore, the Commission believed it was unnecessary to continue the requirement that the organization appoint the Secretary of State as the agent for service of process. The Commission believed that the long-arm jurisdiction of the courts and modern jurisdictional concepts would make these appointment requirements unnecessary.

The purpose of the provision that the registration of a trade name shall only last five years is to eliminate records of unused trade names and thereby unnecessary recordkeeping at the Secretary of State's office. Consequently, every five years a renewal of a trade name certificate is required. Furthermore, it would not have been fair to force every entity which had filed a trade name certificate under the former statute to be required immediately to file a new trade name certificate under this new act. Such entities are therefore exempted from the provisions of this act for a period of five years. Thereafter, any organization which had filed under the former Trade Names Statute is obligated to register by filing a renewal under the new law.

The penalty provisions connected with filing a trade name are taken from the penalty provisions imposed by the "New Jersey Business Corporation Act" under N.J.S. 14A:2-2.1. The Commission believes that this provision is more readily enforceable and more meaningful than the penalty under the former statute which made the failure to file a criminal misdemeanor.

One issue under the former Trade Names Statute was the means by which a withdrawn partner could withdraw his name from a partnership trade name certificate. Under prior law, all partners were required to sign the withdrawal certificate. The Commission has resolved this problem by permitting any withdrawing partner to file a certificate of withdrawal if he so desires. Any original trade name certificate need be filed only by an authorized officer of the entity and does not require the signature of all the partners. This provision is in line with modern concepts of business organization.

Finally, consistent with N.J.S. 14A:2-2.1, R.S. 56:1A-6 reiterates the rule that the registration of a trade name does not give the registrant any proprietary rights in the name. The Secretary of State should continue to permit the registration of identical or similar names, just as the county clerks did under prior law. The language of R.S. 56:1A-6 is taken from subsection (4) of N.J.S. 14A:2-2.1 which sets forth the identical rule for corporate trade names.

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"AN ACT concerning busine
trade names other than corporate
Chapter 1A of Title 56 of the R

R.S. 56:1-1 to R.S. 56:1-7 inclusi
of the Revised Statutes);

P.L. 1951, c. 255, ss.3, 4 (C. 56:1-
56, Chapter 1A of the Revis

:e was the means by which a withdrawn trade name certificate. Under prior law, ertificate. The Commission has resolved to file a certificate of withdrawal if he be filed only by an authorized officer ll the partners. This provision is in line

6:1A-6 reiterates the rule that the regis- any proprietary rights in the name. The gistration of identical or similar names, language of R.S. 56:1A-6 is taken from identical rule for corporate trade names.

COMMISSIONERS' COMMENT TO REPEALER SECTION 56:1A-9 OF

"AN ACT concerning business trade names, creating a uniform system for the filing of trade names other than corporate trade names, revising parts of the statutory law and enacting Chapter 1A of Title 56 of the Revised Statutes."

R.S. 56:1-1 to R.S. 56:1-7 inclusive (See Commissioners' Comment to Title 56, Chapter 1A of the Revised Statutes);

P.L. 1951, c. 255, ss.3, 4 (C. 56:1-2.1 and C. 56:1-2.2) (See Commissioners' Comment to Title 56, Chapter 1A of the Revised Statutes).

COMMISSIONERS' COMMENT TO SECTION 2 EFFECTIVE DATE OF

"AN ACT concerning business trade names, creating a uniform system for the filing of trade names other than corporate trade names, revising parts of the statutory law and enacting Chapter 1A of Title 56 of the Revised Statutes."

This act shall take effect on the first day of the calendar month following the 90th day after enactment.

This effective date is designed to give the Secretary of State and business organizations other than corporations sufficient time for compliance with this legislation.