

To: New Jersey Law Revision Commission
From: Samuel M. Silver
Re.: Partnership Trade Name Certificates
Date: September 11, 2017

MEMORANDUM

Executive Summary

Staff is reviewing the Model Entity Transaction Act¹ (META) to determine whether modifications to New Jersey's law to incorporate provisions of the Act would be of use. In connection with research on this subject, Staff noted that it is presently a "misdemeanor" for a partnership to conduct or transact business in New Jersey if they have not filed the appropriate paperwork with the County Clerk's Office.²

Background

The name of a domestic, or foreign, partnership may not always include the names of every partner. Often times the name may include the designation "and company" or "& Co." in its title. In either event, the partnership **must** file a "trade name certificate" in duplicate with the county clerk in each county in which the partnership does business.³ A "trade name certificate" is also referred to as a "true name certificate" or an "assumed name certificate."⁴ Whether it is called a "trade name," "true name," or "assumed name" certificate the Title 56 mandates that the certificate contain certain information.

The New Jersey statutes set forth compulsory information that must be contained in a "trade name certificate." The certificate must set forth the nature of the business⁵ and the full names and residences of all persons who are members of such firm or partnership⁶. If a partner is not a New Jersey resident the certificate must include a power of attorney appointing and authorizing the county clerk to accept service of process on behalf of that partner.⁷ Finally, the certificate must be sworn to before some person authorized by the laws of New Jersey to administer oaths.⁸ Once received, the County Clerk will file the duplicate copy of this certificate with the Secretary of State.⁹

¹ *Model Entity Transactions Act (META) Summary*, Uniform Law.

² See N.J.S. 56-1-1 and N.J.S. 56:1-2.

³ *Id.* See also, 1 JOHN R MACKEY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.05[2] (MATTHEW BENDER & CO. 2016).

⁴ 1 JOHN R MACKEY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.05[2], FOOTNOTE 3 (MATTHEW BENDER & CO. 2016).

⁵ N.J.S. 56-1-1 and N.J.S. 56:1-2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

The failure of any person to file a “trade name certificate” before conducting or transacting business in New Jersey is not without its consequences. Title 56:1-4 provides that “[a]ny person conducting or transacting business contrary to the provisions of either section 56:1-1 or 56:1-2 of this title shall be guilty of a **misdemeanor** (emphasis added)”. Regardless of whether there failure to file the “certificate of trade name” or to include all of the compulsory information was knowing, or accidental, those responsible are subject to criminal punishment.

The classification of an offense, for sentencing purposes, as a misdemeanor is anachronistic. In New Jersey “crimes” are set forth in Title 2C. In its current incarnation, crimes are classified, for the purpose of sentence, into four degrees.¹⁰ The statute, N.J.S. 2C:43-1(a) refers to crimes of the first degree, second degree, third degree, and fourth degree.¹¹ The New Jersey Criminal Code does recognize that other statutes may define criminal activity and that the designation of these crimes may not follow the schema of N.J.S. 2C:43-1(a).¹²

Misdemeanors are addressed in the criminal code in Subtitle 3, Chapter 43, Section 1, subsection b. Regarding misdemeanors, subsection b. provides that “... notwithstanding any other provision of law, a crime defined by any statute of this State other than this code and designated as a misdemeanor shall constitute for purpose of sentence, a crime of the fourth degree.”

Presently, Title 56:1-4 provides that a violation of the statute is a misdemeanor and there is no sentence stated in the statute. Thus, a violation of the statute is a fourth degree offense.¹³ Those found in violation of this section are subject to eighteen months incarceration¹⁴ and up to a \$10,000 fine.¹⁵

The statutes that set forth the requirements of a “trade name certificate” were last amended the 1950s.¹⁶ In addition, the statutes reflect the “aggregate theory” of partnership. Pursuant to the aggregate theory, a partnership is seen as a collection of the individual partners.¹⁷ In 2000, New Jersey rejected the “aggregate theory” in favor of the “entity theory” of partnerships. A New Jersey partnership is now an entity distinct from its partners.¹⁸

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding the treatment of partnerships that do not comply, willingly or unknowingly, with the statutory filing

¹⁰ N.J.S. 2C:43-1(a).

¹¹ *Id.*

¹² N.J.S. 2C:43-1(b).

¹³ CANNEL, CRIMINAL CODE ANNOTATED, *Comment N.J.S. 2C:43-1(b)*, (Gann 2017).

¹⁴ N.J.S. 2C:43-6.

¹⁵ N.J.S. 2C:43-3(b)(2).

¹⁶ N.J.S. 56-1-1 and *N.J.S. 56:1-2* were last amended in 1951.

¹⁷ 1 JOHN R MACKAY, II, JEFFREY SHAPIRO, ALAN WOVSANIKER, NEW JERSEY CORPORATIONS AND OTHER BUSINESS ENTITIES, 3RD ED. § 19.04[2] (MATTHEW BENDER & CO. 2016).

¹⁸ N.J.S. 42:1A-9(a).

requirements in an effort to determine whether it would be useful to modify or eliminate the imposition of penalties that might no longer be consistent with the State's approach to business entity requirements by updating the statutes.