14A:1-6

LEGISLATIVE HISTORY CHECKLIST

NJSA: 14A:1-6

("New Jersey Business Corporation Act--amendment)

LAWS OF: 1973 CHAPTER: 366

Bill No: S1063

Sponsor(s): Mc Dermott

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Committee: Assembly: Commerce, Industry and Professions

Senate: Labor, Industry and Professions

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CHAPTER 366 LAWS OF N. J. 1973
APPROVED 1-7-74

STATE OF NEW JERSEY

SENATE, No. 1063

Introduced June 15, 1972

By Senators McDERMOTT, BATEMAN, CRABIEL and TANZMAN

Referred to Committee on Labor, Industry and Professions

TOGETHER WITH COMMENTS AND THE

FINAL REPORT OF THE

CORPORATION LAW REVISION COMMISSION

CORPORATION LAW REVISION COMMISSION

ALAN V. LOWENSTEIN
Chairman

DONALD B. KIPP

JAMES A. HESSION

FINAL REPORT
OF THE
CORPORATION LAW REVISION COMMISSION

June 15, 1972.

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), affecting 72 of the 195 sections in the Act and proposing five new sections, together with the Commission's comments regarding the proposed changes or additions.

Background

The Commission was created in 1958 to modernize New Jersey's corporation laws. N. J. S. A. 1:14–1 *et seq.* (c. 10, L. 1958). It submitted the proposed text of Title 14A to the Governor and Legislature on June 20, 1968. That proposed bill was enacted as Chapter 350 of the laws of 1968 and became effective on January 1, 1969. The Commission's existence was extended to enable it to observe and evaluate the operation of Title 14A and to consider and report to the Legislature such amendments or refinements as it may deem appropriate. N. J. S. A. 1:14–7 (c. 7, L. 1969), as amended, c. 254, L. 1971.

The Commission submitted a technical amendments bill on March 4, 1969, correcting technical errors and ambiguities, and making a limited number of substantive revisions. That bill was enacted as Chapter 102 of the laws of 1969. In addition, the Commission cooperated with the Secretary of State in preparing a bill to increase substantially corporate filing fees. That bill was enacted as Chapter 253 of the laws of 1971.

Since adoption of the New Jersey Business Corporation Act (B. C. A.), the Commission has had approximately fifteen all-day meetings. At those meetings, the Commission considered several hundred proposals for amendments or additions 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 recent changes in the Model Business Corporation Act, which has been substantially revised since adoption of the B. C. A., and in the Delaware General Corporation Law.

In reviewing and considering proposed amendments to the B. C. A., the Commission continued to be guided by its original legislative mandate:

> 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 and conflicting, overlapping and redundant provisions, and to present statutes applicable to business corporations, in a logical, clear and concise manner. (N. J. S. A. 1:14–3.)

Principal Changes Proposed

The accompanying bill proposes amendments to 72 sections of the B. C. A. and recommends the adoption of five new sections. A substantial proportion of the proposed amendments are technical in nature, in some cases merely correcting punctuation, eliminating surplusage, or clarifying language. Approximately seventeen of the proposed amendments or additions, however, are of major scope and are worthy of special note. A summary of some of the more significant changes or additions follows:

(1) Proposed new subsection 14A:1–6(5) permits the filing of a certificate of correction with the Secretary of State, correcting any inaccurate document previously filed which inaccurately recorded the corporate action taken. The rights of any persons who relied on the inaccurate filing are preserved.

(2) A new section is proposed, tentatively designated 14A:2–2.1, requiring corporations which use fictitious names in the transaction of business within New Jersey to file a certificate disclosing that fact with the Secretary of State. This section does not interfere with the existing right of a corporation to use whatever business or trade name or trademark it might choose, even one used by other domestic or foreign corporations in New Jersey, and leaves the problem of policing unfair trade practices to the law of trademarks or unfair competition, where it properly belongs. This

section will have the salutary effect of compelling all corporations using such names to make a public disclosure of their actual identity and accordingly minimize the possibility of deliberate or inadvertent deception.

(3) The proposed amendment to subsection 14A:5–6(2) permits shareholder action to be taken without a meeting by a non-unanimous consent of shareholders unless prohibited by the corporation's certificate of incorporation, but does not permit such a consent to be used in lieu of an annual meeting. In addition, this proposed amendment sets out in detail the mechanics to be followed in using such non-unanimous consents of shareholders. This section presently permits the use of a non-unanimous shareholder consent in lieu of a meeting, but only if authorized in the corporation's certificate of incorporation.

(4) Proposed new subsection 14A:5–29(3) creates a statutory norm for preemptive rights of shareholders if the corporation elects by an appropriate statement in its certificate of incorporation to grant such rights. Section 14A:5–29 presently provides that shareholders of a corporation shall not have preemptive rights unless otherwise provided in the certificate of incorporation. This new subsection does not change that statutory norm or limit the right of a corporation to establish preemptive rights of such character as may be desired and specified, but merely spells out precisely the nature of the preemptive rights if the certificate of incorporation specifies merely that the shareholders of the corporation shall have preemptive rights, and goes no further. This amendment provides a measure of certainty regarding those rights in such instances, rather than relying upon the vagaries of the common law of preemptive rights.

(5) The proposed amendment to section 14A:6–2 permits the board of directors of any corporation to consist of only one member; this is consistent with recent changes in the Model Business Corporation Act and in the Delaware Act.

(6) Proposed new section 14A:7–15.1 clarifies the procedures to be used in effecting stock combinations and stock splits. It requires a certificate to be filed with the Secretary of State setting out relevant information regarding the split or combination. It also permits the corporation's certificate of incorporation to be amended by board action alone if that is necessary in order to effect the split or combination, provided there is no increase in the number of authorized but unissued shares caused by such an

amendment. Typically, such amendments would include increasing or decreasing the par value of shares to be combined or split or increasing the number of authorized shares if the split would necessitate such an increase.

(7) The proposed amendment to section 14A:8–3 clarifies the terms which should be included in stock option plans and makes explicit the extent to which such plans may be flexible.

(8) The proposed amendments to sections 14A:10–3 and 14A:10–11 expand the requirements imposed on corporations in advising shareholders of their rights in dissenting from mergers, consolidations or sales of substantially all assets so as to be entitled to be paid the fair value of their shares in cash. In effect, these provisions compel the corporation to outline the procedures to be followed by the shareholder. A proposed amendment to section 14A:11–2 also imposes upon the corporation an obligation in subsequent communications with dissenting shareholders to advise them of deadlines by which action must be taken in order to perfect their rights. The purpose of each of these amendments is to ensure that any shareholder who wishes to dissent from such action does not lose his right because of failure to comply with the relatively complicated procedures which must be followed under Chapter 11 of the B. C. A.

(9) The proposed amendment to subsection 14A:10–3(4) broadens the situations in which a shareholder vote is not required for a surviving corporation to a merger. This subsection presently dispenses with such a shareholder vote if the surviving corporation's certificate of incorporation is not amended by the merger and if the shares to be issued pursuant to the merger will not exceed fifteen percent of the shares of that class or series presently outstanding. The proposed amendment increases this percentage to twenty percent and makes it applicable to common stock or securities convertible into common stock, consistent with other statutory and regulatory formulations.

(10) A proposed new section, tentatively designated 14A:10–12, codifies the *de facto* merger doctrine. This proposed amendment grants to shareholders of a corporation which proposes to acquire another business enterprise in exchange for shares of its stock the same rights they would have if the acquisition were structured as a merger, if the acquiring corporation is to issue an amount of stock equal to 40 percent or more of its present outstanding common stock in order to effect the transaction. Under present

law, a corporation may acquire another business in exchange for shares of its own stock without limitation, and not be compelled to submit the matter to its shareholders, if the transaction is not structured as a merger, at least in the absence of a court determination that the proposed transaction is a *de facto* merger. Adoption of this proposed new section will not only benefit shareholders by giving them a voice in such transactions but also benefit the corporation by providing a reasonable measure of certainty in the presently uncertain area of what constitutes a *de facto* merger.

(11) The proposed amendment to section 14A:11–1 removes certain ambiguities and inconsistencies regarding shareholder appraisal rights. Under the amended section, unless the certificate of incorporation otherwise provides, shareholders will not have the right to dissent from a merger, consolidation or sale of assets in either of the following situations: (a) if prior to the transaction the shareholders own stock which is listed on a national securities exchange or is held by not less than 1,000 holders, or (b) if upon consummation of the transaction the shareholders will receive cash, shares or other securities which will be listed on a national securities exchange or held by not less than 1,000 holders. In its present form, section 14A:11–1 is inconsistent in approach as between mergers and consolidations on the one hand, and sales of assets on the other; and it does not explicitly permit the corporation to vary the statutory result. The proposed amendment will not only permit the certificate of incorporation to override the statute by granting appraisal rights in the two situations above mentioned, but it will authorize a corporation to "volunteer" an appraisal right in other situations where the right is not mandatory under the statute.

(12) Proposed new subsection 14A:12–2(3) permits the filing of a certificate of dissolution by a corporation which has not commenced business, without obtaining a tax clearance certificate and without paying any fee for filing of the certificate of dissolution. The Commission is hopeful that adoption of this new subsection will provide an attractive alternative to merely permitting such a corporation to "wither on the vine" and, accordingly, will substantially reduce the administrative burden in the office of the Secretary of State and the Corporation Tax Bureau.

(13) A proposed new section, tentatively designated 14A:12–5.1, changes the law regarding dissolution of corporations which have a specified duration in their certificates of incorporation. Hereto-

fore, there has been a measure of confusion regarding the status of a corporation when the duration of existence specified in its certificate of incorporation had expired. In addition, there had been speculation that an amendment to the certificate of incorporation specifying a limited period of duration would be a useful device to avoid the difficulties of obtaining tax clearance certificates and filing a certificate of dissolution. This section provides that dissolution shall not take effect until an appropriate certificate of dissolution is filed. It safeguards a shareholder of such a corporation who may have relied upon the existence of a period of limited duration by requiring the corporation to honor any demand for dissolution within sixty days of the date of demand, unless in the interim the certificate of incorporation is amended to extend the duration.

(14) The proposed amendment to section 14A:12–7 substantially enlarges the rights and remedies available in the event of corporate deadlock or shareholder "freeze-out" situations. It adds as a ground for action under this section oppressive or wrongful behavior by those in control of the corporation. Under present law, the only remedy available under this section is dissolution; the proposed amendment would add as alternative remedies the appointment of a provisional director, the appointment of a "custodian" (whose powers would be similar to those of a receiver but whose duty would be to continue the business of the corporation, acting through or in conjunction with the existing board and officers), and a discretionary buy-out of plaintiff's stock at a court-determined value. Each of these remedies is discretionary with the court and each is not exclusive; accordingly, the court is given the flexibility necessary to handle any particular situation.

(15) The proposed amendment to 14A:12–13 provides for shareholder transferee liability even after a corporation in dissolution has taken steps to bar creditors if the creditor is able to show good cause for having failed earlier to present his claim.

(16) A proposed new section, tentatively designated 14A:12–19, prohibits complete liquidation of a corporation without providing for the corporation's dissolution. An accompanying amendment to section 14A:6–12 imposes personal liability on directors who cause a corporation to violate this new section. Adoption of this proposed amendment will close the door on the practice of liquidating corporations, paying all taxes through the date of liquidation, and then allowing them to "wither on the vine," rather than

dissolving and obtaining the necessary tax clearances and paying the additional fees for filing a certificate of dissolution. Adoption of this proposed section and the proposed amendment to section 14A:12–2, should help eliminate a substantial number of inactive corporations which remain on the books in the Secretary of State's office for many years before forfeiture of their charters by proclamation of the Secretary of State.

(17) The proposed amendment to section 14A:14–15 reinstates the requirement that creditors' claims submitted to a receiver be under oath. In addition, it provides a bar for claims of creditors who fail to submit their claims within the prescribed time periods.

Recommendations for Further Action

In recent years the Commission has received many suggestions from members of the bar of this State and other states which related to, but did not fall within the scope of, its legislative mandate. In addition, other matters of a similar nature have been brought to the Commission's attention by its own staff. The Commission is of the view that implementation of each of the following recommendations would assist in achieving the objective which it has constantly kept in mind: ensuring that New Jersey continues to be a leading corporate jurisdiction with sound, well-administered corporation laws.

1. *Administrative Problems.*—Following adoption of Title 14A, the members of the Commission learned from a number of out-of-state sources that, although New Jersey's corporation laws were now at least as clear, modern, and workable as those of any other jurisdiction, New Jersey still is not the most preferred state for incorporation because of delays caused by the administration of the Corporation Business Tax Act (1945) (N. J. S. A. 54:10A–1 *et seq.*) and of the Business Corporation Act itself. The Commission's own experience and the statements made by persons from out-of-state made it clear that the present personnel of the Corporation Tax Bureau and of the Corporation Division of the Secretary of State's office have done an extraordinarily conscientious and courteous job in performing their duties, considering the equipment, personnel, and statutory authority they presently have.

(a) The principal difficulty caused by the Business Corporation Tax Act is the requirement that corporations may not merge or consolidate until all taxes owing to the State shall have been fully

paid. N. J. S. A. 54:10A–12; N. J. S. A. 54:50–11. It long has been recognized that this requirement makes no sense unless the corporation merging or consolidating will merge or consolidate into a foreign corporation which will not be qualified to transact business in New Jersey. In the case of all mergers or consolidations, the surviving corporation by operation of law remains liable for all liabilities of the merged corporation. Unless the surviving corporation is a foreign corporation not qualified to transact business in New Jersey, it is subject to the jurisdiction of the New Jersey courts and consequently the State's ability to collect taxes owing from the merged corporation is, if anything, enhanced.

The effect of the parallel provisions of N. J. S. A. 54:10A–12 and N. J. S. A. 54:50–11 is merely to delay and impose an impediment to a merger or consolidation without furthering any interest of the State. The Division of Taxation has construed these sections as reasonably as possible, recognizing the difficulties they impose, but nonetheless is hamstrung to a degree by the explicit statutory language. The Commission has prepared a bill which would repeal N. J. S. A. 54:10A–12 (which merely duplicates the somewhat broader provisions of N. J. S. A. 54:50–11) and amend N. J. S. A. 54:50–11. Adoption of this bill will eliminate unnecessary delays and substantially ease the administrative burden of the Division of Taxation, without jeopardizing any interests of the State. A copy of that proposed bill is annexed hereto.

(b) The Corporation Division of the Secretary of State's office appears to be understaffed and underequipped. This sometimes results in an inability to provide information or services as quickly as needed, with the result that corporations which might otherwise have incorporated in New Jersey will incorporate in other jurisdictions, notably Delaware. Several other jurisdictions, which in a very real sense compete with New Jersey for domestication of large corporations, are able to provide information regarding availability of names, good standing of corporations, and the like within 24 hours or less, often by telephone or telegram. Delaware is the most obvious example. The Commission understands that this is possible in these other jurisdictions because the staffs are substantially larger, there is more automation, there are more telephone lines, and salary levels are higher. It is remarkable that the staff of the Corporation Division in the Secretary of State's office is able to provide services as promptly and accurately as it does, considering the enormous volume it handles. New Jersey is approximately fourth highest in the nation in number of corporations incorporated annually; Delaware is approximately eleventh.

Enactment of Title 14A gave New Jersey one of the best corporation statutes in the United States. This is insufficient to attract corporate business to this State unless the office charged with administering meaningful parts of the law is given the personnel and equipment necessary to handle the volume of work generated under the law. The Commission strongly recommends that particular attention be paid to the needs of the Corporation Division of the Secretary of State's office through a study and comparison of the workings of similar offices in other jurisdictions. The Commission feels that any such study would disclose not only the need for additional staff and more modern equipment, but also that the cost of such changes will be more than made up by the additional revenues to be generated by an increase in corporations which choose to incorporate in New Jersey.

2. *Not-for-Profit Corporations.*—New Jersey's not-for-profit corporation laws have long been obsolete. Titles 15 and 16 have developed in patchwork fashion and are sorely in need of revision and modernization. The American Bar Association Committee on Corporate Laws, which prepared the Model Business Corporation Act, also prepared a Model Non-Profit Corporation Act, published by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association. The Commission recommends that consideration be given to the revision of Titles 15 and 16 and that a separate body be created to undertake such a revision. The Model Non-Profit Corporation Act would be an excellent starting point for any such revision.

At present, not-for-profit foreign corporations are not required to qualify to transact business in New Jersey. Title 14 had been construed administratively to impose such a requirement, but the definitional provisions of Title 14A make it clear that it is directed only to profit-seeking business corporations. (See N. J. S. 14A:1–2 (j).) The Commission holds to the view that such corporations should not qualify to transact business under Title 14A, which is intended to apply exclusively to profit-seeking business corporations. Accordingly, it is recommended that, pending complete revision of Titles 15 and 16, Title 15 be amended to require that foreign not-for-profit corporations engaging in activities in New Jersey first qualify to transact business in New Jersey by following procedures similar to those set out in Chapter 13 of the B. C. A.

3. *Other Forms of Business Enterprises.*—New Jersey presently imposes no requirement for qualification or registration with the State by certain entities which, although not corporations, have qualities similar to corporations, such as Massachusetts business trusts, foreign limited partnerships, and foreign limited partnership associations. The Commission has no view on whether such business enterprises should be compelled to file a certificate of authority or the like in New Jersey before transacting business here. It is possible, after study and analysis of the problem, that it might be concluded that such entities at a minimum should make their presence known by filing an appropriate statement disclosing relevant information and perhaps appointing a registered agent. The Commission recommends that a study of this subject be undertaken.

4. *Continuation of Commission.*—With enactment of these proposed amendments, the members of the Commission are hopeful that no substantial revision of New Jersey's business corporation laws will be necessary or desirable for some years to come. In recent years, however, new ideas for corporate norms have been developing rapidly, particularly in jurisdictions which are consciously attempting to enhance their corporate climate. Any such ideas should be reviewed and evaluated to determine whether they are suitable for inclusion in New Jersey's laws. Moreover, from time to time, amendments are proposed to our corporation laws which appear on their face to be sound but which, if enacted, could substantially harm New Jersey's corporate climate or cause substantial disruptions because of inconsistencies with other parts of the statute. One of the major problems with old Title 14 was that it too had evolved in a patchwork manner, amendment being superimposed upon amendment, often without regard to consistency with other parts of the statute, resulting in substantial ambiguities. It is recommended, therefore, that a continuing commission or committee be created and charged with responsibility for (a) monitoring changes in the Model Business Corporation Act and in the corporation laws of other jurisdictions; (b) recommending from time to time amendments to the New Jersey Business Corporation Act; and (c) advising the Legislature and Governor, from time to time, on request, of the impact of any pending or proposed legislation on New Jersey's corporate climate.

Procedure and Personnel

In preparing these proposed amendments, the Commission followed the procedures previously followed by it, holding regular meetings, usually lasting all day, with the members and consultants doing independent work and research between meetings, and submitting proposed amendments for consideration at formal meetings. The members of the Commission, as well as its consultants, who attended practically all meetings, served without compensation.

The Commission gratefully acknowledges the great contributions to its efforts made by its consultants, Robert P. Hazlehurst, Jr., and Joseph Lunin, and by its Secretary, John R. MacKay, 2nd. In addition, the Commission wishes to express its appreciation to the many lawyers who contributed suggestions for amendments, in particular to Francis W. Thomas, whose many suggestions and comments were of great value.

The Commission also wishes to acknowledge the assistance in preparation of the Business Corporation Act and of the proposed amendments of William M. Lanning, Chief Counsel, Law Revision and Legislative Services Commission, and of many of the members of the staff of the Office of the Secretary of State and the Division of Taxation, in particular Robert M. Falcey, Assistant Secretary of State; Sidney Glaser, Director of Division of Taxation; Paul Nagy, Supervisor of the Corporation Division of the Department of State; and Edward S. Landerkin, Superintendent, Audit Activity, Division of Taxation.

Respectfully submitted,

ALAN V. LOWENSTEIN, *Chairman*
DONALD B. KIPP
JAMES A. HESSION

/mk

SENATE 1063

AN ACT to amend and supplement the "New Jersey Business Corporation Act," enacted as Title 14A of the New Jersey Statutes by P. L. 1968, c. 350.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N. J. S. 14A:1–6 is amended to read as follows:

14A:1-6 Execution, filing and recording of documents.

(1) If a document relating to a domestic or foreign corporation is required or permitted to be filed in the office of the Secretary of State under this act:

(a) The document shall be in the English language, except that the corporate name need not be in the English language if written in English letters or Arabic or Roman numerals, and except that this requirement shall not apply to a certificate of good standing under paragraph 14A:2–4(2) (b), section 14A:2–5, or subsection 14A:13–4(2).

(b) The filing shall be accomplished by delivering the document to the office of the Secretary of State, together with the fees and any accompanying documents required by law. Thereupon, the Secretary of State shall endorse upon it the word "Filed" with his official title and the date of filing thereof, and shall file it in his office. If so requested at the time of the delivery of the document to his office, the Secretary of State shall include the **[**hour**]** *time* of filing in his endorsement thereon.

(c) The transaction in connection with which the document has been filed shall be effective at the time of filing, unless a subsequent effective time is set forth in such document pursuant to any other provision of this act, in which case such transaction shall be effective at the time so specified, which shall in no event be later than 30 days after the date of filing.

(2) If a document relating to a domestic corporation or a foreign corporation is required or permitted to be filed under this act and is also required by this act to be executed on behalf of such corporation, the document shall be signed by the chairman of the board, or the president or a vice-president. The name of any person so signing such a document, and the capacity in which he signs, shall be stated beneath or opposite his signature. The document may, but need not, contain

(a) the corporate seal; or

(b) an attestation by the secretary or an assistant secretary of the corporation; or

(c) an acknowledgement or proof.

If the corporation is in the hands of a receiver, trustee, or other court appointed officer, the document shall be signed by such fiduciary or the majority of them, if there are more than one.

(3) If a document relating to a domestic or foreign corporation was required or permitted to be filed in the office of the Secretary of State under the law in force prior to the effective date of this act and was or is duly executed before or after the effective date of this act, in accordance with such law, to reflect any vote, consent, certification, or action by directors, officers, or shareholders of a corporation or by any such persons on behalf of the corporation, duly taken, given or made before the effective date of this act, such document and any annual report by a corporation, so executed, may be filed in the office of the Secretary of State on the effective date of this act, and within 6 months thereafter.

(4) The Secretary of State shall record all documents, excepting annual reports, which relate to or in any way affect corporations, and which are required or permitted by law to be filed in his office. The recording may be effected by typewritten copy, or by photographic, microphotographic or microfilming process, or in such other manner as may be provided by law. Such records shall be kept in a place separate and away from the place where the originals are filed.

(5) If any instrument filed with the Secretary of State under any provision of this act is an inaccurate record of the corporate action therein referred to, or was defectively or erroneously executed, such instrument may be corrected by filing with the Secretary of State a certificate of correction executed on behalf of the corporation. The certificate of correction shall specify the inaccuracy or defect to be corrected and shall set forth the correction. The instrument so corrected shall be deemed to have been effective in its corrected form as of its original filing date except as to persons who relied upon the inaccurate portion of the certificate

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

and who are adversely affected by the correction; the correction shall be effective as to such persons as of the effective date of filing of the certificate of correction.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:1-6(1) (b) has been revised to provide that, if so requested, the Secretary of State may include the actual hour and minute of filings in his endorsement on any document filed in his office.

A new subsection 14A:1-6(5) has been added to provide a procedure by which erroneous filing with the Secretary of State may be corrected. From time to time, documents will be filed containing errors which should be correctable by a simple procedure. Delaware adopted a section substantially similar to this subsection in 1969. Del. G.C.L. § 103(f). See also N.Y.B.C.L. § 105.

2. N. J. S. 14A:2-2 is amended to read as follows:

14A:2-2 Corporate name of domestic or foreign corporations.

(1) The corporate name of a domestic corporation or of a foreign corporation authorized to transact business in this State

(a) shall not contain any word or phrase, or abbreviation or derivative thereof, which indicates or implies that it is organized for any purpose other than one or more of the purposes permitted by its certificate of incorporation;

(b) shall not be the same as, or confusingly similar to, the corporate name of any domestic corporation, including a corporate name set forth in a certificate of incorporation filed in the office of the Secretary of State whose effective date is subsequent to the date of filing, as authorized by subsection 14A:2-7 (2), or of any foreign corporation authorized to transact business in this State or any corporate name reserved or registered under this act, unless the written consent of such other domestic or foreign corporation or holder of a reserved or registered name to the adoption of its name, or a confusingly similar name is filed in the office of the Secretary of State with the certificate of incorporation or with the application for an original or amended certificate of authority to transact business in this State or, in lieu of such consent, there is filed a certified copy of a final judgment of a court of competent jurisdiction establishing the prior right of the corporation to the use of such name in this State, and

(c) shall not contain any word or phrase, or any abbreviation or derivative thereof, the use of which is prohibited or restricted by any other statute of this State, unless any such restrictions have been complied with.

(2) This section

(a) shall not require any domestic corporation organized prior to the effective date of this act or any foreign corporation authorized to transact business in this State prior to the effective date of this act to change its corporate name in order to comply with this section, if such name is otherwise lawful on the effective date of this act. No such corporation shall change its corporate name on or after the effective date of this act to a name which is not available for corporate use under this section; *and*

(b) shall not prevent a domestic corporation with which another corporation, domestic or foreign, is merged, or which is formed by the reorganization or consolidation of one or more other domestic or foreign corporations or upon a sale, lease or other disposition to, or exchange with, a domestic corporation of all or substantially all the assets of another corporation, domestic or foreign, including its name, from having the same corporate name as any of such corporations if at the time such other corporation was organized under the laws of, or is authorized to transact business in, this State[; and].

[(c)] *(3) If the name of a foreign corporation is not available for use in this State because of the prohibitions of subsection 14A:2-2(1), such corporation may be* [shall not prevent a foreign corporation from being] authorized to transact business in this State under a fictitious name which is available for corporate use under this section. [if such corporation files] *Such corporation shall file* in the office of the Secretary of State with its application for an original or amended certificate of authority a resolution of its board adopting such fictitious name for use in transacting business in this State.

[(3)] *(4)* The corporate name of a domestic corporation which has been dissolved and any name confusingly similar to the name of a domestic corporation which has been dissolved shall not be available for corporate use for 2 years after the effective time of dissolution, unless, within such 2 year period, the written consent

of such dissolved corporation to the adoption of its name, or a confusingly similar name, is filed in the office of the Secretary of State with the certificate of incorporation of another domestic corporation or with the application of a foreign corporation for an original or amended certificate of authority to transact business in this State.

[(4)] *(5)* The filing in the office of the Secretary of State of the certificate of incorporation of a domestic corporation or the issuance by the Secretary of State of a certificate to a foreign corporation authorizing it to transact business in this State shall not preclude an action by this State to enjoin a violation of this section or an action by any person adversely affected to enjoin such violation or the use of a corporate name in violation of the rights of such person, whether on principles of unfair competition or otherwise. The court in any such action may grant any other appropriate relief.

COMMISSIONERS' COMMENT—1972

The foregoing amendment is necessary to make it clear that a foreign corporation may not adopt a fictitious name under this section unless its own name is not available and to grant express authority for the use by such a foreign corporation of a fictitious name under such circumstances. Both of these concepts were implicit in prior law but the failure to make it clear that non-availability was a condition precedent to using a fictitious name by a foreign corporation has led to confusion.

3. N. J. S. 14A:2-2.1 is added as follows:

14A:2-2.1 Fictitious corporate names.

(1) No domestic corporation, or foreign corporation which transacts business in this State within the meaning of section 14A:13-3, shall transact any business in this State using a fictitious name unless

(a) it also uses its actual name in the transaction of any such business in such a manner as not to be deceptive as to its actual identity; or

(b) it has been authorized to transact business in this State using the fictitious name as provided in subsection 14A:2-2(3); or

(c) it has first registered the fictitious name as provided in this section.

(2) Any corporation may adopt and use any fictitious name, including any which would be unavailable as the name of a domestic or foreign corporation because of the prohibitions of paragraph 14A:2-2(1)(b), but not including a name prohibited as a corporate name by paragraph 14A:2-2(1)(c), by filing a certificate of registration of fictitious name with the Secretary of State executed on behalf of the corporation. The certificate shall set forth

(a) the name, jurisdiction and date of incorporation of the corporation;

(b) the fictitious name;

(c) a brief statement of the character or nature of the particular business or businesses to be conducted using the fictitious name;

(d) that the corporation intends to use such name in this State;

(e) that the corporation has not previously used the fictitious name in this State in violation of this section or, if it has, the month and year in which it commenced such use.

(3) Such a registration shall be effective for five years from the date of filing and may be renewed successively for additional five-year periods by filing a certificate of renewal executed on behalf of the corporation at any time within three months prior to, but not later than, the date of expiration of the registration. The certificate of renewal shall be effective as of the date of expiration of the earlier registration. The certificate of renewal shall set forth the information required in paragraph 14A:2-2.1(2)(a) through paragraph 14A:2-2.1(2)(d), the date of filing of the certificate of registration then in effect, and that the corporation is continuing to use the fictitious name.

(4) Nothing in this section shall be construed

(a) to grant to the registrant of a fictitious name any right in the name as against any prior or subsequent user of the name, regardless of whether used as a trademark, trade name, business name, or corporate name; or

(b) to interfere with the power of any court to enjoin the use of any such name on the basis of the law of unfair competition or on any other basis except the mere fact of identity or similarity of the fictitious name to any other corporate name.

(5) A corporation which has used a fictitious name in this State contrary to the provisions of this section shall, upon filing a certificate of registration of fictitious name or an untimely certificate of renewal, pay to the Secretary of State the filing fee prescribed for such a certificate plus an additional filing fee equal to the full amount of the regular filing fee multiplied by the number of years it has been using such fictitious name in violation of this section after the operative date of the prohibitions of this section specified in subsection 14A:2–2.1(8). For purposes of this subsection, any part of a year shall be considered a full year.

(6) The failure of a corporation to file a certificate of registration or renewal of fictitious name shall not impair the validity of any contract or act of such corporation and shall not prevent such corporation from defending any action or proceeding in any court of this State, but no such corporation shall maintain any action or proceeding in any court of this State arising out of a contract or act in which it used such fictitious name until it has filed such a certificate.

(7) (a) A corporation which files a certificate of registration of fictitious name which contains a false statement or omission regarding the date it first used a fictitious name in this State shall, if such false statement or omission reduces the amount of the additional fee it paid or should have paid as provided in subsection 14A:2–2.1(5), forfeit to the State a penalty of not less than $200.00 nor more than $500.00.

(b) A corporation which ought to have filed a certificate of registration or renewal of fictitious name and fails to do so within 60 days after being notified of its obligation to do so by certified or registered mail by the Secretary of State, by any other governmental officer, or by any person aggrieved by its failure to do so, shall forfeit to the State a penalty of not less than $200.00 nor more than $500.00.

(c) Such penalty shall be recovered with costs in an action prosecuted by the Attorney General. The court may proceed in such an action in a summary manner or otherwise.

(8) The prohibitions of this section shall not be operative until three months from the effective date of the act of which this is a part. Any certificate of registration filed during that three-month period need not include the information required by paragraph 14A:2–2.1(2) (e).

COMMISSIONERS' COMMENT—1972

This section is new. Until adoption of this section, there was no requirement that a corporation register a fictitious name, although there was a requirement that proprietorships and partnerships transacting business under assumed names file business name certificates. N. J. S. A. 56:1–1 *et seq.* That statute is expressly inapplicable to corporations. N. J. S. A. 56:1–5.

The purpose of this section is to create a public record of fictitious names used by corporations and thereby eliminate the possibility of deception. Registration of a name does not create in the registrant any rights in the name. Accordingly, the registration of identical names is not prohibited, and any contest between the users of the same or similar names will continue to be settled on the basis of the law of unfair competition or federal or state trademark laws. See Gilson, Tortious Incorporation: Trap for the Unwary, 24 The Business Lawyer 237 (1968); McDermitt and Manetti, Protection of Discontinued Company Names, 22 The Business Lawyer 423, 426 (1967); 3 Callman, Unfair Competition, Trademarks, and Monopolies § 82.5 (3rd ed. 1969).

This section is derived in part from the Pennsylvania Fictitious Corporate Name Act (Pa. Laws of 1957, Act 374) 54 Purdon's Pa. Stat. Ann. §§ 81–104. California and Virginia have similar statutes. Calif. B. & P. Code § 17900 *et seq.*; Va. Code § 59–169 *et seq.*

4. N. J. S. 14A:2–3 is amended to read as follows:

14A:2-3 Reserved name.

(1) The exclusive right to the use of a corporate name may be reserved upon compliance with the provisions of this section.

(2) The reservation shall be made by filing in the office of the Secretary of State an application to reserve a specified corporate name, *or the first name available for corporate use among not more than three specified names,* executed by or on behalf of the applicant and setting forth the name and address of the applicant. If the Secretary of State finds that the name complies with the provisions of section 14A:2–2, he shall reserve it for the exclusive use of the applicant for a period of 120 days from the date of filing of the application and shall issue a certificate of reservation.

(3) The right to the exclusive use of a specified corporate name so reserved may be transferred by filing in the office of the Secre-

tary of State a notice of such transfer, executed by or on behalf of the applicant for whom the name was reserved, and specifying the name and address of the transferee.

COMMISSIONERS' COMMENT—1972

The procedure for reserving a specified corporate name under this section has been favorably received, and the section has been much used. The fee for the reservation certificate is $20.00 when a single specified corporate name is submitted in the application. 14A:15-3(1). The revision of subsection 14A:2-3(2) will permit the practitioner to submit up to three specified corporate names to the Secretary of State who will issue a certificate of reservation for the first available name. In view of the additional searching required, the reservation fee is being raised to $25.00 when up to three names are submitted. See 14A:15-3(1).

14A:2-4 Registered name.

COMMISSIONERS' COMMENT—1972

Correction to 1968 Comment. The reference in the second sentence to the 60-day period in § 14A:2-3 is erroneous. Under § 14A:2-3, a certificate of reservation is effective for a period of 120 days from the date of filing of the application therefor.

5. N. J. S. 14A:2-6 is amended to read as follows:

14A:2-6 Incorporators.

(1) One or more individuals or domestic or foreign corporations may act as incorporator or incorporators of a corporation by signing and filing in the office of the Secretary of State a certificate of incorporation for such corporation. Individuals acting as incorporators shall be at least [21] *18* years of age. Incorporators need not be United States citizens or residents of this State or subscribers to shares in the corporation.

(2) Except as otherwise provided in the certificate of incorporation, any action required or permitted by this act to be taken by incorporators may be taken without a meeting.

(3) When there are two or more incorporators, if any dies or is for any reason unable to act, the other or others may act. If there is no incorporator able to act, any person for whom an incorporator was acting as agent may act in his stead, or if such other person also dies or is for any reason unable to act, his legal representative may act.

COMMISSIONERS' COMMENT—1972

This section has been amended to be consistent with c. 81, L. 1972, changing the age of majority from 21 to 18 for most purposes.

6. N. J. S. 14A:2-8 is amended to read as follows:

14A:2-8 Organization meeting of directors.

On or after the effective date of the certificate of incorporation, an organization meeting of the board named in the certificate of incorporation shall be held, at the call of a majority of the [incorporators] *board so named*, to adopt by-laws, elect officers, *authorize the issuance of shares*, and transact such other business as may come before the meeting. The [incorporators] *board members* calling the meeting shall give at least 5 days' notice thereof by mail to each director named in the certificate of incorporation, which notice shall state the time and place of the meeting.

COMMISSIONERS' COMMENT—1972

This section was revised to provide that the organization meeting of directors is to be held at the call of a majority of the board of directors named in the certificate of incorporation, rather than at the call of a majority of the incorporators. Model Act § 57 (rev. 1969) has been similarly amended. This section, as revised, also lists the issuance of shares as a standard item on the agenda for the organization meeting of directors.

7. N. J. S. 14A:3-3 is amended to read as follows:

14A:3-3 Guaranty not in furtherance of corporate purposes.

A corporation may give a guaranty not in furtherance of its corporate purposes *or those of any subsidiary, joint venture or other enterprise in which it has an interest*, only when authorized at a meeting of shareholders by the affirmative vote of two-thirds of the votes cast by the holders of each class and series of shares entitled to vote thereon. If authorized by a like vote, such guaranty may be secured by a mortgage of or a security interest in all or any part of the corporate property, or any interest therein, wherever situated.

COMMISSIONERS' COMMENT—1972

The change in phraseology to this section is to clarify the intent of the original section without change in substance.

8. N. J. S. 14A:3–5 is amended to read as follows:

14A:3-5 Indemnification of directors, officers and employees.

(1) As used in this section,

(a) "corporate agent" means any person who is or was a director, officer, employee or agent of the indemnifying corporation *or of any constituent corporation absorbed by the indemnifying corporation in a consolidation or merger* and any person who is or was a director, officer, trustee, employee or agent of any other enterprise, serving as such at the request of the indemnifying corporation, *or of any such constituent corporation,* or the legal representative of any such director, officer, trustee, employee or agent;

(b) "other enterprise" means any domestic or foreign corporation, other than the indemnifying corporation, and any partnership, joint venture, sole proprietorship, trust or other enterprise, whether or not for profit, served by a corporate agent;

(c) "expenses" means reasonable costs, disbursements and counsel fees;

(d) "liabilities" means amounts paid or incurred in satisfaction of settlements, judgments, fines and penalties; *and*

(e) "proceeding" means any pending, threatened or completed civil, criminal, administrative or arbitrative action, suit or proceeding, and any appeal therein and any inquiry or investigation which could lead to such action, suit or proceeding.

(2) Any corporation organized for any purpose under any general or special law of this State shall have the power to indemnify a corporate agent against his expenses and liabilities in connection with any proceeding involving the corporate agent by reason of his being or having been such a corporate agent, other than a proceeding by or in the right of the corporation, if

(a) such corporate agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation; and

(b) with respect to any criminal proceeding, such corporate agent had no reasonable cause to believe his conduct was unlawful.

The termination of any proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not of itself create a presumption that such corporate agent did not meet the applicable standards of conduct set forth in paragraphs 14A:3–5(2) (a) and 14A:3–5(2) (b).

(3) Any corporation organized for any purpose under any general or special law of this State shall have the power to indemnify a corporate agent against his expenses in connection with any proceeding by or in the right of the corporation to procure a judgment in its favor which involves the corporate agent by reason of his being or having been such corporate agent, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation. However, in such proceeding no indemnification shall be provided in respect of any claim, issue or matter as to which such corporate agent shall have been adjudged to be liable for negligence or misconduct, unless and only to the extent that *the Superior Court or* the court in which such proceeding was brought shall determine upon application that despite the adjudication of liability, but in view of all circumstances of the case, such corporate agent is fairly and reasonably entitled to indemnity for such expenses as the *Superior Court or such other* court shall deem proper.

(4) Any corporation organized for any purpose under any general or special law of this State shall indemnify a corporate agent against expenses to the extent that such corporate agent has been successful on the merits or otherwise in any proceeding referred to in subsections 14A:3–5(2) and 14A:3–5(3) or in defense of any claim, issue or matter therein.

(5) Any indemnification under subsection 14A:3–5(2) and, unless ordered by a court, under subsection 14A:3–5(3), may be made by the corporation only as authorized in a specific case upon a determination that indemnification is proper in the circumstances because the corporate agent met the applicable standard of conduct set forth in subsection 14A:3–5(2) or subsection 14A:3–5(3). *Unless otherwise provided in the certificate of incorporation or by-laws,* **[**Such**]** *such* determination shall be made

(a) by the board of directors *or a committee thereof,* acting by *a majority vote of* a quorum consisting of directors who were not parties to *or otherwise involved in* the proceeding; or

(b) if such a quorum is not obtainable, or, even if obtainable and [a] *such* quorum *of the board of directors or committee by a majority vote* of the disinterested directors so directs, by independent legal counsel, in a written opinion, *such counsel to be designated by the board of directors*; or

(c) by the shareholders *if the certificate of incorporation or by-laws or a resolution of the board of directors or of the shareholders so directs.*

(6) Expenses incurred by a corporate agent in connection with a proceeding may be paid by the corporation in advance of the final disposition of the proceeding *if authorized in the manner provided in subsection 14A:3–5(5)* upon receipt of an undertaking by or on behalf of the corporate agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified as provided in this section.

(7) (a) If a corporation upon application of a corporate agent has failed or refused to provide indemnification as required under subsection 14A:3–5(4) or permitted under subsections 14A:3–5(2), 14A:3–5(3) and 14A:3–5(6), a corporate agent may apply to a court for an award of indemnification by the corporation, and such court

(i) may award indemnification to the extent authorized under subsections 14A:3–5(2) and 14A:3–5(3) and shall award indemnification to the extent required under subsection 14A:3–5(4), notwithstanding any contrary determination which may have been made under subsection 14A:3–5(5); and

(ii) may allow reasonable expenses to the extent authorized by, and subject to the provisions of, subsection 14A:3–5(6), if the court shall find that the corporate agent has by his pleadings or during the course of the proceeding raised genuine issues of fact or law.

(b) Application for such indemnification may be made

(i) in the civil action in which the expenses were or are to be incurred or other amounts were or are to be paid; or

(ii) to the Superior Court in a separate proceeding. If the application is for indemnification arising out of a civil action,

it shall set forth reasonable cause for the failure to make application for such relief in the action or proceeding in which the expenses were or are to be incurred or other amounts were or are to be paid.

The application shall set forth the disposition of any previous application for indemnification and shall be made in such manner and form as may be required by the applicable rules of court or, in the absence thereof, by direction of the court to which it is made. Such application shall be upon notice to the corporation. The court may also direct that notice shall be given at the expense of the corporation to the shareholders and such other persons as it may designate in such manner as it may require.

(8) The indemnification provided by this section shall not exclude any other rights to which a corporate agent may be entitled under a certificate of incorporation, by-law, agreement, vote of shareholders, or otherwise.

(9) Any corporation organized for any purpose under any general or special law of this State shall have the power to purchase and maintain insurance on behalf of any corporate agent against any expenses incurred in any proceeding and any liabilities asserted against him [in his capacity as] *by reason of his being or having been a* corporate agent, whether or not the corporation would have the power to indemnify him against such [liability] *expenses and liabilities* under the provisions of this section.

(10) The powers granted by section 14A:3–5 may be exercised by the corporation notwithstanding the absence of any provision in its certificate of incorporation or by-laws authorizing the exercise of such powers.

(11) Except as required by subsection 14A:3–5(4), no indemnification shall be made or expenses advanced by a corporation under this section, and none shall be ordered by a court, if such action would be inconsistent with a provision of the certificate of incorporation, a by-law, a resolution of the board of directors or of the shareholders, an agreement or other proper corporate action, in effect at the time of the accrual of the alleged cause of action asserted in the proceeding, which prohibits, limits or otherwise conditions the exercise of indemnification powers by the corporation or the rights of indemnification to which a corporate agent may be entitled.

COMMISSIONERS' COMMENT—1972

The definition of "corporate agent" in paragraph 14A:3–5(1) (a) has been broadened to include such agents of any constituent corporation absorbed by the indemnifying corporation in a consolidation or merger. This is derived from Del. G.C.L. § 145(h). Subsection 14A:3–5(3), as amended, authorizes the Superior Court to exercise jurisdiction in the instances covered by the subsection, as well as the court in which the proceeding by or in the right of the corporation was brought.

Subsection 14A:3–5(5) has been revised to make it clear that the manner and order therein prescribed of determining that a corporate agent has met the relevant standard of conduct in a specific case may be varied by a provision in the certificate of incorporation or by-laws. This concept appeared to some degree in former R. S. 14:3–14. As amended, subsection 14A:3–5(5) also authorizes a committee of the board of directors to determine that indemnification is proper, as well as the board of directors itself, and clarifies what is meant by a quorum of disinterested directors, either of the board or a committee thereof. Subsection 14A:3–5(6) was amended to provide that a determination by the corporation to advance expenses incurred by a corporate agent before the final disposition of the proceeding shall be made in the same manner that a basic determination as to indemnification is made under subsection 14A:3–5(5).

The change in language in subsection 14A:3–5(9) was made to cause it to be consistent with the equivalent language in subsections 14A:3–5(2) and (3).

Subsection 14A:3–5(11) is new and was derived from New York B.C.L. § 726(b)(2). It was added to make it clear that, except in the case of mandatory indemnification provided for in subsection 14A:3–5(4), the indemnifying corporation by any proper corporate action may prohibit, limit or otherwise condition the exercise of its indemnification powers or the rights of indemnification to which a corporate agent may be entitled. This balances out with the equivalent, but converse, concept in the non-exclusive clause in subsection 14A:3–5(8) and in the view of the Commission does not represent any change of substance from present law under section 14A:3–5.

9. N. J. S. 14A:3–6 is amended to read as follows:

14A:3-6 Provisions relating to actions by shareholders.

(1) No action shall be brought in this State by a shareholder in the right of a domestic or foreign corporation unless the plaintiff was a holder of shares or of voting trust certificates therefor at the time of the transaction of which he complains, or his shares or voting trust certificates thereafter devolved upon him by operation of law from a person who was a holder at such time.

(2) In any action hereafter instituted in the right of any such corporation by the holder or holders of shares of such corporation or of voting trust certificates therefor, the court having jurisdiction, upon final judgment and a finding that the action was brought without reasonable cause, may require the plaintiff or plaintiffs to pay to the parties named as defendant the reasonable expenses, including fees of attorneys, incurred by them in the defense of such action.

(3) In any action now pending or hereafter instituted or maintained in the right of any such corporation by the holder or holders of less than 5% of the outstanding shares of any class *or series* of such corporation or of voting trust certificates therefor, unless the shares or voting trust certificates so held have a market value in excess of $25,000.00, the corporation in whose right such action is brought shall be entitled at any time before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including fees of attorneys, that may be incurred by it in connection with such action or may be incurred by other parties named as defendant for which it may become legally liable. Market value shall be determined as of the date that the plaintiff institutes the action or, in the case of an intervener, as of the date that he becomes a party to the action. The amount of such security may from time to time be increased or decreased, in the discretion of the court, upon showing that the security provided has or may become inadequate or excessive. The corporation shall have recourse to such security in such amount as the court having jurisdiction shall determine upon the termination of such action.

COMMISSIONERS' COMMENT—1972

Subparagraph (3) of this section has been amended to permit the plaintiff or plaintiffs in a shareholders' derivative action to escape the security-for-expenses requirement if he or they hold at least 5 percent of the outstanding shares of any class *or series* of the corpora-

tion or voting trust certificates therefor. This change was considered desirable in view of the extensive use of an "acquisition preferred" stock issued by the board in series, when so authorized under subsection 14A:7-2(2).

10. N. J. S. 14A:4-1 is amended to read as follows:

14A:4-1 Registered Office and Registered Agent.

(1) Every corporation organized for any purpose under any general or special law of this State and every foreign corporation authorized to transact business in this State shall continuously maintain a registered office in this State, and a registered agent having a business office identical with such registered office.

(2) The registered office may be, but need not be, the same as a place of business of the corporation which it serves.

(3) The registered agent may be a natural person of the age of [21] *18* years or more, or a domestic corporation or a foreign corporation authorized to transact business in this State, whether or not any such agent corporation is organized for a purpose or purposes for which a corporation may be organized under this act.

(4) The designation of a principal or registered office in this State and of a registered agent in charge thereof by any corporation of this State or by any foreign corporation authorized to transact business in this State, as in force on the effective date of this act, shall continue with like effect as if made hereunder until changed pursuant to this act.

COMMISSIONERS' COMMENT—1972

This section has been amended to change the requisite age of a registered agent from 21 to 18. See Comment to N. J. S. 14A:2-6.

11. N. J. S. 14A:4-5 is amended to read as follows:

14A:4-5 Annual report to Secretary of State.

(1) Every domestic corporation and every foreign corporation authorized to transact business in this State shall file in the office of the Secretary of State, within the time prescribed by this section, an annual report, *executed on behalf of the corporation*, setting forth

(a) the name of the corporation and, in the case of a foreign corporation, the jurisdiction of its incorporation;

(b) the address of the registered office of the corporation in this State, and the name of its registered agent in this State at such address, and, in the case of a foreign corporation, the address of its main business or headquarters office;

(c) the names and addresses of the directors and officers of the corporation; and

(d) the date appointed for the next annual meeting of the shareholders for the election of directors.

(2) [Such report shall be filed within 30 days after the time appointed for holding the annual election of directors, commencing with the time appointed for the first annual election of directors following the date of incorporation or of registering to transact business.]

The Secretary of State shall designate a date for filing annual reports for each corporation required to submit a report pursuant to this section and shall annually notify the corporation of the date so designated not less than 60 days prior to such date. The corporation shall file the report within 30 days before or 30 days after the date so designated. If the date so designated is not more than six months after the date on which an annual report pursuant to the provisions of prior law was filed or on which the certificate of incorporation became effective, the corporation shall not be required to file an annual report until one year after the first occurrence of the date so designated.

(3) If the report is not so filed, the corporation shall, after written demand therefor by the Secretary of State by certified mail addressed to the corporation at the last address appearing of record in his office, forfeit to the State a penalty of $200.00 for each report required to have been filed not more than 5 years prior thereto and remaining unfiled, to be recovered with costs in a civil action prosecuted by the Attorney General. No corporation shall be subject to penalty if it shall, within 30 days after such written demand, file the reports required by law and pay to the Secretary of State the fee provided by law for the filing of each such report. In lieu of such civil action, the Secretary of State, after expiration of such 30-day period, may issue a certificate to the Clerk of the Superior Court that the corporation is indebted for the payment of such penalty, and thereupon the clerk shall immediately enter upon his record of docketed judgments the name of such corporation as the judgment debtor, and of the State as the judgment

creditor, a statement that the penalty is imposed under this section, the amount of the penalty, and the date of such certificate. Such entry shall have the same force as a judgment docketed in the Superior Court. The Secretary of State within 5 days after such entry shall give notice thereof to the corporation by certified mail addressed to the corporation at the last address appearing of record in his office.

(4) The Secretary of State shall furnish annual report forms, shall keep in his office all such reports and shall prepare an alphabetical index thereof, which reports and index shall be open to public inspection at proper hours.

COMMISSIONERS' COMMENT—1972

Subsection 14A:4–5(1) has been amended by the addition of the words "executed on behalf of the corporation" to bring into play explicitly the guidelines for execution provided by subsection 14A:1–6(2).

Subsection 14A:4–5(2) has been amended to change the date for filing annual reports from thirty days after the annual meeting to a period within thirty days before or thirty days after a date designated by the Secretary of State. Since the date of the annual meeting is fixed by the by-laws or, if the by-laws provide, by the board (section 14A:5–2), and in either case is subject to change from time to time, this amendment will eliminate uncertainty as to when the annual report is due and enable the Secretary of State to enforce the requirement of filing annual reports more efficiently.

12. N. J. S. 5–6 is amended to read as follows:

14A:5-6 Action by shareholders without a meeting.

(1) Any action required or permitted to be taken at a meeting of shareholders by this act or the certificate of incorporation or by-laws of a corporation, may be taken without a meeting if all the shareholders entitled to vote thereon consent thereto in writing, *except that in the case of any action to be taken pursuant to Chapter 10 of this act, such action may be taken without a meeting only if all shareholders consent thereto in writing or if all shareholders entitled to vote thereon consent thereto in writing and the corporation provides to all other shareholders the advance notification required by paragraph 14A:5–6(2) (b).*

(2) [Except for actions required or permitted to be taken at a meeting of shareholders by Chapter 10 of this act, any action required or permitted to be taken at a meeting of shareholders by this act or the certificate of incorporation or by-laws of a corporation, may be taken without a meeting upon the written consent of less than all the shareholders entitled to vote thereon, if

(a) the use of such consent is permitted by the certificate of incorporation; and

(b) the shareholders who so consent would be entitled to cast at least the minimum number of votes which would be required to take such action at a meeting at which all shareholders entitled to vote thereon are present.

Prompt notice of such action shall be given to all shareholders who would have been entitled to vote upon the action if such meeting were held.]

Except as otherwise provided in the certificate of incorporation and subject to the provisions of this subsection, any action required or permitted to be taken at a meeting of shareholders by this act, the certificate of incorporation, or by-laws, other than the annual election of directors, may be taken without a meeting upon the written consent of shareholders who would have been entitled to cast the minimum number of votes which would be necessary to authorize such action at a meeting at which all shareholders entitled to vote thereon were present and voting.

(a) If any shareholder shall have the right to dissent from the proposed action, pursuant to Chapter 11 of this act, the board shall fix a date on which written consents are to be tabulated; in any other case, it may fix a date for tabulation. If no date is fixed, consents may be tabulated as they are received. No consent shall be counted which is received more than 60 days after the date of the board action authorizing the solicitation of consents or, in a case in which consents, or proxies for consents, are solicited from all shareholders who would have been entitled to vote at a meeting called to take such action, more than 60 days after the date of mailing of solicitation of consents, or proxies for consents.

(b) Except as provided in subsection 14A:5–6(2) (c), the corporation, upon receipt and tabulation of the requisite number of written consents, shall promptly notify all non–consenting shareholders, who would have been entitled to notice of a meeting to vote upon such action, of the action consented to, the proposed effective date of such action, and any conditions precedent to

such action. Such notification shall be given at least 20 days in advance of the proposed effective date of such action in the case of any action taken pursuant to Chapter 10 of this act, and at least 10 days in advance in the case of any other action. Any shareholder who did not consent, personally, or by proxy, to any action which he has a right to dissent from as provided in Chapter 11 of this act shall in such notice also be informed that he has the right to dissent and to be paid the fair value of his shares, provided he files with the corporation a written notice of dissent as required by subsection 14A:11-2 (1) within 20 days from the date of giving of the notice, or such greater period of time as may be granted by the corporation, and outlining briefly, with particular reference to the time periods within which actions must be taken, the procedures set forth in Chapter 11 of this act with which he must comply in order to assert and enforce such right.

(c) The corporation need not provide the notification required by paragraph 14A:5-6(2) (b) if it

(i) solicits written consents or proxies for consents from all shareholders who would have been entitled to vote at a meeting called to take such action, and at the same time gives notice of the proposed action to all other shareholders who would have been entitled to notice of a meeting called to vote upon such action;

(ii) advises all shareholders, if any, who are entitled to dissent from the proposed action, as provided in Chapter 11 of this act, of their right to do so and to be paid the fair value of their shares, provided they file with the corporation before the date fixed for tabulation of the written consents a written notice of dissent as required by subsection 14A:11-2 (1), and outlining briefly, with particular reference to the time periods within which actions must be taken, the procedures set forth in Chapter 11 of this act with which they must comply in order to assert and enforce such right; and

(iii) fixes a date for tabulation of consents not less than 20 days, in the case of any proposed action to be taken pursuant to Chapter 10 of this act, or not less than 10 days in the case of any other proposed action, and not more than 60 days, after the date of mailing of solicitations of consents or proxies for consents.

(d) Any consent obtained pursuant to paragraph 14A:5-6(2) (c) may be revoked at any time prior to the day fixed for tabulation of consents. Any other consent may be revoked at any time prior to the day on which the proposed action could be taken upon compliance with paragraph 14A:5-6(2) (b). No revocation shall be effective unless in writing and until received by the corporation at the place fixed for receipt of consents or, if none, at the main business office or headquarters of the corporation.

(3) Whenever action is taken pursuant to subsection 14A:5-6(1) or 14A:5-6(2), the written consents of the shareholders consenting thereto *or the written report of inspectors appointed to tabulate such consents* shall be filed with the minutes of proceedings of shareholders.

(4) Any action taken pursuant to subsection 14A:5-6(1) or 14A:5-6(2) shall have the same effect for all purposes as if such action had been taken at a meeting of the shareholders.

(5) If any other provision of this act requires the filing of a certificate upon the taking of an action by shareholders, and such action is taken in the manner authorized by subsection 14A:5-6(1) or 14A:5-6(2), such certificate shall state that such action was taken without a meeting pursuant to the written consents of the shareholders and shall set forth the number of shares represented by such consents.

COMMISSIONERS' COMMENT—1972

This section has been substantially modified to permit the use of a non-unanimous consent of shareholders, in lieu of a shareholders' meeting, unless otherwise provided in the certificate of incorporation. As originally enacted, this section permitted the use of non-unanimous shareholder consents only if specifically provided for in the certificate of incorporation. Del. G.C.L. § 228 is similar. In addition, the unanimous consent section has been revised to require either consent from, or advance notice to, holders of non-voting shares in the case of mergers, consolidations, or sales of substantially all assets. See sections 14A:10-3 and 14A:10-11.

Unlike the Delaware Act, subsection 14A:5-6(2) does not permit a non-unanimous consent to be used in lieu of an annual meeting of shareholders, and it requires that notice of any corporate action to be taken pursuant

to a non-unanimous consent be given to non-consenting shareholders in advance of the actual date on which the action will be taken. The notice to be given is keyed to the notice required for calling shareholder meetings. See sections 14A:5–4; 14A:10–3; 14A:10–11.

This new subsection departs from the Delaware Act in that it sets out specifically the mechanics to be followed in obtaining and tabulating consents and is tied in specifically to Chapter 11 which deals with dissenters' rights. The board is authorized to fix a date for tabulating of consents, and consents which are received more than 60 days after the date of solicitation of consents may not be counted.

Ordinarily, subsection 5–6(2), as amended, requires two separate communications to shareholders in order to effect corporate action: the first, to obtain the requisite consents and the second to notify all non-consenting shareholders. Paragraph 14A:5–6(2) (c) eliminates the necessity of subsequent notification if all shareholders who would have been entitled to notice of a meeting called to approve the proposed action have in effect been notified of the proposal either by a solicitation of their consents or by ordinary notice, in the case of shareholders not entitled to vote. The Commission was of the opinion that subsequent notification should not be required where all shareholders entitled to notice are advised initially—just as they are in the case of a proxy solicitation—of the proposed action.

Paragraph 14A:5–6(2) (d) permits the revocation of a written consent within certain limitations. It should be compared to the provision in subsection 14A:5–19(1) permitting revocation of proxies.

Subsection 14A:5–6(3) has been modified to permit a written report of inspectors to be filed in the corporation's minute book in lieu of filing the actual consents.

13. N. J. S. 14A:5–7 is amended to read as follows:

14A:5-7 Fixing record date.

(1) [For the purpose of determining the shareholders entitled to notice of or to vote at any meeting of shareholders or any adjournment thereof, or to express consent to or dissent from any proposal without a meeting, or for the purpose of determining shareholders entitled to receive payment of any dividend or allotment of any right, or for the purpose of any other action, the

by-laws may provide for fixing, or in the absence of such provision the board may fix, in advance, a date as the record date for any such determination of shareholders. Such date shall not be more than 60 nor less than 10 days before the date of such meeting, nor more than 60 days prior to any other action.]

The by-laws may provide for fixing, or in the absence of such a provision the board may fix, in advance, a date as the record date for determining the corporation's shareholders with regard to any corporate action or event and, in particular, for determining the shareholders entitled to

(a) notice of or to vote at any meeting of shareholders or any adjournment thereof;

(b) give a written consent to any action without a meeting; or

(c) receive payment of any dividend or allotment of any right.

The record date may in no case be more than 60 days prior to the shareholders' meeting or other corporate action or event to which it relates. The record date for a shareholders' meeting may not be less than 10 days before the date of the meeting. The record date to determine shareholders entitled to give a written consent may not be more than 60 days before the date fixed for tabulation of the consents or, if no date has been fixed for tabulation, more than 60 days before the last day on which consents received may be counted.

(2) If no record date is fixed

(a) the record date for *a shareholders' meeting* [the determination of shareholders entitled to notice of or to vote at a meeting of shareholders] shall be the close of business on the day next preceding the day on which notice is given, or, if no notice is given, the day next preceding the day on which the meeting is held; and

(b) the record date for determining shareholders for any purpose other than that specified in paragraph 14A:5–7(2) (a) shall be at the close of business on the day on which the resolution of the board relating thereto is adopted.

(3) When a determination of shareholders of record *for a shareholders' meeting* [entitled to notice of or to vote at any meeting of shareholders] has been made as provided in this section, such determination shall apply to any adjournment thereof, unless the

board fixes a new record date under this section for the adjourned meeting.

COMMISSIONERS' COMMENT—1972

This section has been structurally revised for purposes of clarity. In addition, a new sentence has been added specifically treating the determination of the record date in cases where shareholder consents are to be used.

14. N. J. S. 14A:5–8 is amended to read as follows:

14A:5-8 Voting list.

(1) The officer or agent having charge of the stock transfer books for shares of a corporation shall make and certify a complete list of the shareholders entitled to vote at a shareholders' meeting or any adjournment thereof. *A list required by this subsection may consist of cards arranged alphabetically.* Such list shall

(a) be arranged alphabetically within each class, [and] series, *or group of shareholders maintained by the corporation for convenience of reference*, with the address of, and the number of shares held by, each shareholder;

(b) be produced at the time and place of the meeting;

(c) be subject to the inspection of any shareholder during the whole time of the meeting; and

(d) be prima facie evidence as to who are the shareholders entitled to examine such list or to vote at any meeting.

(2) If the requirements of this section have not been complied with, the meeting shall, on the demand of any shareholder in person or by proxy, be adjourned until the requirements are complied with. Failure to comply with the requirements of this section shall not affect the validity of any action taken at such meeting prior to the making of any such demand.

COMMISSIONERS' COMMENT—1972

Subsection 14A:5–8(1) has been amended to permit the corporation to prepare the list in a manner consistent with common practices in effect today. The Commission felt that these changes would not impair the usefulness of these lists and that the changes would be consistent with the data processing methods used by many corporations today in keeping records of all shareholders and printing out lists of such shareholders.

COMMISSIONERS' COMMENT—1972

14A:5-15 Shares held by fiduciaries.

Correction to 1968 Comment. The third paragraph of the 1968 comment to this section shall be corrected to read:

"The provision of this section respecting shares held jointly by fiduciaries has no counterpart in the Model Act. It is patterned after section 89 of The Banking Act of 1948 (C. 17:9A–89)."

15. N. J. S. 14A:5–19 is amended to read as follows:

14A:5-19 Proxy voting.

(1) Every shareholder entitled to vote at a meeting of shareholders or to express consent [or dissent] without a meeting may authorize another person or persons to act for him by proxy. Every proxy shall be executed in writing by the shareholder or his agent, *except that a proxy may be given by a shareholder or his agent by telegram or cable or its equivalent.* No proxy shall be valid [after] *for more than* 11 months [from the date of its execution], unless a longer time is expressly provided therein, but in no event shall a proxy be valid after 3 years from the date of execution. Unless it is coupled with an interest, a proxy shall be revocable at will. A proxy shall not be revoked by the death or incapacity of the shareholder but such proxy shall continue in force until revoked by the personal representative or guardian of the shareholder. The presence at any meeting of any shareholder who has given a proxy shall not revoke such proxy unless the shareholder shall file written notice of such revocation with the secretary of the meeting prior to the voting of such proxy.

(2) A person named in a proxy as the attorney or agent of a shareholder may, if the proxy so provides, substitute another person to act in his place, including any other person named as an attorney or agent in the same proxy. The substitution shall not be effective until an instrument effecting it is filed with the secretary of the corporation.

COMMISSIONERS' COMMENT—1972

This section has been amended to make it clear that a proxy may be given by a telegram or cable.

16. N. J. S. 14A:5–21 is amended to read as follows:

14A:5-21 Agreements as to voting; provision in certificate of incorporation as to control of directors.

(1) An agreement between two or more shareholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as therein provided, or as they may agree, or as determined in accordance with a procedure agreed upon by them.

(2) A provision in the certificate of incorporation otherwise prohibited by law because it improperly restricts the board in its management of the business of the corporation, or improperly transfers *or provides for the transfer* to one or more [shareholders or to one or more] persons [or corporations] *named in the certificate of incorporation or* to be selected *from time to time by shareholders* [by him or them], all or any part of such management otherwise within the authority of the board, shall nevertheless be valid if all the incorporators have authorized such provision in the certificate of incorporation or the holders of record of all outstanding shares, whether or not having voting power, have authorized such provision in an amendment to the certificate of incorporation. *If all management powers otherwise within the authority of the board are so transferred, the certificate of incorporation may provide that the corporation shall not have a board in which case the certificate of incorporation and any other certificate or document requiring a statement of the number, names, and addresses of directors shall set out in lieu thereof the name, address, and title, if any, of the person or persons in whom such management authority is then vested.*

(3) A provision authorized by subsection 14A:5–21(2) shall become invalid if, to the knowledge of the board, *or of the person or persons having the management authority otherwise in the board,*

(a) subsequent to the adoption of such provision, shares are transferred or issued to any person who takes delivery of the share certificate without notice thereof, unless such person consents in writing to such provisions; or

(b) any shares of the corporation are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association.

(4) If a provision authorized by subsection 14A:5–21(2) shall have become invalid as provided in subsection 14A:5–21(3), the board, *or the person or persons having the management authority otherwise in the board,* shall amend the certificate of incorporation to delete such provision by filing a certificate of amendment in the office of the Secretary of State. The certificate shall be executed on behalf of the corporation and shall set forth

(a) the name of the corporation;

(b) the date of the adoption of the amendment;

(c) the deleted provision; and

(d) the event set forth in subsection 14A:5–21(3) by reason of which the provision has become invalid.

(5) The effect of any provision authorized by subsection 14A:5–21(2) shall be to relieve the directors, *if any, and grant to* and impose upon the [shareholders] *person or persons vested with management authority otherwise in the board the rights, powers, privileges, and liabilities, including* [the] liability for managerial acts or omissions, that [is] *are granted to and* imposed [on] *upon* directors by law to the extent that, and so long as, the discretion *and* [or] powers *which otherwise would be in* [of] the directors in their management of corporate affairs *are vested in such person or persons* [is controlled] by any such provision. Such [shareholders] *person or persons* shall be deemed *to be directors for purposes of applying the provisions of this act and shall be deemed* to be corporate agents for the purposes of section 14A:3–5.

(6) If the certificate of incorporation contains a provision authorized by subsection 14A:5–21(2), the existence of such provision shall be noted conspicuously on the face of every certificate for shares issued by such corporation, and each holder of such certificate shall conclusively be deemed to have taken delivery with notice of such provision.

(7) As used in this section, "person" shall include a natural person, a domestic or foreign corporation, a partnership, limited partnership, trust, firm, society, association, joint stock company, or any other entity legally competent to contract in its own name.

COMMISSIONERS' COMMENT—1972

Subsections 14A:5–21(2) through 14A:5–21(5) have been amended to permit the board to be abolished completely if all management powers normally held by the

board are transferred to other persons. In addition, subsection 14A:5-21(2) has been amended to make clear the procedures to be followed in designating the person or persons to be vested with management powers. A new subsection 14A:5-21(7) has been added merely to define "person" as used in the preceding subsections.

17. N. J. S. 14A:5-24 is amended to read as follows:

14A:5-24 Elections of directors; cumulative voting.

(1) Elections of directors need not be by ballot unless a shareholder demands election by ballot at the election and before the voting begins[, or unless the by-laws so require]. *If the by-laws require election by ballot at any shareholders' meeting, such requirement is waived unless compliance therewith is requested by a shareholder entitled to vote at such meeting.*

(2) At each election of directors every shareholder entitled to vote at such election shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected and for whose election he has a right to vote, or, if the certificate of incorporation so provides, to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the aggregate number of his votes shall equal, or by distributing such votes on the same principle among any number of such candidates.

(3) Except as otherwise provided by the certificate of incorporation, directors shall be elected by a plurality of the votes cast at an election.

COMMISSIONERS' COMMENT—1972

This section has been revised to eliminate any question as to the validity of a meeting to elect directors at which ballots were not used, even if the use of ballots is prescribed in the by-laws, unless a shareholder has requested their use. As revised, the requirements regarding ballots will be the same as the requirements regarding the use of inspectors of elections. See subsection 14A:5-25(4).

18. N. J. S. 14A:5-25 is amended to read as follows:

14A:5-25 Selection of inspectors.

(1) Unless the by-laws otherwise provide, the board may, in advance of any shareholders' meeting, *or of the tabulation of written consents of shareholders without a meeting,* appoint one

or more inspectors to act at the meeting or any adjournment thereof *or to tabulate such consents and make a written report thereof.*

(2) If inspectors *to act at any meeting of shareholders* are not so appointed by the board or as otherwise provided in the by-laws or shall fail to qualify, the person presiding at a shareholders' meeting may, and on the request of any shareholder entitled to vote thereat, shall, make such appointment.

(3) In case any person appointed as inspector fails to appear or act, the vacancy may be filled by appointment made by the board in advance of the meeting or at the meeting by the person presiding at the meeting.

(4) If the by-laws require inspectors at any shareholders' meeting, such requirement is waived unless compliance therewith is requested by a shareholder entitled to vote at such meeting.

(5) Each inspector, before entering upon the discharge of his duties, shall take and sign an oath faithfully to execute the duties of inspector [at such meeting] with strict impartiality and according to the best of his ability.

(6) No person shall be elected a director [at a meeting at] *in an election for* which he has served as an inspector.

COMMISSIONERS' COMMENT—1972

This section has been revised to permit the use of inspectors for the tabulation of shareholder consents when such consents are used in lieu of a meeting as provided in section 14A:5-6.

19. N. J. S. 14A:5-28 is amended to read as follows:

14A:5-28 Books and records; right of inspection.

(1) Each corporation shall keep books and records of account and minutes of the proceedings of its shareholders, board and executive committee, if any. Unless otherwise provided in the by-laws, such books, records and minutes may be kept outside this State. The corporation shall [keep] *make available for inspection* at its registered office, or at the office of its transfer agent in this State, a record or records containing the names and addresses of all shareholders, the number, class and series of shares held by each and the dates when they respectively became the owners of record thereof, *within 10 days after demand by a shareholder entitled to*

inspect them, as defined in subsection 14A:5-28(3), except that in the case of shares listed on a national securities exchange, the records [of the holders of such shares] may be [kept] *made available* at the office of the corporation's transfer agent within or without this State. Any of the foregoing books, minutes or records may be in written form or in any other form capable of being converted into written form within a reasonable time. A corporation shall convert into written form without charge any such records not in such form, upon the written request of any person entitled to inspect them.

(2) Upon the written request of any shareholder, the corporation shall mail to such shareholder its balance sheet as at the end of the preceding fiscal year, and its profit and loss and surplus statement for such fiscal year.

(3) Any person who shall have been a shareholder of record of a corporation for at least six months immediately preceding his demand, or any person holding, or so authorized in writing by the holders of, at least 5% of the outstanding shares of any class *or series*, upon at least five days' written demand shall have the right for any proper purpose to examine in person or by agent or attorney, during usual business hours, its minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom, at the places where the same are kept pursuant to subsection 14A:5-28(1).

(4) Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which said shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes and record of shareholders of a corporation.

(5) Holders of voting trust certificates representing shares of the corporation shall be regarded as shareholders for the purpose of this section.

COMMISSIONERS' COMMENT—1972

This section has been amended to substitute for the requirement that all domestic corporations, except those listed on national exchanges, keep their shareholder records in this State a requirement that such records be made available for inspection within ten days after

demand by a shareholder entitled to inspect them. This change eliminates the burdensome requirement that small publicly-held corporations, headquartered or with transfer agents outside of New Jersey, keep duplicate shareholder records.

Subsection 14A:5-28(3) has been amended to add the words "or series."

20. N. J. S. 14A:5-29 is amended to read as follows:

14A:5-29 Preemptive rights.

(1) Except as otherwise provided in the certificate of incorporation, a corporation may issue or deliver unissued or treasury shares, or option rights, or *obligations or other* securities having conversion or option rights, without first offering them to existing shareholders.

(2) The preemptive rights, whether created by statute or common law, of shareholders of corporations organized prior to the effective date of this act shall not be affected by subsection 14A:5-29(1). Any such corporation may alter or abolish its shareholders' preemptive rights by an amendment of its certificate of incorporation.

(3) If a corporation organized after the effective date of this act elects to grant its shareholders preemptive rights, such rights shall be as provided in this subsection, except as otherwise provided in the certificate of incorporation. Such an election may be made by stating in the certificate of incorporation that "The shareholders shall have preemptive rights." The effect of the inclusion of such a statement shall be as follows:

(a) Upon the issue for cash of shares, or options to purchase shares, of the same class as those held by a shareholder, the shareholder shall have a preemptive right to acquire a pro rata portion of such shares or options so issued according to the number of shares of such class held by him. Such preemptive right shall extend to unissued shares and to treasury shares. It shall also extend to shares, obligations or other securities, however described, which are convertible into shares of the same class as those held by the shareholder.

(b) Shares, obligations or other securities of the corporation which are subject to preemptive rights as herein provided shall not be deemed to be issued for cash within the meaning of this section if cash constitutes only a part of the consideration received by the corporation.

(c) A shareholder may waive his preemptive right; a waiver of a preemptive right, when evidenced by a writing, shall be binding upon the shareholder notwithstanding it is given without consideration.

(d) No shareholder shall have a preemptive right to acquire shares, obligations or other securities as herein provided, which

(i) are issued pursuant to a plan of merger or consolidation;

(ii) are issued pursuant to subsection 14A:7-7(2) or Chapter 8 of this act;

(iii) are issued to satisfy conversion or option rights, however evidenced, granted by the corporation;

(iv) are issued pursuant to a plan of reorganization approved by a court pursuant to a statute of this State or of the United States; or

(v) are part of the shares, obligations or other securities authorized in the original certificate of incorporation and are issued within six months from the effective date of such certificate.

(e) Upon the proposed issuance of shares, obligations or other securities subject to preemptive rights, the board shall cause notice to be given to each shareholder of record entitled to preemptive rights. The notice shall set forth

(i) the amount of shares, obligations or other securities with respect to which the shareholder has a preemptive right and the method used to determine that amount;

(ii) the price and other terms and conditions upon which the shareholder may purchase such shares, obligations or other securities; and

(iii) the time within which and the method by which the shareholder must exercise the right.

The notice shall be given at least 30 days prior to the time within which the shareholder must exercise the right.

(f) Shares, obligations or other securities subject to preemptive rights, which are not acquired by shareholders in the exercise of their preemptive rights may, for a period not exceeding one year after the date limited by the directors for the exercise

of such preemptive rights, be issued, sold, or optioned to such person or persons as the board may determine, at a price not less than that at which they were offered to such shareholders. Any such shares, obligations or other securities not so issued, sold or optioned during such one-year period, shall at the expiration of such period again be subject to preemptive rights of shareholders.

COMMISSIONERS' COMMENT—1972

This section has been amended by adding a new subsection 14A:5-29(3), which sets out a formulation of preemptive rights for corporations which elect to grant their shareholders such rights. The purpose of the amendment is to simplify the drafting problems confronting corporations—typically, closely-held corporations—which wish to grant shareholders preemptive rights. It sets out a thorough statutory formulation of the nature of such rights which will be applicable if the certificate of incorporation merely provides "The shareholders of the corporation shall have premptive rights." The statutory formula, of course, may be modified by an appropriate provision in the certificate of incorporation.

The statutory formulation of preemptive rights set forth in subsection 14A:5-29(3) is not intended by the Commission to be a statement of what constitutes preemptive rights under prior statutes or at common law. For example, if the corporation elects to have preemptive rights under this formulation, paragraph 14A:5-29(3) (a) provides that the right shall be applicable to treasury shares. The Commission is aware that the courts have generally held that treasury shares are not subject to preemptive rights. See *Borg* v. *International Silver Co.*, 11 F. 2d 143, 146 (S.D. N.Y.), affirmed 11 F. 2d 147, 151 (2d Cir. 1925).

The provisions of subsection 14A:5-29(3) are derived in substantial part from the New York Business Corporation Law. N.Y.B.C.L. § 622.

21. N. J. S. 14A:6-1 is amended to read as follows:

14A:6-1 Board of directors.

The business and affairs of a corporation shall be managed by is board, except as in this act or in its certificate of incorporation otherwise provided. Directors shall be at least [21] *18* years of age and need not be United States citizens or residents of this State

or shareholders of the corporation unless the certificate of incorporation or by-laws so require. The certificate of incorporation or by-laws may prescribe other qualifications for directors.

COMMISSIONERS' COMMENT—1972

This section has been amended to change the age qualification of a director from 21 to 18. See Comment to N. J. S. 14A:2–6.

22. N. J. S. 14A:6–2 is amended to read as follows:

14A:6-2 Number of directors.

[The number of directors of a corporation shall be not less than three, except that in cases where all the shares with voting powers of a corporation are owned beneficially and of record by either one or two shareholders, the number of directors may be less than three but not less than the number of shareholders.] *The board of directors of a corporation shall consist of one or more members.* Subject [to such limitation and] to any provisions contained in the certificate of incorporation, the by-laws shall specify the number of directors, or that the number of directors shall not be less than a stated minimum nor more than a stated maximum, with the actual number to be determined in the manner prescribed in the by-laws, except as to the number constituting the first board.

COMMISSIONERS' COMMENT—1972

The amendment to this section, permitting the board of directors in all cases to consist of only one member, is a departure from prior law. Until September of 1968, New Jersey corporation law had required without exception that the board consist of three or more members. R. S. 14:7–1. An amendment adopted at that time, and carried over into the B.C.A., permitted corporations with less than three shareholders to have a lesser number of members of the board but not less than the number of shareholders. L. 1968, c. 263, § 2; N.J.S. 14A:6–2.

Both the Model Act and the Delaware Act have been recently amended to permit a single-member board in all cases. Model Act § 36 (rev. 1969); Del. G.C.L. § 141(b). In following this change to the Model Act, it was the opinion of the Commission that, although in many cases it may be unwise as a matter of corporate policy to grant to a single person the management powers of a corporation, there undoubtedly are and will

continue to be many corporations where this is the wish of all the interested parties. Accordingly, the Commission concluded that the State has no substantial interest in forcing such corporations to be managed by deliberative bodies in cases where the interested parties wish to empower a single person to manage. *Cf.* N.J.S. 14A:6–7(2), permitting board action to be taken without a meeting upon the unanimous consent of the board. See also N.J.S. 14A:1–1(3) (b).

23. N. J. S. 14A:6–7 is amended to read as follows:

14A:6-7 Quorum of board of directors and committees; action of directors without a meeting.

(1) A majority of the entire board, or of any committee thereof, shall constitute a quorum for the transaction of business, unless the certificate of incorporation or the by-laws shall provide that a greater or lesser number shall constitute a quorum, which in no case shall be less than the greater of two persons or one-third of the entire board or committee, except that when [a] *the entire board or a committee thereof consists* of one director [is authorized under the provisions of section 14A:6–2], then one director shall constitute a quorum. The act of the majority present at a meeting at which a quorum is present shall be the act of the board or of the committee, unless the act of a greater number is required by this act, the certificate of incorporation or the by-laws.

(2) Unless otherwise provided by the certificate of incorporation or by-laws, any action required or permitted to be taken pursuant to authorization voted at a meeting of the board or any committee thereof, may be taken without a meeting if, prior or subsequent to such action, all members of the board or of such committee, as the case may be, consent thereto in writing and such written consents are filed with the minutes of the proceedings of the board or committee. Such consent shall have the same effect as a unanimous vote of the board or committee for all purposes, and may be stated as such in any certificate or other document filed with the Secretary of State.

COMMISSIONERS' COMMENT—1972

This section has been amended to reflect the changes to sections 14A:6–2 and 14A:6–9, permitting the board or any committee thereof to consist of only one member.

24. N. J. S. 14A:6–8 is amended to read as follows:

14A:6-8 Effect of common directorships and directors' personal interest.

(1) No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any domestic or foreign corporation, firm or association of any type or kind in which one or more of its directors are directors or are otherwise interested, shall be void or voidable solely by reason of such common directorship or interest, or solely because such director or directors are present at the meeting of the board or a committee thereof which authorizes or approves the contract or transaction, or solely because his or their votes are counted for such purpose, if

(a) the contract or other transaction is fair and reasonable as to the corporation at the time it is authorized, approved or ratified; or

(b) the fact of the common directorship or interest is disclosed or known to the board or committee and the board or committee authorizes, approves, or ratifies the contract or transaction by [a vote sufficient for the purpose] *unanimous written consent, provided at least one director so consenting is disinterested, or by affirmative vote of a majority of the disinterested directors, even though the disinterested directors be less than a quorum* [without counting the vote or votes of such common or interested director or directors]; or

(c) the fact of the common directorship or interest is disclosed or known to the shareholders, and they authorize, approve or ratify the contract or transaction.

(2) Common or interested directors may be counted in determining the presence of a quorum at a board or committee meeting at which a contract or transaction described in subsection 14A:6–8(1) is authorized, approved or ratified.

(3) The board, by the affirmative vote of a majority of directors in office and irrespective of any personal interest of any of them, shall have authority to establish reasonable compensation of directors for services to the corporation as directors, officers, or otherwise; provided that the approval of the shareholders shall be required if the by-laws so provide.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:6–8(1) (b) has been amended to make clear the interrelationship between this paragraph and subsection 14A:6–8(2). A similar change has been made to the Delaware Act. Del. G.C.L., § 144(a)(1). This paragraph has also been changed to permit a unanimous consent of the board to be used to authorize or approve a contract or transaction in which some directors have a conflicting interest, provided at least one director so consenting is disinterested.

25. N. J. S. 14A:6–9 is amended to read as follows:

14A:6-9 Executive committee; other committees.

(1) If the certificate of incorporation or the by-laws so provide, the board, by resolution adopted by a majority of the entire board, may appoint from among its members an executive committee and one or more other committees, each of which shall have one or more members. To the extent provided in such resolution, or in the certificate of incorporation or in the by-laws, each such committee shall have and may exercise all the authority of the board, except that no such committee shall

(a) make, alter or repeal any by-law of the corporation;

(b) elect or appoint any director, or remove any officer or director;

(c) submit to shareholders any action that requires shareholders' approval; or

(d) amend or repeal any resolution theretofore adopted by the board *which by its terms is amendable or repealable only by the board.*

(2) The board, by resolution adopted by a majority of the entire board may,

(a) fill any vacancy in any such committee;

(b) appoint one or more directors to serve as alternate members of any such committee, to act in the absence or disability of members of any such committee with all the powers of such absent or disabled members;

(c) abolish any such committee at its pleasure; and

(d) remove any director from membership on such committee at any time, with or without cause.

(3) Actions taken at a meeting of any such committee shall be reported to the board at its next meeting following such committee meeting; except that, when the meeting of the board is held within 2 days after the committee meeting, such report shall, if not made at the first meeting, be made to the board at its second meeting following such committee meeting.

(4) The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board, or any member thereof, of any responsibility imposed by law.

COMMISSIONERS' COMMENT—1972

Subsection 14A:6-9(1) was amended by c. 394, L. 1971, to permit a committee to consist of one member; previously, this section required three members. The Commission concurs with this change. See amendment and accompanying comment to section 14A:6-2, permitting the board to consist of one member. Title 14 did not specify a minimum number of members for an executive committee. R. S. 14:7-4. Delaware amended its statute in 1969 to change the requirement from two members to one member. Del. G.C.L. § 141 (c). The Model Act does not specify a minimum number of members. Model Act § 42 (rev. 1969).

Paragraph 14A:6-9(1) (d) has been amended so as to permit a corporation to allow a committee of the board to amend or repeal resolutions adopted by the board except where such resolutions by their own terms are not amendable or repealable by a committee.

26. N. J. S. 14A:6-11 is amended to read as follows:

14A:6-11 Loans to officers or employees.

A corporation may lend money to, or guarantee any obligation of, or otherwise assist, any officer or other employee of the corporation or of any subsidiary, whenever, in the judgment of the directors, such loan, guarantee or assistance may reasonably be expected to benefit the corporation; provided, however, that a corporation shall not lend money to, guarantee any obligation of, or otherwise assist, any officer or other employee who is also a director of the corporation, *except pursuant to a plan adopted by the shareholders in accordance with the provisions of Chapter 8 of this act*, unless such loan, guarantee or assistance is authorized by the certificate of incorporation or a by-law adopted by the shareholders, and then only when authorized by a majority of

the entire board. The loan, guarantee or other assistance may be made with or without interest, and may be unsecured, or secured in such manner as the board shall approve, including, without limitation, a pledge of shares of the corporation, and may be made upon such other terms and conditions as the board may determine. *Notwithstanding the provisions of subsection 14A:7-5(1), the proceeds of any such loan may be applied to the purchase of shares of the corporation, and any shares so purchased shall be deemed to be fully paid and nonassessable.*

COMMISSIONERS' COMMENT—1972

This section has been amended to remove any inconsistency with Chapter 8 and to make it clear that loans may be made to employees for the purpose of enabling them to purchase shares of the corporation's stock. The Commission was concerned that subsection 14A:7-5(1) might be read to prohibit the proceeds of a loan from being used to purchase shares of the corporation's stock since the grant of the loan and the purchase of the stock could be viewed as a single step.

27. N. J. S. 14A:6-12 is amended to read as follows:

14A:6-12 Liability of directors in certain cases.

(1) In addition to any other liabilities imposed by law upon directors of a corporation, directors who vote for, or concur in, any of the following corporate actions

(a) the declaration of any dividend or other distribution of assets to the shareholders contrary to the provisions of this act or contrary to any restrictions contained in the certificate of incorporation;

(b) the purchase of the shares of the corporation contrary to the provisions of this act or contrary to any restrictions contained in the certificate of incorporation;

(c) the distribution of assets to shareholders during or after dissolution of the corporation without paying, or adequately providing for, all known debts, obligations and liabilities of the corporation, except that the directors shall be liable only to the extent of the value of assets so distributed and to the extent that such debts, obligations and liabilities of the corporation are not thereafter paid, discharged, or barred by statute or otherwise;

(d) the complete liquidation of the corporation and distribution of all of its assets to its shareholders without dissolving or providing for the dissolution of the corporation and the payment of all fees, taxes, and other expenses incidental thereto, except that the directors shall be liable only to the extent of the value of assets so distributed and to the extent that such fees, taxes, and other expenses incidental to dissolution are not thereafter paid;

[(d)**]** *(e)* the making of any loan to an officer, director or employee of the corporation or of any subsidiary thereof contrary to the provisions of this act;

shall be jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons, respectively, as a result of any such action.

(2) Any director against whom a claim is successfully asserted under this section shall be entitled to contribution from the other directors who voted for, or concurred in, the action upon which the claim is asserted.

(3) Directors against whom a claim is successfully asserted under this section shall be entitled, to the extent of the amounts paid by them to the corporation as a result of such claims,

(a) upon payment to the corporation of any amount of an improper dividend or distribution, to be subrogated to the rights of the corporation against shareholders who received such dividend or distribution with knowledge of facts indicating that it was not authorized by this act, in proportion to the amounts received by them respectively;

(b) upon payment to the corporation of any amount of the purchase price of an improper purchase of shares, to have the corporation rescind such purchase of shares and recover for their benefit, but at their expense, the amount of such purchase price from any seller who sold such shares with knowledge of facts indicating that such purchase of shares by the corporation was not authorized by this act;

(c) upon payment to the corporation of the claim of any creditor by reason of a violation of paragraph 14A:6–12(1) (c), to be subrogated to the rights of the corporation against shareholders who received an improper distribution of assets;

(d) upon payment to the corporation of the amount of any loan made improperly **[**to a director or shareholder**]**, to be subrogated to the rights of the corporation against **[**a director or shareholder**]** *the person* who received the improper loan.

(4) A director shall not be liabile under this section if, in the circumstances, he discharged his duty to the corporation under section 14A:6 14.

(5) Every action against a director for recovery upon a liability imposed by subsection 14A:6–12(1) shall be commenced within six years next after the cause of any such action shall have accrued.

COMMISSIONERS' COMMENT—1972

Subsection 14A:6–12(1) has been amended to provide as an additional ground for liability the concurrence of a director in the complete liquidation of the corporation and distribution of all of its assets to shareholders without providing for dissolution and the payment of all fees, taxes, and other expenses incidental thereto. See new section 14A:12–19.

Subsection 14A:6–12(3) has been amended to make it clear that a director who has been held liable for an improper loan and makes payment to the corporation may be subrogated to the rights of the corporation against any person who received such an improper loan.

Correction to 1968 Comment. The reference under the heading "Source or Reference" to the New York Business Corporation Law should be changed to § 719 from § 719 (d).

28. N. J. S. 14A:6–13 is amended to read as follows:

14A:6-13 Liability of directors; presumption of assent to action taken at a meeting.

A director of a corporation who is present at a meeting of its board, or any committee thereof of which he is a member, at which action on any corporate matter referred to in section 14A:6–12 is taken shall be presumed to have concurred in the action taken unless his dissent shall be entered in the minutes of the meeting or unless he shall file his written dissent to such action with the person acting as the secretary of the meeting before or promptly after the adjournment thereof. Such right to dissent shall not apply to a director who voted in favor of such action. A director who is absent from a meeting of the board, or any committee

thereof of which he is a member, at which any such action is taken shall be presumed to have concurred in the action unless he shall file his dissent with the secretary of the corporation within a reasonable time after learning of such action.

COMMISSIONERS' COMMENT—1972

This section has been modified to correct the punctuation.

14A:6-14 Liability of directors; reliance on corporate records.

COMMISSIONERS' COMMENT—1972

Correction to 1968 Comment. This comment should be revised to show that this section is also derived from section 717 of the New York Business Corporation Law.

29. N. J. S. 14A:6-15 is amended to read as follows:

14A:6-15 Officers.

(1) The officers of a corporation shall consist of a president, a secretary, a treasurer, and, if desired, a chairman of the board, one or more vice presidents, and such other officers as may be prescribed by the by-laws. Unless otherwise provided in the by-laws, the officers shall be elected [or appointed] by the board.

(2) Any two or more offices may be held by the same person but no officer shall execute, acknowledge, or verify any instrument in more than one capacity if such instrument is required by law or by the by-laws to be executed, acknowledged, or verified by two or more officers.

(3) Any officer elected [or appointed] as herein provided shall hold office for the term for which he is so elected [or appointed] and until a successor is elected [or appointed] and has qualified, subject to earlier termination by removal or resignation.

(4) All officers of the corporation, as between themselves and the corporation, shall have such authority and perform such duties in the management of the corporation as may be provided in the by-laws, or as may be determined by resolution of the board not inconsistent with the by-laws.

COMMISSIONERS' COMMENT—1972

Subsection 14A:6-15 has been amended to eliminate the ambiguous concept of appointment of an officer by the board.

30. N. J. S. 14A:7-2 is amended to read as follows:

14A:7-2 Issuance of shares in classes and series; board action.

(1) The division of shares into classes and into series within any class or classes, the determination of the designation and the number of shares of any class or series, the determination of the relative rights, preferences and limitations of the shares of any class or series, and any or all of such divisions and determinations, may be accomplished by the original certificate of incorporation or may be accomplished by an amendment or amendments thereto. Such an amendment may be made by any procedure to amend the certificate of incorporation provided for in Chapter 9 of this act or as provided in subsection 14A:7-2(2).

(2) Such an amendment may be made by action of the board if the certificate of incorporation authorizes the board to [take such action] *make such divisions and determinations.* Unless otherwise provided in the certificate of incorporation, authority granted to the board to determine the number of shares of any class or series shall be deemed to include the power to increase the number of shares of such class or series previously determined by it, and to decrease such previously determined number of shares to a number not less than that of the shares then outstanding. Upon any such decrease, the affected shares shall continue as part of the authorized shares and shall have such designation and such relative rights, preferences and limitations as they had before the board first acted to include them in such class or series. Unless otherwise provided in the certificate of incorporation, authority granted to the board to determine the relative rights and preferences of any class or series shall be deemed to include the power to determine relative rights and preferences which are prior or subordinate to, or equal with, the shares of any other class or series, whether or not such other shares are issued and outstanding at the time when the board acts to determine such relative rights and preferences. The certificate of incorporation may authorize the board to change the designation or number of shares, or the relative rights, preferences and limitations of the shares, of any theretofore established class or series no shares of which have been issued.

(3) Whenever the board acts under subsection 14A:7-2(2) it shall adopt a resolution setting forth its actions and stating the designation and number of shares, and the relative rights, preferences and limitations of the shares, of each class and series

thereby created or with respect to which it has made a determination or change.

(4) Before the issue of any shares of a class or series with respect to which the board has acted under subsection 14A:7-2(2), the corporation shall execute and file in the office of the Secretary of State a certificate of amendment to the certificate of incorporation setting forth

(a) the name of the corporation;

(b) a copy of the resolution of the board required by subsection 14A:7-2(3);

(c) that such resolution was duly adopted by the board and the date of such adoption; and

(d) that the certificate of incorporation is amended so that the designation and number of shares of each class and series acted upon in the resolution, and the relative rights, preferences and limitations of each such class and series, are as stated in the resolution.

COMMISSIONERS' COMMENT—1972

Subsection 14A:7-2(2) has been amended to make it clear that, in the case of a corporation organized prior to the effective date of Title 14A (January 1, 1969) whose certificate of incorporation authorizes the board to issue preferred stock in series as contemplated by R. S. 14:8-2, the board has the authority to amend the certificate of incorporation to reflect the terms of any such series so authorized by the board. The Commission was of the view that such authority exists by implication under the present wording of Section 14A:7-2, but felt it desirable to remove any doubt on the subject.

31. N. J. S. 14A:7-3 is amended to read as follows:

14A:7-3 Subscriptions for shares.

(1) Unless otherwise provided by the subscription agreement or unless all of the subscribers consent to the revocation of such subscription, a subscription for shares of a corporation to be formed shall be irrevocable for a period of 6 months if no certificate of incorporation shall be filed within such period. If the certificate of incorporation is filed within such period, or if it is filed at any later time before revocation, such subscription shall also be irrevocable until 60 days after the filing of the certificate of

incorporation. Subscriptions for shares, whether made before or after the organization of a corporation, shall be accepted or rejected by the board, unless the certificate of incorporation or the by-laws require action by the shareholders.

(2) A subscription agreement, whether made before or after the formation of a corporation, shall not be enforceable unless it satisfies the requirements provided in N. J. S. § 12A:8-319 with respect to a contract for the sale of securities.

(3) A subscriber shall not become a holder of any shares for which the full consideration [to be received by the corporation] has not been paid. Unless otherwise provided by the subscription agreement

(a) any payment made by the subscriber, in accordance with the subscription agreement or as called for by the board, shall be applied to pay the full consideration [to be received by the corporation] for as many whole shares as possible and any remaining balance of such payment shall be applied as part payment of a share;

(b) a share certificate shall be registered in the name of the subscriber for the number of shares so paid for in full; and

(c) the corporation shall be entitled to retain such share certificate as security for the performance by the subscriber of his obligations under the subscription agreement and subject to the power of sale or rescission upon default provided in paragraphs 14A:7-3(5) (b) and 14A:7-3(5) (c).

(4) Unless otherwise provided by the subscription agreement

(a) subscriptions for shares, whether made before or after the organization of a corporation, shall be paid in full at such time, or in such installments and at such times, as shall be determined by the board;

(b) any call made by the board for payment on subscriptions shall be uniform as to all shares of the same class or as to all shares of the same series, as the case may be;

(c) all such calls for payments on subscriptions shall be upon 30 days' notice thereof and of the time and place of payment, which notice shall be given personally or by registered or certified mail.

(5) In the event of default in the payment of any installment or call or other amount due under the terms of the subscription agreement, including any amount which may become due as a result of a default in the performance of any provision thereof, the corporation shall have the following rights and duties:

(a) It may proceed to collect the amount due in the same manner as any other debt owing to it. At any time before full satisfaction of the claim or any judgment therefor, it may proceed as provided in paragraph 14A:7-3(5) (b).

(b) It may sell the shares in any reasonable manner. Notice of the time and place of any public sale or of the time after which any private sale may be had, together with a statement of the amount due upon each share, shall be given in writing to the subscriber personally or by registered or certified mail at least 20 days before any such time stated in the notice. Unless otherwise provided in the subscription agreement, the corporation may not be the purchaser at any sale. Any excess of net proceeds realized over the amount due plus interest shall be paid over to the subscriber. If the sale is made in good faith, in a reasonable manner and upon the notice required by this paragraph, the corporation may recover the difference between the amount due plus interest and the net proceeds of the sale. A good faith purchaser for value shall acquire title to the sold shares free of any rights of the subscriber even though the corporation fails to comply with one or more of the requirements of this subsection.

(c) It may rescind the subscription, with the effect provided in subsection 14A:7-3(6), and may recover damages for breach of contract. Unless special circumstances show proximate damages of a different amount, the measure of damages shall be the difference between the market price at the time and place for tender of the shares and the unpaid contract price. Liquidated damages may be provided for in the subscription agreement in an amount which is reasonable under the circumstances, including the difficulties of proof of loss. The subscriber shall be entitled to restitution of any amount by which the sum of his payments exceeds the corporation's damages for breach of contract, whether fixed by agreement or judgment.

The rights and duties set forth in subsection 14A:7-3(5) shall be interpreted as cumulative so far as is consistent with the purpose of entitling the corporation to a full and single recovery of the

amount due or its damages. The subscription agreement may limit the rights and remedies of the corporation set forth in subsection 14A:7-3(5), and may add to them so far as is consistent with the preceding sentence.

(6) The rescission by the corporation of a subscription under which a portion of the shares subscribed for have been issued and in which the corporation retains a security interest, as provided in subsection 14A:7-3(3), shall effect the cancellation of such shares.

(7) A contract made with a corporation to purchase its shares, whether shares to be issued or treasury shares, is a subscription agreement and not an executory contract to purchase shares, unless otherwise provided in the agreement.

COMMISSIONERS' COMMENT—1972

Subsection 14A:7-3(3) has been amended to remove any implication that the consideration paid by the subscriber for shares must be paid directly to the issuing corporation. The Commission recognized that in some cases it may be desirable for the consideration to be paid to a wholly-owned subsidiary of the issuer, rather than directly to the issuer. Although the Commission was of the view that receipt of the consideration by the subsidiary would be held to constitute receipt by the parent corporation, it nevertheless considered it desirable to clarify the statute on this point.

32. N. J. S. 14A:7-5 is amended to read as follows:

14A:7-5 Payment for shares.

(1) Subject to any restrictions contained in the certificate of incorporation, the consideration for the issuance of shares may be paid, in whole or in part, in money, in real property, in tangible or intangible personal property, including stock of another corporation, or in labor or services actually performed for the corporation or in its formation. Neither obligations of the subscriber nor any future services shall constitute payment or part payment for *the issuance of* shares of the corporation.

(2) When payment of the full consideration for which shares are to be issued is [received by the corporation] *made*, the subscriber shall thereupon become entitled to all the rights and privileges of a holder of such shares, including the registration in his name of a certificate representing them, and such shares shall be fully paid and nonassessable.

COMMISSIONERS' COMMENT—1972

The amendment of subsection 14A:7–5(1) is for the purpose of clarification. Section 19 of the Model Act has been amended in the same manner.

The change in subsection 14A:7–5(2) is to remove any implication that the consideration paid by the subscriber for shares must be paid directly to the issuing corporation. See Comment on amendment of subsection 14A:7–3(3).

Note the qualification to subsection 14A:7–5(1), permitting the proceeds of loans to employees to be applied to stock purchases, provided in section 14A:6–11.

33. N. J. S. 14A:7–6 is amended to read as follows:

14A:7-6 Redeemable shares.

(1) A corporation may provide in its certificate of incorporation for one or more classes or series of shares which are redeemable, in whole or in part, at the option of the corporation in cash, its bonds or other property, at such price or prices, within such period or periods, and under such conditions as are stated in the certificate of incorporation. [If so provided in its certificate of incorporation, a corporation may create a] *A* sinking fund *may be created* for the redemption of any class or series of redeemable shares.

(2) A corporation which is an open-end investment company, as defined in an Act of Congress entitled "Investment Company Act of 1940," as amended or supplemented, or any act adopted in substitution therefor, may, if its certificate of incorporation so provides and upon compliance with that act, issue shares which are redeemable at the option of the holder at a price approximately equal to the shares' proportionate interest in the net assets of the corporation, and a shareholder may compel redemption of such shares in accordance with their terms.

(3) A corporation may provide, in its original certificate of incorporation or by an amendment approved by unanimous vote of the shareholders, for one or more classes or series of shares which are redeemable, in whole or in part, at the option of the shareholder. Subject to the restrictions imposed by section 14A:7–16, such shares may be redeemable in cash, bonds of the corporation or other property, at such price or prices, within such period or periods and under such conditions as are stated

in the certificate of incorporation, and such shares may also be redeemable at the option of the corporation, as provided in subsection 14A:7–6(1). The certificate of incorporation may be amended to delete or change a provision for shares redeemable at the option of the shareholder only with the unanimous approval of the holders of such shares. A provision for shares redeemable at the option of the shareholder shall become invalid when the number of holders of such shares, other than directors, officers, employees and the spouses of such persons, shall become 25 or more. For the purposes of the preceding sentence, shares which are held in joint or common tenancy or by the entireties shall be counted as held by one holder. The provisions of this subsection shall not be applicable to an open-end investment company.

(4) If a provision for shares redeemable at the option of the holder shall have become invalid as provided in subsection 14A:7–6(3), the board shall amend the certificate of incorporation to delete such provision by filing a certificate of amendment in the office of the Secretary of State. The certificate shall be executed on behalf of the corporation and shall set forth

(a) the name of the corporation;

(b) the date of adoption of the amendment;

(c) the deleted provision; and

(d) that the provision for shares redeemable at the option of the holder has become invalid because the number of holders of such shares, other than directors, officers, employees and the spouses of such persons, has become 25 or more.

The corporation shall thereupon give written notice of such invalidity to each holder of shares which have ceased to be redeemable at the option of the holder.

COMMISSIONERS' COMMENT—1972

Subsection 14A:7–6(1) has been amended to remove any implication that a sinking fund may be created only when authorized by the certificate of incorporation.

34. N. J. S. 14A:7–7 is amended to read as follows:

14A:7-7 Share rights and options.

(1) Subject to any provisions in respect thereof set forth in its certificate of incorporation, a corporation may create and issue,

whether or not in connection with the issuance and sale of any of its shares or bonds, rights or options entitling the holders thereof to purchase from the corporation shares of any class or series for such consideration and upon such terms and conditions as may be fixed by the board. The shares to be purchased upon the exercise of any such right or option may be authorized but unissued shares, treasury shares or shares to be purchased or acquired by the corporation for the purpose. Such rights or options shall be evidenced in such manner as the board shall approve and, without limiting the generality of the foregoing, may be evidenced by warrants attached to or forming part of bond instruments or share certificates or existing independently thereof. The instruments evidencing such rights or options shall set forth or incorporate by reference the terms and conditions of their exercise, including the time or times, which may be limited or unlimited in duration, within which, and the price or prices at which such shares may be purchased from the corporation, and any limitations on the transferability of any such right or option. The consideration for shares to be purchased upon the exercise of any such right or option shall comply with the requirements of sections 14A:7–4 and 14A:7–5. In the absence of fraud in the transaction, the judgment of the board as to the adequacy of the consideration received for such rights or options shall be conclusive.

(2) If such rights or options are to be issued to employees as defined in subsection 14A:8–1(2), or to their families, dependents or beneficiaries, pursuant to a plan, the provisions of Chapter 8 of this act govern their issuance. Without *acting pursuant to* a plan, a corporation may also issue such rights or options to any such employee, as an incentive to service or continued service of any such employee, provided [that no], *however, that shareholder approval shall be required for the issuance of any such right or option if the shares of the corporation subject thereto, together with the shares subject to or acquired by exercise of any rights or options previously issued by the corporation to* such employee, [together with] his dependents [and] *or* beneficiaries, [shall receive in the aggregate rights and options entitling him to] *would equal in number* more than 1% of [each] *the shares of any* class [of shares] of the corporation [except with shareholder approval] *outstanding at the date of the board action authorizing the issuance of such right or option.*

COMMISSIONERS' COMMENT—1972

Subsection 14A:7–7(2) has been amended to clarify the circumstances under which share rights or options may be issued to directors, officers or employees without using a plan adopted pursuant to Chapter 8.

35. N. J. S. 14A:7–8 is amended to read as follows:

14A:7-8 Determination of amount of stated capital.

(1) The consideration received by a corporation upon the issuance of shares having a par value shall constitute stated capital to the extent of the par value and the excess, if any, shall constitute capital surplus.

(2) The consideration received by a corporation upon the issuance of shares without par value shall constitute stated capital unless, [at the time of] *prior to* or within 60 days after the issuance of such shares, the board shall allocate a portion of such consideration to capital surplus. No such allocation shall be made of any portion of the consideration for the issue of shares without par value which is fixed by the shareholders pursuant to a right reserved in the certificate of incorporation, unless such allocation is authorized by a vote of the shareholders, nor shall such allocation be made contrary to any restrictions contained in the certificate of incorporation.

(3) If shares have been or shall be issued by a corporation in merger or consolidation or in acquisition of all or substantially all of the outstanding shares or of the property and assets of another corporation, whether domestic or foreign, any amount that would otherwise constitute capital surplus under the foregoing provisions of this section may instead be allocated to earned surplus by the board of the issuing corporation except that its aggregate earned surplus shall not exceed the sum of the earned surpluses of the issuing corporation and of all other corporations, domestic or foreign, that were merged or consolidated or of which the shares or assets were acquired.

(4) The stated capital of a corporation may be increased from time to time by resolution of the board directing that all or a part of the surplus of the corporation be transferred to stated capital. The board may direct that the amount so transferred shall be stated capital in respect to any designated class or series of shares.

COMMISSIONERS' COMMENT—1972

Subsection 14A:7–8(2) has been modified to permit allocations to capital surplus at any time prior to or within sixty days after the actual issuance of the shares.

36. N. J. S. 14A:7–11 is amended to read as follows:

14A:7-11 Certificates representing shares.

(1) The shares of a corporation shall be represented by certificates signed by, or in the name of the corporation by, the chairman or vice-chairman of the board, or the president or a vice-president, and by the treasurer or an assistant treasurer, or the secretary or an assistant secretary of the corporation and may be sealed with the seal of the corporation or a facsimile thereof. If the certificate is countersigned by a transfer agent or registrar, who is not an officer or employee of the corporation, any and all other signatures may be facsimiles. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon such certificate shall have ceased to be such officer, transfer agent, or registrar before such certificate is issued, it may be issued by the corporation with the same effect as if he were such officer, transfer agent or registrar at the date of its issue.

(2) Every share certificate delivered after the effective date of this act by a corporation which is authorized to issue shares of more than one class shall set forth upon the face or back of the certificate, a full statement

(a) of the designations, relative rights, preferences and limitations of the shares of each class and series authorized to be issued, so far as the same have been determined, and

(b) of the authority of the board to divide the shares into classes or series and to determine and change the relative rights, preferences and limitations of any class or series, or

shall set forth that the corporation will furnish to any shareholder, upon request and without charge, such a full statement.

(3) Each certificate representing shares shall state upon the face thereof

(a) that the corporation is organized under the laws of this State;

(b) the name of the person to whom issued; and

(c) the number and class of shares, and the designation of the series, if any, which such certificate represents.

(4) No certificate shall be issued for any share until such share is fully paid, except as provided in section 14A:8–3.

(5) A card which is punched, magnetically coded or otherwise treated so as to facilitate machine or automatic processing, may be used as a share certificate if it otherwise complies with the provisions of this section.

COMMISSIONERS' COMMENT—1972

A new subsection 14A:7–11(5) has been added to this section to make it clear that punched or magnetically treated cards may be used in lieu of conventional stock certificates in order to facilitate machine or automatic processing.

37. N. J. S. 14A:7–13 is amended to read as follows:

14A:7-13 Issuance of fractional shares or scrip.

Unless otherwise provided in its certificate of incorporation, a corporation may, but shall not be obliged to, issue fractions of a share and certificates therefor [on original issue or otherwise when necessary to effect share transfers, dividends, distributions, exchanges or reclassifications, or to effect mergers, consolidations or reorganizations]. By action of its board, a corporation may, in lieu of issuing fractional shares, pay cash equal to the value of such fractional share, or issue scrip in registered or bearer form which shall entitle the holder to receive a certificate for a full share upon the surrender of such scrip aggregating a full share. A certificate for a fractional share shall entitle the holder to exercise voting rights, to receive dividends thereon, and to participate in any distribution of assets of the corporation in the event of liquidation, but scrip shall not entitle the holder to exercise such voting rights, receive dividends or participate in any such distribution of assets unless such scrip shall so provide. All scrip shall be issued subject to the condition that it shall become void if not exchanged for certificates representing full shares before a specified date. If such scrip is not so exchanged, the corporation shall either sell the shares for which such scrip was exchangeable and distribute the proceeds thereof pro rata to the holders of such scrip; or pay, pro rata, to the holders of such scrip the market value of the shares for which such scrip was exchangeable as of the day when such scrip became void.

COMMISSIONERS' COMMENT—1972

Section 14A:7–13 has been modified to permit general use of fractional shares. The Commission believes that the change will afford increased flexibility. The Model Act and the Delaware Act are similarly unlimited. Model Act § 24 (1969 rev.); Del. G.C.L. § 155.

38. N. J. S. 14A:7–15.1 is added as follows:

14A:7-15.1 Share divisions and combinations.

(1) A corporation may effect a division or combination of its shares in the manner hereinafter set forth. As used in this section, the terms "division" and "combination" mean dividing or combining shares of any class or series, whether issued or unissued, into a greater or lesser number of shares of the same class or series without in either case changing the stated capital of the corporation.

(2) Except as otherwise provided in the certificate of incorporation, a division or combination may be effected by action of the board alone unless (a) the rights or preferences of the holders of outstanding shares of any class or series will be adversely affected thereby or (b) the number of authorized but unissued shares will be increased thereby, in either of which cases shareholder approval shall be required in accordance with subsection 14A:9–2(4) and section 14A:9–3. In any case in which the board alone is authorized to effect a combination or division, it shall have authority to amend the certificate of incorporation to increase or decrease the par value of shares, increase or decrease the number of authorized shares or make any other change necessary or appropriate to assure that the rights or preferences of the holders of outstanding shares of any class or series will not be adversely affected by such combination or division.

(3) If a division or combination is effected by board action without shareholder approval, there shall be executed on behalf of the corporation and filed in the office of the Secretary of State a certificate setting forth

(a) the name of the corporation;

(b) the date of adoption by the board of the resolution approving the division or combination;

(c) that the division or combination will not adversely affect the rights or preferences of the holders of outstanding shares

of any class or series and will not, except as permitted by subsection 14A:7–15.1(5), increase the number of authorized but unissued shares;

(d) the class or series and number of shares thereof subject to the division or combination and the number of shares into which they are to be divided or combined;

(e) any amendment of the certificate of incorporation in connection with the division or combination, or that no amendment is being made; and

(f) if the division or combination is to become effective at a time subsequent to the time of filing, the date, which may not exceed 30 days from the date of filing, when the same is to become effective.

(4) If a division or combination is effected by action of the board and shareholders, there shall be executed on behalf of the corporation and filed in the office of the Secretary of State a certificate of amendment as provided in subsection 14A:9–4(3), which certificate shall set forth, in addition to all information required by said subsection, the information required by paragraph 14A:7–15.1(3) (d).

(5) Upon a combination becoming effective, the authorized shares of the class or series subject thereto shall be reduced by the number by which the issued shares of such class or series were reduced as a result of the combination unless the certificate of incorporation otherwise provides or the combination was approved by the shareholders in accordance with subsection 14A:9–2(4) and section 14A:9–3.

(6) Nothing herein shall be deemed to prevent the corporation from increasing or decreasing its stated capital as permitted by this act in connection with any division or combination effected pursuant to this section.

COMMISSIONERS' COMMENT—1972

A new section 14A:7–15.1 has been added to clarify the procedure for effecting share divisions (stock splits) and share combinations (reverse stock splits).

The section provides that the board of directors alone may effect a division or combination of shares where the rights or preferences of holders of outstanding shares

will not be adversely affected and where the number of authorized but unissued shares will not be increased. In other cases the shareholders must approve the action in accordance with the provisions relating to amendments to the certificate of incorporation. See 14A:9–2(4); 14A:9–3.

Where the board alone is authorized to effect a division or combination, it may amend the certificate of incorporation and the corporation must execute and file a certificate setting forth the information required in subsection 14A:7–15.1 Where the division or combination is effected pursuant to shareholder action, a certificate of amendment must be filed in accordance with 14A:9–4 (3) but with the additional information required by paragraph 14A:7–15.1(3) (d).

Subsection 14A:7–15.1(5) provides that where the board alone has effected a combination of shares, unless the certificate of incorporation otherwise provides, the number of the authorized shares of the class or series combined is reduced by an amount equal to the number by which the issued shares of such class or series are reduced by the combination.

Subsection 14A:7–15.1 defines a division or combination as an increase or decrease in the number of shares without changing the stated capital of the corporation. However, subsection 14A:7–15.1(6) provides that the corporation may, in conjunction with a combination or division, change its stated capital in accordance with other provisions of this act.

39. N. J. S. 14A:7–17 is amended to read as follows:

14A:7-17 Disclosure to shareholders upon certain distributions or earned surplus transactions.

(1) Every dividend or other distribution from a source in whole or in part other than earned surplus, and every share dividend or other distribution of shares of the corporation, except a share dividend paid out of earned surplus, shall be accompanied by a written notice disclosing the amounts by which such dividend or distribution affects stated capital, capital surplus and earned surplus, or, if such amounts are not determinable at the time of such notice, disclosing the approximate effect of such dividend or distribution upon stated capital, capital surplus and earned surplus and stating that such amounts are not yet determinable.

(2) A corporation which applies any part or all of its capital surplus to the reduction or elimination of any deficit in its earned surplus, as permitted by subsection 14A:7–20(3), shall disclose such application in [each] *the next* financial statement covering the period in which such application is made that is furnished by the corporation to [any of] *all* its shareholders, *or, if practicable, in the first notice of dividend or share distribution that is furnished to holders of each class or series of its shares between the date of such application and the next such financial statement,* and in any event to all its shareholders within [6] *16* months of the date of such application.

(3) Failure of the corporation to comply in good faith with the provisions of this section shall make it liable for any damage sustained by any shareholder in consequence thereof.

COMMISSIONERS' COMMENT—1972

Subsection 14A:7–17(2) has been amended to require that any application of capital surplus to a deficit in earned surplus be disclosed to the shareholders in the next financial statement covering the period in which such application is made or at the time of the next dividend payment, if sooner, but in any event within 16 months after the date of such application. This subsection, as amended, follows section 517(a) (4) of the New York Business Corporation Law except that the outside limit for notification to the shareholders has been enlarged from 6 to 16 months in order to permit inclusion of the required notice in an annual report to the shareholders.

40. N. J. S. 14A:7–18 is amended to read as follows:

14A:7-18 Cancellation of reacquired shares.

(1) When shares of a corporation are reacquired out of stated capital or by their conversion into other shares of the corporation, the reacquisition shall effect their cancellation. When shares of a corporation are otherwise reacquired by it, the corporation may retain them as treasury shares or may cancel them by resolution of the board. In all cases of cancellation, except that of converted shares, a statement of cancellation shall be filed as provided in [this section] *subsection 14A:7–18(2).* Upon their cancellation, reacquired shares shall be restored to the status of authorized but unissued shares, unless the certificate of incorporation, or the plan of merger or consolidation in the case of shares acquired

by the corporation pursuant to Chapter 11 of this act, provides that such shares shall not be reissued, in which case the filing of the statement of cancellation, pursuant to a resolution of the board, shall constitute an amendment to the certificate of incorporation and shall reduce the authorized number of shares by the number of shares so cancelled.

(2) The statement of cancellation shall be executed on behalf of the corporation and filed in the office of the Secretary of State not later than 30 days after the cancellation of the reacquired shares. The statement shall set forth:

(a) the name of the corporation;

(b) the number of shares cancelled, itemized by classes and series, and if cancelled shares were not reacquired out of stated capital or by their conversion into other shares of the corporation, the date of adoption of the resolution of the board cancelling such shares;

(c) the aggregate number of issued shares, itemized by classes and series, after giving effect to such cancellation;

(d) the amount, expressed in dollars, of the stated capital of the corporation after giving effect to such cancellation;

(e) if the certificate of incorporation, or the plan of merger or consolidation in the case of shares acquired by the corporation pursuant to Chapter 11 of this act, provides that the cancelled shares shall not be reissued

(i) that the certificate of incorporation is amended pursuant to a resolution of the board by decreasing the aggregate number of shares which the corporation is authorized to issue by the number of shares cancelled, and

(ii) the number of shares which the corporation has authority to issue, itemized by classes and series, after giving effect to such cancellation; and

(f) if shareholder approval is required by subsection 14A:7–18(3) for a reduction of the stated capital of the corporation, a statement of the date of approval by the shareholders, [the number of shares outstanding,] the number of shares entitled to vote thereon, and the number of shares voted for and against the reduction of the stated capital, respectively; and, if any class or series of shares is entitled to vote thereon as a class, a separate statement of such facts for each class and series entitled to vote separately.

(3) Except as otherwise provided in this subsection, upon the cancellation of reacquired shares *of any class or series* the stated capital of the corporation shall be reduced by the amount represented by such shares before their cancellation. *The stated capital represented by each share shall be deemed to be the amount of stated capital represented by all issued shares of such class or series, including the cancelled shares, divided by the total number of such issued shares.* In the case of shares without par value for whose issue the consideration was fixed by the shareholders, as provided in subsection 14A:7–4(2), if such shares are not redeemable and are not preferred over the shares of any other class or series in the payment of dividends or in the distribution of assets upon liquidation and have not been reacquired for any of the purposes set forth in subsection 14A:7–16(2), their cancellation shall cause a reduction of the stated capital only to the extent, if any, that the stated capital represented by such shares exceeded the minimum amount required, as provided in subsection 14A:7–8 (2), unless such further reduction has been approved by a vote of the shareholders or is authorized by the certificate of incorporation. This subsection shall not be applicable to converted shares.

(4) A statement of cancellation of converted shares shall be filed only if the certificate of incorporation provides that such shares shall not be reissued. The statement of cancellation shall set forth the information required by paragraphs 14A:7–18(2) (a), (b), (c) and (e) *and shall be filed not later than 60 days after the close of the fiscal year in which the shares were reacquired.*

(5) Nothing contained in this section shall be construed to forbid a cancellation of shares or a reduction of stated capital in any other manner permitted by this act.

COMMISSIONERS' COMMENT—1972

Subsection 14A:7–18(1) has been amended for purposes of clarification and in order to avoid any inconsistencies with subsection 14A:7–18(4).

Subsection 14A:7–18(2) has been amended to delete the requirement that the number of shares outstanding be set forth in the certificate. See comment to amendment to section 14A:9–4.

Subsection 14A:7–18(3) has been amended to make it clear that there is no necessity to ascertain the stated capital originally allocated to each share at the time of its issuance in order to determine the amount of reduction of stated capital attributable to cancellation of shares. The Commission felt that, for the purpose of determining the stated capital represented by each share, all shares of a particular class or series should be considered fungible.

Subsection 14A:7–18(4) has been modified to relieve corporations of the burden of filing numerous statements of cancellation where shares are continually being converted.

41. N. J. S. 14A:7–19 is amended to read as follows:

14A:7-19 Reduction of stated capital by board action.

(1) Unless otherwise provided in the certificate of incorporation and subject to the provisions of subsections 14A:7–19(3), 14A:7–19(4) and 14A:7–19(5), a reduction of stated capital of a corporation, where such reduction [is not accompanied by any action requiring] *does not require* an amendment of the certificate of incorporation and *is* not accompanied by a cancellation of shares, may be made by resolution of the board setting forth the amount of the proposed reduction, the manner in which the reduction shall be effected and the date upon which the reduction shall become effective.

(2) A statement of such reduction shall be executed on behalf of the corporation and filed in the office of the Secretary of State not later than 30 days after the effective date of the reduction. Such statement shall set forth

(a) the name of the corporation;

(b) a statement of the amount of the reduction, the manner in which such reduction is effected, and the amount, expressed in dollars, of stated capital of the corporation after giving effect to such reduction; and

(c) if shareholder approval is required for a reduction of the stated capital of the corporation, a statement of the date of approval by the shareholders, [the number of shares outstanding,] the number of shares entitled to vote thereon, and the number of shares voted for and against the reduction of the stated capital, respectively; and, if any class or series of shares is entitled

to vote thereon as a class, a separate statement of such facts for each class and series entitled to vote separately.

(3) Unless the certificate of incorporation otherwise provides, the board shall have discretion to reduce the stated capital of shares under this section [whether or not the stated capital after such reduction is at least equal to] *without regard to* the aggregate amount of the preferences of issued shares in the assets of the corporation upon liquidation [plus], *provided that stated capital after such reduction shall not be less than* the aggregate amount of the par value of all [other] issued shares with par value.

(4) If the consideration for the issue of shares without par value was fixed by the shareholders under subsection 14A:7–4(2), the board shall not reduce the stated capital represented by such shares except to the extent, if any, that the board was authorized by the shareholders to allocate a portion of such consideration to surplus, as provided in subsection 14A:7–8(2), unless such further reduction has been approved by a vote of the shareholders or is authorized by the certificate of incorporation.

(5) Stated capital which remains in existence, because of the applicability of the [second] *third* sentence of subsection 14A:7–18(3), after the cancellation of the shares which formerly represented it, shall not be reduced by the board unless such reduction has been approved by a vote of the shareholders or is authorized by the certificate of incorporation.

COMMISSIONERS' COMMENT—1972

The changes to section 14A:7–19 are intended merely to clarify the language used and to effect technical corrections.

42. N. J. S. 14A:8–1 is amended to read as follows:

Employee benefit plans.

14A:8–1 Employee benefit plans.

(1) A corporation may, in the manner prescribed in section 14A:8–2, establish and carry out wholly or partly at its expense, any one or more of the following plans for the benefit of some or all employees [of the corporation or any subsidiary thereof], *as hereinafter defined*, and their families, dependents or beneficiaries

(a) plans providing for the sale or distribution of its shares of any class or series, held by it or issued or purchased by it

for the purpose, including stock option, stock purchase, stock bonus, profit-sharing, savings, pension, retirement, deferred compensation and other plans of similar nature, whether or not such plans also provide for the distribution of cash or property other than its shares;

(b) plans providing for payments solely in cash or property other than shares of the corporation, including profit-sharing, bonus, savings, pension, retirement, deferred compensation and other plans of similar nature; and

(c) plans for the furnishing of medical service; life, sickness, accident, disability or unemployment insurance or benefits; education; housing; social and recreational services; and other similar aids and services.

(2) The term "employees" as used in this Chapter means employees, officers, directors, and agents of the corporation or any subsidiary thereof, or other persons who are or have been actively engaged in the conduct of the business of the corporation or any [other] subsidiary thereof, including any who have retired, become disabled or died prior to the establishment of any plan heretofore or hereafter adopted.

COMMISSIONERS' COMMENT—1972

The change made in subsection 14A:8–1(1) is intended merely to simplify the sentence structure by incorporating the definition of "employees" set forth in subsection 14A:8–1(2). The deletion of the word "other" from subsection 14A:8–1(2) corrects an error in the present text.

43. Section 12 of P. L. 1969, c. 102 (C. 14A:8–1.1) is amended to read as follows:

12. A corporation which on January 1, 1969 was lawfully carrying out or participating in a plan of a type described in New Jersey Statute 14A:8–1 [or any alteration of such a plan,] may continue to do so, but any amendment shall require shareholder approval to the same extent as if such plan had been originally established in accordance with the requirements of Chapter 8 of the New Jersey Business Corporation Act.

COMMISSIONERS' COMMENT—1972

The purpose of this amendment is to eliminate language which the Commission considered unnecessary. No change in substance is intended.

44. N. J. S. 14A:8–2 is amended to read as follows:

14A:8-2 Formulation of plans; submission to shareholders in certain instances.
The board alone, by affirmative vote of a majority of directors in office, may adopt any plan described in section 14A:8–1 and may include such provisions therein as the board may deem advisable; provided that the approval of the shareholders shall be required for the adoption of any plan which permits the use or issuance of treasury shares or authorized but unissued shares, and shall also be required for the adoption of any other plan if the certificate of incorporation or the by-laws so provide. *Nothing herein or in subsection 14A:7–7(2) shall be deemed to require shareholder approval for the issuance by a corporation of share options or rights in substitution for outstanding options or rights issued by another corporation prior to its merger or consolidation with, or the acquisition of its shares or assets by, the corporation issuing such substituted options or rights or its subsidiary.*

COMMISSIONERS' COMMENT—1972

The purpose of this addition is to make clear that shareholder approval is not required to authorize the issuance of substituted stock options by a corporation when it acquires another corporation having outstanding stock options.

45. N. J. S. 14A:8–3 is amended to read as follows:

14A:8-3 Terms of plan; issuance of certificates.
[The approval by the shareholders of a] *Every* plan [for the issue of rights or options to employees shall include approval of] *described in section 14A:8–1 providing for the sale or distribution of shares shall specify the maximum number of shares, subject to adjustment in the event of changes in the capital structure of the corporation, which may be sold or distributed thereunder, and shall include, or shall authorize the board or a committee thereof to fix,* the terms and conditions upon which [such rights or options] *shares are to be sold or distributed or options to purchase shares* are to be issued, such as, but without limitation thereto, any restrictions [upon the administration of] *on the number of shares that eligible individuals may have the right to purchase or receive, the method of administering* the plan, the terms and conditions of payment for shares in full or in installments, the issue of certificates for shares to be paid for in installments, any limitations upon the transferability of such shares and the voting and dividend rights to which the holders of such shares may be entitled, though

the full amount of the consideration therefor has not been paid; provided that, *except as permitted by section 14A:6–11,* no certificate for shares shall be delivered under the plan, prior to full payment in cash, property or services therefor, unless the fact that the shares are partly paid for is noted conspicuously on the face of such certificate, or such certificate is deposited with a trustee to be held pursuant to the terms of a plan or an appropriate agreement.

COMMISSIONERS' COMMENT—1972

The purpose of this amendment is to give greater flexibility with respect to the content of stock option, stock purchase, stock bonus and similar plans adopted by the shareholders pursuant to section 14A:8–2. The Commission recognized that many stock option plans, for example, state merely the general terms and conditions on which options may be granted thereunder and leave the details of the actual option grants to be determined by the board or a committee of the board administering the plan. The Commission wished to avoid any possibility that the present text of section 14A:8–3 might be construed as requiring that every such plan submitted for shareholder approval must contain every term and condition upon which option grants may be made to employees under the plan.

46. N. J. S. 14A:8–4 is amended to read as follows:

14A:8-4 Amendment or termination of plans.

(1) Unless otherwise provided in the plan, the board may amend or terminate any plan described in section 14A:8–1 heretofore or hereafter adopted, provided that

[(a) no such amendment or termination shall impair any rights which have accrued under the plan or deprive any employee or beneficiary of the employee of the equivalent in cash or other benefits of the contributions of the employee under the plan; and

(b) any amendment made by the board to a plan which was approved by the shareholders in accordance with section 14A:8–2, shall be submitted to the shareholders for approval, unless the board shall have determined that such amendment will not result in a material increase in the cost of the plan to the corporation; and

(c) any amendment made by the board to a plan which, under section 14A:8–2, did not initially require shareholder approval, shall require shareholder approval, if the effect of such amendment is to include in the plan a provision, which if originally included in the plan, would have required shareholder approval of the plan.]

(a) any amendment made by the board to a plan which was approved by the shareholders in accordance with section 14A:8–2 shall be submitted to the shareholders for approval, unless the board shall have determined that such amendment will not result in a material increase in the cost of the plan to the corporation; and

(b) any amendment made by the board to a plan which, under section 14A:8–2, did not initially require shareholder approval, shall require shareholder approval, if the effect of such amendment is to include in the plan a provision, which if originally included in the plan, would have required shareholder approval of the plan.

(2) No amendment or termination of any such plan, whether made by the board alone or by the board with the approval of the shareholders, shall impair any rights which have accrued under the plan or deprive any employee or beneficiary of the employee of the equivalent in cash or other benefits of the contributions of the employee under the plan.

COMMISSIONERS' COMMENT—1972

The purpose of this amendment is merely to make clear that, whether an amendment or termination of a plan described in section 14A:8–1 is made by the board or by the board with the approval of the shareholders, no such amendment or termination may impair any rights which have accrued under the plan or deprive any employee or beneficiary of the employee of the equivalent in cash or other benefits of the contributions of the employee under the plan.

47. N. J. S. 14A:9–2 is amended to read as follows:

14A:9-2 Procedure to amend certificate of incorporation.

(1) Before the organization meeting of the board, the incorporators may amend the certificate of incorporation by complying with subsection 14A:9–4(1).

(2) Amendment of the certificate of incorporation by action of the board is provided for in subsection 14A:4–3(1), subsection 14A:5–21(4), subsection 14A:7–2(4), subsection 14A:7–6(4), subsection 14A:7–9(4), *subsection 14A:7–15.1(3),* and subsections 14A:7–18(1) and 14A:7–18(4). Amendment of the certificate of incorporation by action of the registered agent to change the registered office is provided for in subsection 14A:4–3(3).

(3) An amendment of the certificate of incorporation pursuant to a plan of merger may be made in the manner provided in Chapter 10 of this act.

(4) All other amendments of the certificate of incorporation shall be made in the following manner:

(a) The board shall approve the proposed amendment and direct that it be submitted to a vote at a meeting of the shareholders.

(b) Written notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this act for the giving of notice of meetings of shareholders.

(c) At such meeting a vote of shareholders entitled to vote thereon shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the votes cast by the holders of shares entitled to vote thereon and, in addition, if any class or series of shares is entitled to vote thereon as a class, the affirmative vote of a majority of the votes cast in each class vote; except that, in the case of a corporation organized prior to the effective date of this act, the proposed amendment shall be adopted upon receiving the affirmative vote of two-thirds of the votes so cast. The voting requirements of this section shall be subject to such greater requirements as are provided in this act for specific amendments, or as may be provided in the certificate of incorporation.

(d) Subject to the provisions of section 14A:5–12, a corporation organized prior to the effective date of this act may adopt the majority voting requirements prescribed in paragraph 14A:9–2(4) (c) by amendment of its certificate of incorporation adopted by the affirmative vote of two-thirds of the votes cast by the holders of shares entitled to vote thereon.

(e) Any number of amendments may be acted upon at one meeting.

(f) Upon adoption, a certificate of amendment shall be filed in the office of the Secretary of State as provided in section 14A:9–4.

COMMISSIONERS' COMMENT—1972

This section has been amended merely to reflect the fact that the board may amend the certificate of incorporation under the provisions of new section 14A:7–15.1.

48. N. J. S. 14A:9–4 is amended to read as follows:

14A:9-4 Certificate of amendment.

(1) If the amendment is made as provided by subsection 14A:9–2(1), a certificate of amendment shall, subject to subsection 14A:2–6(3), be signed by all the incorporators, shall set forth the name of the corporation and the amendment so adopted, and shall recite that the amendment is made by unanimous consent of the incorporators before the organization meeting of the directors.

(2) If the amendment is made by the board as referred to in subsection 14A:9–2(2), a certificate of amendment shall be executed on behalf of the corporation. The certificate shall set forth the information required by the section of this act which empowers the board to make the amendment.

(3) If the amendment is made as provided by subsection 14A:9–2(4), a certificate of amendment shall be executed on behalf of the corporation and shall set forth

(a) the name of the corporation;

(b) the amendment so adopted;

(c) the date of the adoption of the amendment by the shareholders;

(d) [the number of shares outstanding, and] the number of shares entitled to vote thereon, and if the shares of any class or series are entitled to vote thereon as a class, the designation and number of [outstanding] shares entitled to vote thereon of each such class or series;

(e) the number of shares voted for and against such amendment, respectively, and if the shares of any class or series are entitled to vote thereon as a class, the number of shares of each

such class and series voted for and against such amendment, respectively;

(f) if such amendment is intended to provide for an exchange, reclassification or cancellation of issued shares, a statement of the manner in which the same shall be effected; and

(g) if, pursuant to subsection 14A:9–4(5), the amendment is to become effective at a time subsequent to the time of filing, the date when the amendment is to become effective.

(4) If such amendment is accompanied by a reduction of stated capital, the corporation may also include in the certificate, at its discretion, in lieu of a statement of reduction under section 14A:7–19, a statement of the amount of the reduction, the manner in which the reduction is effected, and the amount, expressed in dollars, of stated capital of the corporation after giving effect to the reduction.

(5) Each certificate of amendment of the certificate of incorporation shall be filed in the office of the Secretary of State and the amendment shall become effective upon the date of filing or at such later time, not to exceed 30 days from the date of filing, as may be set forth in the certificate. If the certificate of amendment includes a statement provided for in subsection 14A:9–4(4), the stated capital shall be reduced when the amendment becomes effective.

COMMISSIONERS' COMMENT—1972

Subsection 14A:9–4(3) has been modified to remove the requirement that the certificate of amendment include a statement of the number of shares outstanding. The Commission believes that it is sufficient to require only that the number of shares entitled to vote on the amendment be set forth in the certificate.

49. N. J. S. 14A:9–5 is amended to read as follows:

14A:9-5 Restated certificate of incorporation.

(1) A corporation may restate and integrate in a single certificate the provisions of its certificate of incorporation as theretofore amended, including any provision effected by a merger or consolidation and any further amendments as may be adopted concurrently with the restated certificate.

(2) If the proposed restated certificate merely restates and integrates, but does not [further] *substantively* amend the certificate of incorporation as theretofore amended, it may be adopted by the board.

(3) If the proposed restated certificate restates and integrates and also [further] *substantively* amends the certificate of incorporation as theretofore amended, such restated certificate shall be adopted in the following manner:

(a) the board shall approve the proposed restated certificate and direct that it be submitted to a vote at a meeting of the shareholders;

(b) written notice setting forth the proposed restated certificate shall be given to each shareholder of record entitled to vote thereon within the time and in the manner provided in this act for the giving of notice of such meeting;

(c) at such meeting a vote of shareholders entitled to vote thereon shall be taken on the proposed restated certificate. The proposed restated certificate shall be adopted upon receiving a number of votes sufficient to adopt an amendment to the corporation's certificate of incorporation. The voting requirements of this section shall be subject to such greater requirements as are provided in this act for specific amendments or as may be provided in the certificate of incorporation.

(4) The restated certificate shall recite that it is a restated certificate and shall contain all such provisions as are required in an original certificate of incorporation filed at the time the restated certificate is filed, except that

(a) it shall state the address of the corporation's then current registered office, and the name of its then current registered agent, and it shall also state the number, names and addresses of the directors constituting its then current board;

(b) it need not include statements as to the incorporator or incorporators or as to the first directors or the first registered office and registered agent;

(c) if, pursuant to subsection 14A:9–5(6), the restated certificate is to become effective subsequent to the time of filing, it shall state the date when it is to become effective.

(5) The restated certificate shall be executed on behalf of the corporation, and shall be filed in the office of the Secretary of State. There shall be attached to it and filed therewith a certificate executed on behalf of the corporation and setting forth

(a) the name of the corporation;

(b) the date such restated certificate was adopted; and

(c) if the restated certificate [of incorporation] was adopted by the shareholders, it shall also set forth

(i) [the number of the shares outstanding, and] the number of shares entitled to vote thereon, and, if the shares of any class or series are entitled to vote thereon as a class, the designation and number of [outstanding] shares entitled to vote thereon of each such class and series;

(ii) the number of shares voted for and against such adoption, and, if the shares of any class or series are entitled to vote thereon as a class, the number of shares of each such class and series voted for and against such adoption; and

(iii) if [an] *any* amendment of the certificate of incorporation [was adopted concurrently with the adoption of the] *made by such* restated certificate *is intended to provide for an exchange, reclassification, or cancellation of issued shares, a statement of the manner in which the same shall be effected*[, the information required by paragraphs 14A:9-4(3) (b), 14A:9-4(3) (f), and 14A:9-4(3) (g)].

(6) The restated certificate [and any amendment included therein] shall become effective upon the date of filing with the Secretary of State or at such later time, not to exceed 30 days from the date of filing, as may be set forth therein. *A restated certificate adopted in the manner prescribed herein, whether by action of the board alone pursuant to subsection 14A:9-5(2) or by action of the board and the shareholders pursuant to subsection 14A:9-5(3), shall supersede for all purposes the original certificate of incorporation and all amendments thereto made prior to the adoption of such restated certificate, and such restated certificate may be separately certified as the certificate of incorporation.*

COMMISSIONERS' COMMENT—1972

Subsections 14A:9-5(2) and 14A:9-5(3) have been amended to make it clear that a restated certificate may be adopted by the board without shareholder approval provided it does not make any substantive change in the certificate of incorporation.

Subparagraph 14A:9-5(5) (c) (i) has been changed to delete the requirement that the number of outstanding shares be set forth in the certificate of adoption. A similar change has been made in paragraph 14A:9-4(3) (d). The change in subparagraph 14A:9-5(5) (c) (iii) eliminates unnecessary references to other paragraphs.

Subsection 14A:9-5(6) has been amended to make it clear that a restated certificate supersedes the original certificate of incorporation and all amendments to it and that it may be separately certified as the certificate of incorporation.

50. N. J. S. 14A:9-6 is amended to read as follows:

14A:9-6 Abandonment of amendment *or restated certificate*.

Prior to the effective date of an amendment of the certificate of incorporation *or of a restated certificate* for which shareholder approval is required under the provisions of this act, such amendment *or such restated certificate* may be abandoned pursuant to provisions therefor, if any, set forth in the resolution of the shareholders approving such amendment *or such restated certificate or in any resolution subsequently adopted by the shareholders.* If a certificate of amendment *or a restated certificate* has been filed in the office of the Secretary of State prior to such abandonment, a certificate of abandonment shall be filed in the office of the Secretary of State. The certificate shall state that the amendment *or the restated certificate* has been abandoned in accordance with the provisions therefor set forth in the resolution of the shareholders [adopting such amendment].

COMMISSIONERS' COMMENT—1972

This section has been modified to extend its application to restated certificates and to permit the shareholders to authorize the abandonment of an amendment or restated certificate of incorporation by a resolution adopted subsequent to the resolution approving the amendment or restated certificate of incorporation.

51. N. J. S. 14A:10-1 is amended to read as follows:

14A:10-1 Procedure for merger.

(1) Any two or more domestic corporations may merge into one of such corporations pursuant to a plan of merger approved in the manner provided in this act.

(2) The board of each corporation shall approve a plan of merger setting forth

(a) the names of the corporations proposing to merge, and the name of the corporation into which they propose to merge, which is hereinafter designated as the surviving corporation;

(b) the terms and conditions of the proposed merger, including a statement of any amendments in the certificate of incorporation of the surviving corporation to be effected by such merger;

(c) the manner and basis of converting the shares of each [merging] corporation into shares, *obligations, or* other securities[, or obligations] of the surviving corporation *or of any other corporation or, in whole or in part, into cash or other property*[, or into cash or other consideration which may include shares or other securities or obligations of a corporation not a party to the merger, or into any combination thereof]; and

(d) such other provisions with respect to the proposed merger as are deemed necessary or desirable.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:10–1(2) (c) has been amended to follow the wording of Section 71(c) of the Model Act. No substantive change is intended.

52. N. J. S. 14A:10–2 is amended to read as follows:

14A:10-2 Procedure for consolidation.

(1) Any two or more domestic corporations may consolidate into a new corporation pursuant to a plan of consolidation approved in the manner provided in this act.

(2) The board of each corporation shall approve a plan of consolidation setting forth

(a) the names of the corporations proposing to consolidate, and the name of the new corporation into which they propose to consolidate, which is hereinafter designated as the new corporation;

(b) the terms and conditions of the proposed consolidation;

(c) the manner and basis of converting the shares of each corporation into shares, [other securities, or] obligations *or other securities* of the new corporation, or [into cash or other consideration which may include shares or other securities or obligations] of [a] *any other corporation* [not a party to the consolidation,] or [into any combination thereof], *in whole or in part, into cash or other property*;

(d) with respect to the new corporation, all of the statements required to be set forth in the certificate of incorporation for corporations organized under this act, except that it shall not be necessary to set forth the name and address of each incorporator; and

(e) such other provisions with respect to the proposed consolidation as are deemed necessary or desirable.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:10–2(2) (c) has been amended to follow the wording of Section 72(c) of the Model Act. No substantive change is intended.

53. N. J. S. 14A:10–3 is amended to read as follows:

14A:10-3 Approval by shareholders.

(1) The board of each corporation, upon approving such plan of merger or plan of consolidation, shall direct that the plan be submitted to a vote at a meeting of shareholders. Written notice shall be given *not less than 20 nor more than 60 days before such meeting* to each shareholder of record, whether or not entitled to vote at such meeting[, not less than 20 nor more than 60 days before such meeting], in the manner provided in this act for the giving of notice of meetings of shareholders. Such notice shall include, or shall be accompanied by

(a) a copy or a summary of the plan of merger or consolidation[, as the case may be]; and

(b) a statement informing shareholders who, under Chapter 11 of this act, are entitled to dissent, that they have the right to dissent and to be paid the fair value of their shares[, provided that they file with the corporation before the taking of the vote of the shareholders on the plan of merger or consolidation a written notice of dissent as required by subsection 14A:11–2(1), and that they otherwise comply with] *and outlining briefly, with particular reference to the time periods within which actions must be taken,* the procedures set forth in Chapter 11 of this act *with which they must comply in order to assert and enforce such right.*

(2) At each such meeting, a vote of the shareholders shall be taken on the proposed plan of merger or consolidation. Such plan shall be approved upon receiving the affirmative vote of a majority of the votes cast by the holders of shares of each such corporation entitled to vote thereon, and, in addition, if any class or series is entitled to vote thereon as a class, the affirmative vote of a majority of the votes cast in each class vote; except that, in the case of a corporation organized prior to the effective date of this act, the plan of merger or consolidation shall be approved upon receiving the affirmative vote of two-thirds of the votes so cast. Any class or series of shares of any such corporation shall be entitled to vote as a class if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to the certificate of incorporation, would entitle such class or series of shares to vote as a class unless such provision is one which could be adopted by the board without shareholder approval as referred to in subsection 14A:9-2(2). The voting requirements of this section shall be subject to such greater requirements as are provided in this act for specific amendments or as may be provided in the certificate of incorporation.

(3) Subject to the provisions of section 14A:5-12, a corporation organized prior to the effective date of this act may adopt the majority voting requirements prescribed in subsection 14A:10-3(2) by an amendment of its certificate of incorporation adopted by the affirmative vote of two-thirds of the votes cast by the holders of shares entitled to vote thereon.

(4) Notwithstanding the provisions set forth in subsections 14A:10-3(1) and 14A:10-3(2), the approval of the shareholders of a surviving corporation shall not be required to authorize a merger *unless its certificate of incorporation otherwise provides* if

(a) the [agreement] *plan* of merger does not [change the name or authorized shares or series of any class or otherwise amend] *make an amendment of* the certificate of incorporation of the surviving corporation *which is required by the provisions of this act to be approved by the shareholders;* and

[(b) the authorized unissued shares and the treasury shares of each class and series of the surviving corporation to be issued or delivered under the plan of merger do not exceed 15 per cent of the shares of each such class or series of the surviving corporation outstanding immediately prior to the effective date of the merger.]

(b) either (i) no shares of common stock of the surviving corporation and no securities convertible into such common shares are to be issued or delivered under the plan of merger or (ii) the number of common shares of the surviving corporation to be issued or delivered under such plan, plus those initially issuable upon conversion of any other securities to be issued or delivered under such plan, does not exceed 20% of the following: the number of common shares of the surviving corporation outstanding immediately prior to the merger becoming effective plus the number of such common shares, if any, initially issuable upon conversion of any other securities then outstanding.

COMMISSIONERS' COMMENT—1972

The first paragraph of subsection 14A:10-3(1) has been modified for the purpose of clarification, no change of substance being intended. A similar change has been made in subsection 14A:10-11(1).

Paragraph 14A:10-3(1) (b) has been amended to require that shareholders be informed of the specific steps they must take to preserve their right to dissent and to be paid for their shares. The Commission considers that fairness to the dissenting shareholder requires that his corporation assume the burden of supplying this information.

Paragraph 14A:10-3(4) (a) has been amended to make it consistent with other sections of Chapter 10 and to simplify and clarify the wording. No change of substance is intended.

Paragraph 14A:10-3(4) (b) has been amended to provide greater flexibility by permitting a merger to be effected without approval of the shareholders of the surviving corporation where under the plan of merger either (a) no common shares or securities convertible into common shares are to be issued or (b) the common shares or securities convertible into common shares which are to be issued will not exceed 20 percent of (i) the common shares outstanding immediately prior to the merger plus (ii) any common shares issuable upon conversion of other securities then outstanding. Note that under new section 14A:10-12, shareholder approval of a corporate acquisition is required under certain circumstances where common stock or securities convertible into common stock are to be issued by the acquiring corporation.

54. N. J. S. 14A:10-4 is amended to read as follows:

14A:10-4 Certificate of merger or consolidation.

(1) After approval of the plan of merger or consolidation, a certificate of merger or a certificate of consolidation[, as the case may be,] shall be executed on behalf of each corporation. The certificate shall set forth

(a) the plan of merger or the plan of consolidation;

(b) as to each corporation whose shareholders are entitled to vote, the number of shares [outstanding] *entitled to vote thereon*, and, if the shares of any class *or series* are entitled to vote *thereon* as a class, the designation and number of [outstanding] shares *entitled to vote thereon* of each such class *or series*;

(c) as to each corporation whose shareholders are entitled to vote, the number of shares voted for and against such plan, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class *or series* voted for and against such plan, respectively; and

(d) in the case of a merger governed by subsection 14A:10-3(4), that the plan of merger was approved by the board of directors [without any vote of shareholders] of the surviving corporation *and that no vote of the shareholders of the surviving corporation was required because of the applicability of said subsection*; and

(e) if, pursuant to subsection 14A:10-4(2), the merger is to become effective at a time subsequent to the date of filing with the Secretary of State, the date when the merger is to become effective.

(2) The *executed original and a copy of the* certificate shall be filed in the office of the Secretary of State and the merger or consolidation shall become effective upon the date of such filing or at such later time, not to exceed 30 days after the date of filing, as may be set forth in the certificate. *The Secretary of State shall upon filing forward the copy of the certificate to the Director of the Division of Taxation.*

COMMISSIONERS' COMMENT—1972

Paragraph 14A:10-4(1) (b) has been modified to require that the certificate set forth the number of shares entitled to vote, rather than the number of outstanding shares. Additionally, the wording of paragraph (b) and paragraph (c) of subsection 14A:10-4(1) has been modified to include "series" as well as "classes" of shares.

Paragraph 14A:10-4(1) (d) has been amended to require that, in the case of a merger governed by subsection 14A:10-3(4), the certificate state that no shareholder vote of the surviving corporation was required because of the applicability of that subsection.

Subsection 14A:10-4(2) has been amended to require a copy of the certificate to be filed together with the executed original, the copy to be forwarded to the Director of the Division of Taxation. This change was made to enable the Division of Taxation to be aware promptly of all mergers or consolidations of corporations so as to enable it to keep its records current. An amendment to N.J.S.A. 54:10A-12 and N.J.S.A. 54:50-11, submitted contemporaneously with these proposed amendments, would eliminate the need to obtain tax clearances from the Division of Taxation in the case of all mergers except those in which the surviving corporation is a foreign corporation not qualified to transact business in New Jersey. This proposed change to subsection 14A:10-4(2) will insure that the Division of Taxation continues to receive the information it otherwise would have obtained at the time when tax clearances were requested in accordance with the present provisions of N.J.S.A. 54:10A-12.

55. N. J. S. 14A:10-5 is amended to read as follows:

14A:10-5 Merger of subsidiary corporation.

(1) Any domestic corporation owning at least 90% of the outstanding shares of each class and series of another domestic corporation or corporations, may merge such other corporation or corporations into itself, or may merge itself, or itself and any such subsidiary corporation or corporations, into any such subsidiary corporation, without approval of the shareholders of any of the corporations, except as provided in subsections 14A:10-5(5) and 14A:10-5(6). The board of the parent corporation shall approve a plan of merger setting forth those matters required to be set forth in plans of merger under section 14A:10-1. Approval by the board of any such subsidiary corporation shall not be required.

(2) If the parent corporation owns less than 100% of the outstanding shares of each subsidiary corporation, it shall mail to

each minority shareholder of record of each subsidiary corporation, unless waived in writing, a copy or a summary of the plan of merger. The parent corporation shall also mail to each shareholder who, under Chapter 11 of this act, is entitled to dissent, a statement informing such shareholder that he has the right to dissent and to be paid the fair value of his shares, [provided that he files with the corporation, within 20 days after the mailing of such copy or summary, a written demand for the fair value of his shares as required by subsection 14A:11-2(4), and that he otherwise complies with] *and outlining briefly, with particular reference to the time periods within which actions must be taken,* the procedures set forth in Chapter 11 of this act *with which he must comply in order to assert and enforce such right.*

(3) A certificate of merger shall be executed on behalf of the parent corporation. The certificate shall set forth

(a) the plan of merger;

(b) the number of outstanding shares of each class and series of each subsidiary corporation which is a party to the merger and the number of such shares of each class and series owned by the parent corporation;

(c) if the parent corporation owns less than 100% of the outstanding shares of each subsidiary corporation, the date of the mailing of a copy or a summary of the plan of merger to minority shareholders of each subsidiary corporation; or if all such shareholders have waived such mailing in writing, a statement that such waiver has been obtained; [and]

(d) if approval of the shareholders of the parent corporation is required by subsection 14A:10-5(6), the information as to such corporation required by paragraphs 14A:10-4(1) (b) and 14A:10-4(1) (c); and

[(d)] *(e)* if, pursuant to subsection 14A:10-5(4), the merger is to become effective at a time subsequent to the date of filing with the Secretary of State, the date when the merger is to become effective.

(4) The *executed original and a copy of the* certificate shall be filed in the office of the Secretary of State and the merger shall become effective upon the date of such filing or at such later time, not to exceed 30 days from the date of filing, as may be set forth in the certificate. *The Secretary of State shall upon filing forward the copy of the certificate to the Director of the Division of Taxation.*

(5) Approval of the shareholders of any such subsidiary corporation shall be obtained pursuant to its certificate of incorporation, if such certificate requires approval of a merger by the affirmative vote of the holders of more than the percentage of the shares of any class or series of such corporation then owned by the parent corporation.

(6) Approval of the shareholders of the parent corporation shall be obtained:

(a) whenever its certificate of incorporation requires shareholder approval of such a merger; or

(b) pursuant to section 14A:10-3 where

(i) the plan of merger contains a provision which would change any part of the certificate of incorporation of the parent corporation into which a subsidiary corporation is being merged, unless such change is one that can be made by the board without shareholder approval as referred to in subsection 14A:9-2(2); or

(ii) a subsidiary corporation is to be the surviving corporation.

(7) The grant of the power to merge under this section shall not preclude the effectuation of any merger as elsewhere provided in this Chapter.

COMMISSIONERS' COMMENT—1972

Subsection 14A:10-5(2) has been amended to require that shareholders be informed of the procedures with which they must comply to perfect their rights as dissenters. See Comment on amendments to Section 14A:10-3.

A new paragraph (d) has been added to subsection 14A:10-5 to require the certificate of merger to set forth the shareholder vote in cases where shareholder approval is required by subsection 14A:10-5(6).

Subsection 14A:10-5(4) has been amended to require that filing of an executed original and a copy of the certificate of merger. This change has been made for the same reasons as the proposed change to subsection 14A:10-4(2).

56. N. J. S. 14A:10–7 is amended to read as follows:

14A:10-7 Merger or consolidation of domestic and foreign corporations.

(1) One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner[, if such merger or consolidation is permitted by the laws of the jurisdiction under which each such foreign corporation is organized]:

(a) Each domestic corporation shall comply with the provisions of this act with respect to the merger or consolidation of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the jurisdiction under which it is organized.

(b) The certificate of merger or consolidation required by section 14A:10–4 shall be executed on behalf of each domestic corporation and each foreign corporation and, in addition to the information required by subsection 14A:10–4(1), shall set forth that the applicable provisions of the laws of the jurisdiction under which each foreign corporation was organized have been, or upon compliance with filing and recording requirements will have been, complied with.

[(b)] *(c)* If the surviving or new corporation is to be a foreign corporation and is to transact business in this State, it shall comply with the provisions of this act with respect to foreign corporations, and, whether or not it is to transact business in this State, the certificate of merger or consolidation required [to be filed on behalf of the domestic corporation or corporations pursuant to subsection 14A:10–4(2)] *by section 14A:10–4* shall, in addition to [the] *other required information* [required by subsection 14A:10–4 (1)], set forth

(i) an agreement by such foreign corporation that it may be served with process in this State in any proceeding for the enforcement of any obligation of any domestic corporation or any foreign corporation, previously amenable to suit in this State, which is a party to such merger or consolidation, and in any proceeding for the enforcement of the rights of a dissenting shareholder of any such domestic corporation against the surviving or new corporation; and

(ii) an irrevocable appointment by such foreign corporation of the Secretary of State of this State as its agent to accept service of process in any such proceeding, and the post office address, within or without this State, to which the Secretary of State shall mail a copy of the process in such proceeding;

(iii) an agreement by such foreign corporation that it will promptly pay to the dissenting shareholders of any such domestic corporation the amount, if any, to which they shall be entitled under the provisions of this act with respect to the rights of dissenting shareholders.

(2) The provisions of subsection 14A:10–3(4) shall apply to a merger in which the surviving corporation is a domestic corporation.

(3) If the surviving or new corporation is a domestic corporation, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations. If the surviving or new corporation is a foreign corporation, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of the jurisdiction of incorporation of such foreign corporation shall provide otherwise.

(4) One or more foreign corporations and one or more domestic corporations may be merged in the manner provided in section 14A:10–5 [if such merger is permitted by the laws of the jurisdiction of incorporation of such foreign corporation], provided that, if the parent corporation is a foreign corporation, it shall, notwithstanding the provisions of the laws of its jurisdicton of incorporation, comply with the provisions of subsection 14A:10–5(2) with respect to notice to shareholders of any domestic subsidiary corporation which is a party to the merger.

COMMISSIONERS' COMMENT—1972

The first sentence of subsection 14A:10–7(1) has been amended to eliminate language which the Commission considered to be surplusage. No change of substance is intended.

A new paragraph 14A:10–7(1) (b) has been added to make it clear that the certificate of merger or consolidation must be executed by all corporate parties, domestic and foreign, and to require that the certificate set forth that the applicable provisions of the laws of the jurisdiction of each foreign corporation have been or will be complied with.

Paragraph 14A:10-7(1) (b) has been redesignated as paragraph (c) and minor language changes, none substantive, have been made.

Subsection 14A:10-7(4) has been amended to eliminate any inference that the "short-form" merger procedure is unavailable in the case of a foreign subsidiary unless the laws of the subsidiary's jurisdiction expressly authorize such procedure.

57. N. J. S. 14A:10-9 is amended to read as follows:

14A:10-9 Acquisition of all the shares, or a class or series of shares, of a corporation.

(1) Subject to the limitations imposed by any other statute of this State, any domestic corporation may, in the manner provided by this section, acquire, in exchange for its shares, all the shares, or all the shares of any class or series, of any other corporation organized under any statute of this State.

(2) Such acquiring corporation shall submit by first-class mail to all holders of the shares to be acquired a written offer which shall

(a) specify the shares to which such offer relates;

(b) prescribe the terms and conditions of such offer, including the method of acceptance thereof and the manner of exchanging such shares;

(c) contain a statement summarizing the rights of such shareholders as provided in paragraph 14A:10-9(3) (b).

Any such offer may provide for the payment of cash in lieu of the issuance of fractional shares of the acquiring corporation.

(3) If, within 120 days after the date of such mailing, the offer is accepted by the holders of not less than 90% of the shares of each class and series to which the offer relates, other than shares already held at the date of mailing by, or by a nominee for, the acquiring corporation or any subsidiary thereof, the acquiring corporation shall, within 60 days after such acceptance:

(a) execute and file a certificate in the office of the Secretary of State setting forth such acceptance; and

(b) give written notice of such acceptance, by registered or certified mail, return receipt requested, to each holder of such shares to which the offer relates, who has not accepted the offer.

Such notice shall include, or be accompanied by, a statement [that]

(i) *that* such shareholders may elect either to accept the offer or to dissent therefrom and be paid the fair value of their shares provided that they file with the acquiring corporation, not later than [30] *20* days after the mailing of such written notice, a written demand for the fair value of their shares as required by subsection 14A:11-2(5), and otherwise comply with the procedures set forth in Chapter 11 of this act; [and]

(ii) outlining briefly, with particular reference to the time periods within which actions must be taken, the procedures set forth in Chapter 11 of this act with which they must comply; and

[(ii)] *(iii) that* if such shareholders do not make written demand for the payment of the fair value of their shares [to which the offer relates] within [the] *said 20-day* [30-day] period [specified in subsection 14A:11-2(5)], they shall be deemed to have accepted the offer.

(4) Upon the filing of such certificate in the office of the Secretary of State as required by paragraph 14A:10-9(3) (a)

(a) the acquiring corporation shall cause to be issued to the holders of shares who have accepted or who are deemed to have accepted such offer pursuant to the provisions of paragraph 14A:10-9(3) (b) certificates for shares of the acquiring corporation to which they respectively are entitled;

(b) all shares in exchange for which shares of the acquiring corporation are so issued shall become the property of the acquiring corporation, irrespective of whether the certificates for such shares have been surrendered for exchange, and the acquiring corporation shall be entitled to have new certificates registered in its name as the holder thereof; and

(c) the acquiring corporation, or a corporate fiduciary designated by it, shall hold in trust, for delivery to the persons entitled thereto, certificates for its shares registered in the names of any holders, other than shares of dissenting shareholders, who have not surrendered their shares for exchange in accordance with the offer, and shall hold in trust, for payment to the persons entitled thereto, any cash payable in lieu of fractional shares.

(5) This section shall not be construed to prevent a corporation from making an offer to purchase the shares of another corporation conditioned upon the acceptance of holders of less than 90% of the shares to which such offer relates. Such an offer may be joined as an alternate offer with an offer made pursuant to this section; but in no case shall the acquiring corporation have the right to avail itself of the provisions of this section unless the holders of the percentage of shares to which the offer relates required by subsection 14A:10–9(3) shall accept the offer within the time period required by subsection 14A:10–9(3).

(6) Whenever a corporation whose capital stock is acquired pursuant to this section is a stock insurance company organized under any law of this State (hereinafter called the insurance subsidiary),

(a) the acquiring corporation shall furnish to the Commissioner of Banking and Insurance such information as he may, from time to time, reasonably request in respect to the honesty and trustworthiness of its directors and officers, and

(b) upon a finding by the Commissioner of Banking and Insurance that the acquiring corporation has failed or refused to take such steps as may be necessary to remove from office any of the directors or officers referred to in paragraph 14A:10–9(6)(a) hereof whom the commissioner, after hearing upon notice to such acquiring corporation and such officer or director, has found to be a dishonest or untrustworthy person, the commissioner may forthwith take possession of the property and business of the insurance subsidiary as provided in chapter 30 of Title 17 of the Revised Statutes, and

(c) upon a finding by the Commissioner of Banking and Insurance that access to specified books and records of the acquiring corporation which relate to the condition and affairs of the insurance subsidiary is necessary to the discharge of his regulatory duties with respect to such subsidiary under Title 17 of the Revised Statutes, the commissioner may have access to the books and records which he has so specified and the acquiring corporation shall answer any inquiry by him which is pertinent thereto.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:10–9(3) (b) has been amended to add the requirement that shareholders be informed of the

procedures with which they must comply to perfect their rights as dissenters. See Comment on amendments to section 14A:10–3. The period within which dissenters must demand payment for their shares has been reduced from 30 to 20 days to conform with subsections 14A:11–2(3), (4) and (5). No other changes of substance are intended.

58. N. J. S. 14A:10–11 is amended to read as follows:

14A:10-11 Sale or other disposition of assets other than in regular course of business.

(1) A sale, lease, exchange, or other disposition of all, or substantially all, the assets of a corporation, if not in the usual and regular course of its business as conducted by such corporation, may be made upon such terms and conditions and for such consideration, which may consist in whole or in part of money or property, real or personal, including shares, bonds or other securities of any other corporation, domestic or foreign, as may be authorized in the following manner:

(a) The board shall recommend such sale, lease, exchange, or other disposition and direct that it be submitted to a vote at a meeting of shareholders.

(b) Written notice shall be given *not less than 20 nor more than 60 days before such meeting* to each shareholder of record, whether or not entitled to vote at such meeting[, not less than 20 nor more than 60 days before such meeting], in the manner provided in this act for the giving of notice of meetings of shareholders. Such notice shall include, or shall be accompanied by

(i) a statement summarizing the principal terms of the proposed transaction; and

(ii) a statement informing shareholders who, under Chapter 11 of this act, are entitled to dissent, that they have the right to dissent and to be paid the fair value of their shares[, provided that they file with the corporation before the taking of the vote of the shareholders on such sale, lease, exchange or other disposition, a written notice of dissent as required by subsection 14A:11–2(1) and otherwise comply with] *and outlining briefly, with particular reference to the time periods within which actions must be taken,* the procedures set forth in Chapter 11 of this act *with which they must comply in order to assert and enforce such right.*

(c) At such meeting the shareholders may approve such sale, lease, exchange, or other disposition and may fix, or may authorize the board to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such sale, lease, exchange or other disposition shall be approved upon receiving the affirmative vote of a majority of the votes cast by the holders of shares entitled to vote thereon, and, in addition, if any class or series of shares is entitled to vote thereon as a class, the affirmative vote of a majority of the votes cast in each class vote; except that, in the case of a corporation organized prior to the effective date of this act, the sale, lease, exchange, or other disposition shall be approved upon receiving the affirmative vote of two-thirds of the votes so cast.

(d) Subject to the provisions of section 14A:5–12, a corporation organized prior to the effective date of this act may adopt the majority voting requirements prescribed in paragraph 14A:10–11(1) (c) by an amendment of its certificate of incorporation adopted by the affirmative vote of two-thirds of the votes cast by the holders of shares entitled to vote thereon.

(2) Notwithstanding such approval or authorization by the shareholders, the board may abandon such sale, lease, exchange, or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action by the shareholders.

(3) The sale, lease, exchange, or other disposition of all, or substantially all, the assets of one or more subsidiaries of a corporation, if not in the usual and regular course of business as conducted by such subsidiary or subsidiaries, shall be treated as a disposition within the meaning of subsection 14A:10–11(1) if the subsidiary or subsidiaries constitute all, or substantially all, the assets of the corporation.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:10–11(1) (b) has been modified to simplify and clarify the wording. No change of substance is intended.

Subparagraph 14A:10–11(1) (b) (ii) has been amended to add the requirement that shareholders be informed of the procedures with which they must comply

to perfect their rights as dissenters. See Comment on amendments to section 14A:10–3.

A new subsection 14A:10–11(3) has been added to clarify the original intent of the words "all, or substantially all, the assets" in subsection 14A:10–11(1) in cases where assets are disposed of by subsidiaries.

Correction to 1968 Comment. The third paragraph of the Commissioners' Comment –1968 should be disregarded. It is not an accurate reflection of prior law. See R. S. 14:3–5.

59. N. J. S. 14A:10–12 is added as follows:

14A:10-12 Shareholders' rights on other corporate acquisitions.

Shareholders of a corporation which proposes to acquire, directly or through a subsidiary, in exchange for its shares, obligations or other securities, some or all of the outstanding shares of another corporation, or some or all of the assets of a corporation, a business trust, a business proprietorship or a business partnership, shall have the same rights, if any, as they would if they were shareholders of a surviving corporation in a merger

(a) to notice of the proposed acquisition;

(b) to vote on the proposed acquisition; and

(c) to dissent from the proposed acquisition and be paid the fair value of their shares

if (i) the securities to be issued or delivered pursuant to such acquisition are, or may be converted into, shares of the acquiring corporation's common stock and (ii) the number of the acquiring corporation's common shares to be issued or delivered, plus those initially issuable upon conversion or exchange of any other securities to be issued or delivered, will exceed 40 percent of the following: the number of its common shares outstanding immediately prior to the acquisition becoming effective plus the number of its common shares, if any, initially issuable upon conversion or exchange of any other securities then outstanding.

COMMISSIONERS' COMMENT—1972

This section is new. It codifies the de facto merger doctrine articulated in *Applestein v. United Board & Carton Corp.*, 60 N.J. Super. 333 (Ch. Div.), affirmed per curiam, 33 N.J. 72 (1960), by granting to shareholders the same rights they would have in a merger in the event

of any acquisition where the corporation will issue common stock exceeding 40 percent of the number of shares of its common stock previously outstanding. The Commission is of the opinion that shareholders should be granted the right to vote and to dissent to the same extent as in a merger in any corporate acquisition, however structured, involving the issuance of such a substantial number of shares. At the same time, the Commission believes that this codification will minimize the substantial uncertainties which *Applestein* created.

The Rhode Island and Ohio acts have similar provisions. R.I. B.C.A. § 7–7.1–70.1; Ohio G.C.L. § 1701–83. Note also the similar requirement for a shareholder vote imposed by the New York Stock Exchange and the American Stock Exchange. New York Stock Exchange, Company Manual, p. A-283; American Stock Exchange, Company Guide, § 713.

Compare subsection N.J.S. 14A:10–3(4), which eliminates the requirement for a vote of the shareholders of a surviving corporation on a merger if its certificate of incorporation is not amended and the merger involves the issuance of 20 percent or less of the number of shares of its common stock previously outstanding.

60. N. J. S. 14A:11–1 is amended to read as follows:

14A:11-1 Right of shareholders to dissent.

(1) Any shareholder of a domestic corporation shall have the right to dissent from any of the following corporate actions

(a) any plan of merger or consolidation to which the corporation is a party, provided that, *unless the certificate of incorporation otherwise provides*

(i) a shareholder shall not have *the* right to dissent from any plan of merger or consolidation with respect to shares

(A) *of a class or series* which [are] *is* listed on a national securities exchange or [are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association] *is held of record by not less than 1,000 holders* on the record date fixed to determine the shareholders entitled to [receive notice of and to] vote [at the meeting of shareholders at which] *upon* the plan of merger or consolidation [is to be acted on]; [and] *or*

(B) for which, pursuant to the plan of merger or consolidation, [such shareholders are required to accept only shares or shares and cash in lieu of fractional shares of the corporation surviving or resulting from such merger or consolidation] *he will receive (x) cash, (y) shares, obligations or other securities which, upon consummation of the merger or consolidation, will either be listed on a national securities exchange or held of record by not less than 1,000 holders, or (z) cash and such securities;*

(ii) a shareholder of a surviving corporation shall not have the right to dissent from a plan of merger, if the merger did not require for its approval the vote of such shareholders as provided *in section 14A:10–5 or* in subsections 14A:10–3(4) [and], 14A:10–7(2) *or 14A:10–7(4)*; *or*

(b) any sale, lease, exchange or other disposition of all or substantially all of the assets of a corporation not in the usual or regular course of business as conducted by such corporation, [other than] *provided that, unless the certificate of incorporation otherwise provides, the shareholder shall not have the right to dissent*

(i) with respect to shares [where] *of a class or series which*, at the record date fixed to determine the shareholders entitled to [receive notice of and to] vote [at the meeting of shareholders at which] *upon* such transaction [is to be voted on], [such shares are] *is* listed on a national securities exchange or [are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association] *is held of record by not less than 1,000 holders*; or

(ii) *from* a transaction pursuant to a plan of dissolution of the corporation which provides for distribution of substantially all of its net assets to shareholders in accordance with their respective interests within 1 year after the date of such transaction, where such transaction is wholly for

(A) cash; or

(B) shares, [bonds] *obligations* [and] *or* other securities which [are], *upon consummation or the plan of dissolution will either be* listed on a national securities exchange or [are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association] *held of record by not less than 1,000 holders*; or

(C) cash and such securities; or

(iii) *from* a sale pursuant to an order of a court having jurisdiction.

(2) Any shareholder of a domestic corporation shall have the right to dissent with respect to any shares owned by him which are to be acquired pursuant to section 14A:10–9.

(3) A shareholder may not dissent as to less than all of the shares owned beneficially by him and with respect to which a right of dissent exists. A nominee or fiduciary may not dissent on behalf of any beneficial owner as to less than all of the shares of such owner with respect to which the right of dissent exists.

(4) *A corporation may provide in its certificate of incorporation that holders of all its shares, or of a particular class or series thereof, shall have the right to dissent from specified corporate actions in addition to those enumerated in subsection 14A:11–1(1), in which case the exercise of such right of dissent shall be governed by the provisions of this Chapter.*

COMMISSIONERS' COMMENT—1972

The amendment of subsection 14A:11–1(1) modifies the previous statute by withholding the right of appraisal (unless the certificate of incorporation otherwise provides) on a merger, consolidation, or sale of all or substantially all the assets of a corporation if a shareholder holds prior to the transaction, or will acquire as a result of the transaction, readily marketable securities. Under subsection 14A:11–1(1), as amended, there is no appraisal right with respect to shares held prior to a merger, consolidation, or sale of assets which are of a class or series listed on a national securities exchange or held of record by not less than 1,000 holders. Similarly, there is no appraisal right for a shareholder who will receive upon consummation of any such transaction cash, securities which are either listed on a national securities exchange or held of record by not less than 1,000 holders, or a combination of cash and securities.

The Commission concluded that the standard of record ownership by not less than 1,000 holders was preferable to the standard of regular quotation in an over-the-counter market. Although the Delaware Act uses a 2,000 holder test, the commission felt that a 1,000 holder

requirement would adequately assure the marketability of securities so held.

Subparagraph 14A:11–1(1) (ii) (a) has been amended to make it clear that there is no right of appraisal for shareholders of a parent corporation which is to survive a "short-form" merger pursuant to section 14A:10–5 or subsection 14A:10–7(4).

A new subsection 14A:11–1(4) has been added to permit a corporation to provide in its Certificate of Incorporation that shareholders are entitled to the right of dissent from specified corporate actions in addition to those corporate actions as to which the right to dissent is required by this Act. This, in effect, enables a corporation to "volunteer" an appraisal right in particular situations where the right is not required by the statute.

61. N. J. S. 14A:11–2 is amended to read as follows:

14A:11-2 Notice of dissent; demand for payment; endorsement of certificates.

(1) Whenever a [meeting of shareholders is called to] vote *is to be taken, either at a meeting of shareholders or upon written consents in lieu of a meeting pursuant to section 14A:5–6,* upon a proposed corporate action from which a shareholder may dissent under section 14A:11–1, any shareholder electing to dissent from such action shall file with the corporation before the taking of the vote of the shareholders on such corporate action, *or within the time specified in paragraphs 14A:5–6(2)(b) or 14A:5–6(2)(c), as the case may be, if no meeting of shareholders is to be held,* a written notice of such dissent stating that he intends to demand payment for his shares if the action is taken.

(2) Within 10 days after the date on which such corporate action takes effect, the corporation, or, in the case of a merger or consolidation, the surviving or new corporation, shall give written notice of the effective date of such corporate action, by certified mail to each shareholder who filed written notice of dissent pursuant to subsection 14A:11–2(1), except any who voted for or consented in writing to the proposed action.

(3) Within 20 days after the mailing of such notice, any shareholder to whom the corporation was required to give such notice and who has filed a written notice of dissent pursuant to this section may make written demand on the corporation, or, in the case of a merger or consolidation, on the surviving or new corporation, for the payment of the fair value of his shares.

(4) Whenever a corporation is to be merged pursuant to section 14A:10–5 or subsection 14A:10–7(4)[,] and[, where] shareholder approval is not required under subsections 14A:10–5(5) and 14A:10–5(6), a shareholder who has the right to dissent pursuant to section 14A:11–1 may, not later than 20 days after a copy or summary of the plan of such merger and the statement required by subsection 14A:10–5(2) is mailed to such shareholder, make written demand on the corporation or on the surviving corporation, for the payment of the fair value of his shares.

(5) Whenever all the shares, or all the shares of a class or series, are to be acquired by another corporation pursuant to section 14A:10–9, a shareholder of the corporation whose shares are to be acquired may, not later than [30] *20* days after the mailing of notice by the acquiring corporation pursuant to paragraph 14A:10–9(3)(b), make written demand on the acquiring corporation for the payment of the fair value of his shares.

(6) Not later than 20 days after demanding payment for his shares pursuant to this section, the shareholder shall submit the certificate or certificates representing his shares to the corporation upon which such demand has been made for notation thereon that such demand has been made, whereupon such certificate or certificates shall be returned to him. If shares represented by a certificate on which notation has been made shall be transferred, each new certificate issued therefor shall bear similar notation, together with the name of the original dissenting holder of such shares, and a transferee of such shares shall acquire by such transfer no rights in the corporation other than those which the original dissenting shareholder had after making a demand for payment of the fair value thereof.

(7) Every notice or other communication required to be given or made by a corporation to any shareholder pursuant to this Chapter shall inform such shareholder of all dates prior to which action must be taken by such shareholder in order to perfect his rights as a dissenting shareholder under this Chapter.

COMMISSIONERS' COMMENT—1972

The change in subsection 14A:11–2(1) is to accord with the change made in section 14A:5–6 permitting a shareholder vote on a merger, consolidation or sale of assets to be effected by written consent in lieu of a meeting.

The change in subsection 14A:11–2(4) is made for purposes of clarification.

The change in subsection 14A:11–2(5) from 30 days to 20 days in the period within which a shareholder may demand payment of the fair value of his shares is made to bring this subsection into conformity with subsections 14A:11–2(3) and (4). A comparable change has been made in subsection 14A:10–9(3).

The addition of subsection 14A:11–2(7) is to assure that dissenting shareholders are informed of all relevant time periods within which action must be taken under this chapter in order to perfect their rights.

62. N. J. S. 14A:11–3 is amended to read as follows:

14A:11-3 "Dissenting shareholder" defined; date for determination of fair value.

(1) A shareholder who has made demand for the payment of his shares in the manner prescribed by subsections 14A:11–2(3), 14A:11–2(4) or 14A:11–2(5) is hereafter in this Chapter referred to as a "dissenting shareholder".

(2) Upon making such demand, the dissenting shareholder shall cease to have any of the rights of a shareholder except the right to be paid the fair value of his shares and any other rights of a dissenting shareholder under this Chapter.

(3) "Fair value" as used in this Chapter shall be determined

(a) as of the day prior to the day [on which] *of* the [vote] *meeting* of shareholders [was taken approving the proposed action] *at which the proposed action was approved or as of the day prior to the day specified by the corporation for the tabulation of consents to such action if no meeting of shareholders was held*; or

(b) in the case of a merger pursuant to section 14A:10–5 or subsection 14A:10–7(4) in which shareholder approval is not required, as of the day prior to the day on which the board of directors [approves] *approved* the plan of merger; or

(c) in the case of an acquisition of all the shares or all the shares of a class or series by another corporation pursuant to section 14A:10–9, as of the day prior to the day on which the board of directors of the acquiring corporation [authorizes] *authorized* the acquisition, *or, if a shareholder vote was taken pursuant to section 14A:10–12, as of the day provided in paragraph 14A:11–3(3)(a).*

In all cases, "fair value" shall exclude any appreciation or depreciation resulting from the proposed action.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:11–3(3) (a) has been modified to indicate the date as of which fair value is to be determined where the action of the shareholders was taken by consent in lieu of a meeting.

Paragraph 14A:11–3(3)(c) has been amended to reflect the addition of section 14A:10–12.

63. N. J. S. 14A:11–6 is amended to read as follows:

14A:11-6 Determination of fair value by agreement.

(1) Not later than 10 days after the expiration of the period within which shareholders may make written demand to be paid the fair value of their shares, the corporation upon which such demand has been made pursuant to subsections 14A:11–2(3), 14A:11–2(4) or 14A:11–2(5) shall mail to each dissenting shareholder the balance sheet and the surplus statement of the corporation whose shares he holds, as of the latest available date which shall not be earlier than 12 months prior to the making of such offer and a profit and loss statement or statements for not less than a 12-month period ended on the date of such balance sheet or, if the corporation was not in existence for such 12-month period, for the portion thereof during which it was in existence. The corporation may accompany such mailing with a written offer to pay each dissenting shareholder for his shares at a specified price deemed by such corporation to be the vair value thereof. Such offer shall be made at the same price per share to all dissenting shareholders of the same class, or, if divided into series, of the same series.

(2) If, not later than 30 days after the expiration of the 10-day period limited by subsection 14A:11–6(1), the fair value of the shares is agreed upon between any dissenting shareholder and the corporation, payment therefor shall be made [within 20 days after] *upon* surrender of the certificate or certificates representing such shares.

COMMISSIONERS' COMMENT—1972

The 20-day interval between surrender of certificates and payment therefor has been eliminated. The Commission felt that a waiting period is not necessary.

64. N. J. S. 14A:12–1 is amended to read as follows:

14A:12-1 Methods of dissolution.

(1) A corporation may be dissolved in any one of the following ways

(a) [automatically] by *the filing of a certificate of dissolution pursuant to section 14A:12–5.1 upon* expiration of any period of duration stated in the corporation's certificate of incorporation;

(b) by action of the incorporators or directors pursuant to section 14A:12–2;

(c) by action of the shareholders pursuant to section 14A:12–3;

(d) by action of the board and the shareholders pursuant to section 14A:12–4;

(e) by action of a shareholder or shareholders pursuant to section 14A:12–5;

(f) by a judgment of the Superior Court in an action brought pursuant to sections 14A:12–6 or 14A:12–7, or otherwise;

(g) automatically by a proclamation of the [Governor] *Secretary of State* repealing or revoking a certificate of incorporation for nonpayment of taxes.

(2) A corporation which has been dissolved in a proceeding pursuant to section 14A:12–6 or 14A:12–7, or which has been dissolved, or whose charter has been forfeited or revoked, for a cause or by a method not mentioned in this section, shall be subject to all the provisions of this chapter and of Chapter 14, to the extent that such provisions are compatible with a court directed dissolution, or with the statute or common law proceeding pursuant to which such dissolution, forfeiture or revocation is effected.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:12–1(1) (a) has been amended to reflect the change effected by new section 14A:12–5.1.

65. N. J. S. 14A:12–2 is amended to read as follows:

14A:12-2 Dissolution before commencing business.

(1) A corporation may be dissolved by action of its incorporators when there has been no organization meeting of the board, or by the board if there has been an organization meeting, provided that the corporation

(a) has not commenced business;

(b) has not issued any shares;

(c) has no debts or other liabilities; and

(d) has received no payments on subscriptions for its shares, or, if it has received such payments, has returned them to those entitled thereto, less any part thereof disbursed for expenses.

(2) The dissolution of such a corporation shall be effected in the following manner: the sole incorporator or director, if there is only one, or both incorporators or directors, if there are only two, or a majority of the incorporators or directors, if there are more than two, shall execute and file in the office of the Secretary of State a certificate of dissolution stating

(a) the name of the corporation;

(b) the name of the registered agent of the corporation;

(c) the location of the registered office of the corporation;

(d) the names of the incorporators and directors constituting the first board;

(e) that the corporation has not commenced business and has issued no shares, and has no debts or other liabilities;

(f) that the corporation has received no payments or subscriptions to its shares, or, if it has received such payments, that it has returned them to those entitled thereto, less any part thereof disbursed for expenses; and

(g) that the sole incorporator or director, if there is only one, or both incorporators or directors, if there are only two, or a majority of the incorporators or directors, if there are more than two, has or have elected that the corporation be dissolved.

(3) Notwithstanding the provisions of sections 14A:2-2 and 14A:15-2, and section 12 of the "Corporation Business Tax Act (1945)" (P. L. 1945, c. 162), as amended and supplemented, and Chapter 50 of Title 54 of the Revised Statutes, as amended and supplemented,

(a) the Secretary of State shall accept for filing a certificate of dissolution pursuant to the provisions of this section

(i) without payment of any filing fee; and

(ii) without the filing with him of the certificate of the Director of the Division of Taxation evidencing the payment, or provision for the payment, by the corporation of taxes, fees, penalties, and interest; and

(b) the name of the corporation shall be available immediately for corporate use upon the filing of a certificate of dissolution pursuant to the provisions of this section.

COMMISSIONERS' COMMENT—1972

This section has been amended by adding a new subsection 14A:12-2(3), permitting a certificate of dissolution to be filed for a corporation which has not commenced business without the payment of any fees and the production of a tax clearance certificate. See N.J.S.A. 54:10A-12. The Commission was of the view that corporations which are formed and then not "used" should be subject to dissolution with minimum effort and expense; the alternative to dissolution is merely to permit the corporation to lapse and its certificate of incorporation to be revoked for non-payment of taxes. That alternative imposes an administrative burden on the offices of the Secretary of State and the Corporation Tax Bureau. See 1972 Comment to section 14A:12-19.

66. N. J. S. 14A:12-5.1 is added as follows:

14A:12-5.1 Dissolution upon expiration of period of duration.

(1) A corporation shall not be dissolved when the period of duration stated in its certificate of incorporation expires until a certificate of dissolution executed on its behalf has been filed in the office of the Secretary of State. Upon written demand to the corporation by any shareholder, a corporation whose duration has expired shall, within 60 days of such demand, file a certificate of dissolution in the office of the Secretary of State unless within such time it amends its certificate of incorporation to extend its duration, as provided in section 14A:9-1(2) (c).

(2) A certificate of dissolution filed pursuant to this section shall set forth

(a) the name of the corporation;

(b) the name of the registered agent of the corporation;

(c) the location of the registered office of the corporation;

(d) the names of the corporation's directors and officers; and

(e) the fact that the corporation is dissolved because of expiration of the period of duration stated in its certificate of incorporation.

COMMISSIONERS' COMMENT—1972

This section is new. Under prior law, a corporation was automatically dissolved upon the expiration of the period of duration set forth in its charter. Under this section, such a corporation's existence is continued until a certificate of dissolution is filed.

Title 14 had permitted reinstatement of the existence of a corporation, the duration of which had expired, and this concept was carried forward into the B.C.A. R. S. 14:11–8 through R. S. 14:11–12, as amended, L. 1958, c. 60; N.J.S. 14A:9–1(2) (c).

The amendments to sections 14A:12–8 and 14A:12–1 which also implement this concept should be referred to.

67. N. J. S. 14A:12–7 is amended to read as follows:

14A:12-7 [Dissolution of deadlocked corporation.] *Involuntary dissolution; other remedies.*

[A corporation may be dissolved by a judgment entered in an action brought in the Superior Court by one or more directors or by one or more shareholders entitled to vote at an election of directors of the corporation, upon proof that

(a) the directors of the corporation, or its shareholders if a provision in the corporation's certificate of incorporation contemplated by subsection 14A:5–21(2) is in effect, are unable to agree on matters respecting the management of the corporation's affairs; or

(b) the shareholders of the corporation are so divided in voting power that, for a period which includes at least two consecutive annual meeting dates, they have failed to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors; and

(c) as a result of the facts contemplated by either or both paragraphs 14A:12–7(a) and 14A:12–7(b), the corporation is unable to function normally in the best interests of its creditors and shareholders.]

(1) The Superior Court, in an action brought under this section, may appoint a custodian, appoint a provisional director, order a

sale of the corporation's stock as provided below, or enter a judgment dissolving the corporation, upon proof that

(a) the shareholders of the corporation are so divided in voting power that, for a period which includes the time when two consecutive annual meetings were or should have been held, they have failed to elect successors to directors whose terms have expired or would have expired upon the election and qualification of their successors; or

(b) the directors of the corporation, or the person or persons having the management authority otherwise in the board, if a provision in the corporation's certificate of incorporation contemplated by subsection 14A:5–21(2) is in effect, are unable to effect action on one or more substantial matters respecting the management of the corporation's affairs; or

(c) in the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.

(2) An action may be brought under this section by one or more directors or by one or more shareholders. In such action, in the case of appointment of a custodian or a provisional director, the court may proceed in a summary manner or otherwise.

(3) One or more provisional directors may be appointed if it appears to the court that such an appointment may be in the best interests of the corporation and its shareholders, notwithstanding any provisions in the corporation's by-laws, certificate of incorporation, or any resolutions adopted by the board or shareholders. A provisional director shall have all the rights and powers of a duly elected director of the corporation, including the right to notice of and to vote at meetings of directors, until such time as he shall be removed by order of the court or, unless otherwise ordered by the court, by a vote or written consent of a majority of the votes entitled to be cast by the holders of shares entitled to vote to elect directors.

(4) A custodian may be appointed if it appears to the court that such an appointment may be in the best interests of the corporation and its shareholders, notwithstanding any provisions in the corporation's by-laws, certificate of incorporation, or any resolutions

adopted by the shareholders or the board. Subject to any limitations which the court imposes, a custodian shall be entitled to exercise all of the powers of the corporation's board and officers to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors, until such time as he shall be removed by order of the court or, unless otherwise ordered by the court, by the vote or written consent of a majority of the votes entitled to be cast by the holders of shares entitled to vote to elect directors. Such powers may be exercised directly or through, or in conjunction with, the corporation's board or officers, in the discretion of the custodian or as the court may order. If so provided in the order appointing him, a custodian shall have the fact-determining powers of a receiver as provided in subsections 14A:14–5(e) and (f).

(5) Any custodian or provisional director shall be an impartial person who is neither a shareholder nor a creditor of the corporation or of any subsidiary or affiliate of the corporation.

(6) Any custodian or provisional director shall report from time to time to the court concerning the matter complained of, or the status of the deadlock, if any, and of the status of the corporation's business, as the court shall direct. In addition, he shall submit to the court, if so directed, his recommendations as to the appropriate disposition of the action. If, after the appointment of a custodian or provisional director, the court determines that a judgment of dissolution is in the best interests of the shareholders of the corporation, such a judgment shall be entered. The court may continue any custodian or provisional director in such office subsequent to the entry of a judgment of dissolution and until such time as the affairs of the corporation are wound up, or it may appoint such person or another as receiver, as provided in section 14A:12–15.

(7) In any proceeding under this section, the court shall allow reasonable compensation to the custodian or provisional director for his services and reimbursement or direct payment of his reasonable costs and expenses which amounts shall be paid by the corporation.

(8) Upon motion of the corporation or a holder or holders of 50 percent or more of the outstanding voting shares of the corporation, before or after the appointment of a custodian or provisional director, the court may order the sale by the plaintiff or plaintiffs of all shares of the corporation's stock held by them to either the corporation or the moving shareholders, whichever is specified in

the motion, if the court determines in its discretion that such an order would be fair and equitable to all parties under all of the circumstances of the case.

(a) The purchase price of any shares so sold shall be their fair value as of the date of the commencement of the action or such earlier or later date deemed equitable by the court, plus or minus any adjustments deemed equitable by the court if the action was brought in whole or in part under paragraph 14A:12–7(1)(c).

(b) Within five days after the entry of any such order, the corporation shall provide each selling shareholder with the information it is required to provide a dissenting shareholder under section 14A:11–6, and within 10 days after entry of the order the purchasing party shall make a written offer to purchase at a price deemed by the purchasing party to be the fair value of the shares.

(c) If the parties are unable to agree on fair value within 40 days of entry of the order, the court shall make the determination of the fair value, and the provisions of sections 14A:11–8 through 14A:11–11 shall be followed insofar as they are applicable.

(d) Interest may be allowed at the rate and from the date determined by the court to be equitable, and if the court finds that the refusal of the shareholder to accept any offer of payment was arbitrary, vexatious, or otherwise not in good faith, no interest shall be allowed. If the court finds that the action was maintainable under paragraph 14A:12–7(1)(c), the court in its discretion may award to the selling shareholder or shareholders reasonable fees and expenses of counsel and of any experts, including accountants, employed by them.

(e) The purchase price shall be paid in cash within 30 days after the court has determined the fair value of the shares.

(f) Upon entry of an order for the sale of shares under this subsection, and provided the corporation or the moving shareholders post a bond in adequate amount with sufficient sureties or otherwise satisfy the court that the full purchase price of the shares, plus such additional costs, expenses, and fees as may be awarded, will be paid when due and payable, the selling shareholders shall no longer have any rights or status as shareholders, officers, or directors, except the right to receive the fair value of their shares plus such other amounts as might be awarded.

In such event, the court may remove any custodian or provisional director who may have been appointed.

(9) In determining whether to enter a judgment of dissolution in an action brought under this section, the court shall take into consideration whether the corporation is operating profitably and in the best interests of its shareholders, but shall not deny entry of such a judgment solely on that ground.

(10) If the court determines that any party to an action brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith, it may in its discretion award reasonable expenses, including counsel fees incurred in connection with the action, to the injured party or parties.

COMMISSIONERS' COMMENT—1972

This section has been substantially revised to enlarge the grounds on which an action may be brought and to provide additional remedies. The remedies available in an action under this section, as amended, should be compared to those available in a shareholder derivative action and in an action to compel a receivership. N.J.S. 14A:3–6; N.J.S. 14A:14–2.

This section has been amended (1) by deleting as a condition precedent to any action under this section a showing that "the corporation is unable to function normally in the best interests of its creditors and shareholders"; (2) by adding as a ground for action under this section, in the case of a closely-held corporation, a showing of misconduct or oppressive behavior by those in control; and (3) by adding three alternative remedies to dissolution—appointment of a provisional director, appointment of a custodian, and a judicially ordered sale of stock, at a price to be agreed upon or to be determined as in the case of dissenter's rights.

The Commission was mindful on the one hand that the principals of a business enterprise, even if profitable, should not be joined irrevocably together if there is substantial dissension among them and, on the other, that dissolution of a business is a drastic remedy to be applied with caution. In addition, the Commission recognized that there is often a public interest involved in avoiding dissolution as a remedy in the event of deadlock or internal dissension.

The deletion of the requirement of old paragraph 14A:12–7(c) that the corporate deadlock must cause the corporation to be "unable to function normally in the best interests of its creditors and shareholders" is consistent with most modern commentary. See Israels, The Sacred Cow of Corporate Existence—Problems of Deadlock and Dissolution, 19 U. Chi. L. Rev. 778 (1952); Chayes, Madam Wagner and the Close Corporation, 73 Harv. L. Rev. 1532, 1545–47 (1960); Howe, Corporate Divorce: Deadlocks in the Close Corporation, 22 The Business Lawyer 469 (1967). New subsection 14A:12–7(9) provides that the court shall take such factors into consideration but shall not deny dissolution solely on the ground that the corporation is operating profitably.

New paragraph 14A:12–7(1) (c) permits an action under this section in the case of a corporation having 25 or fewer shareholders if those in control have acted fraudulently or illegally, been guilty of mismanagement or abuse of authority, or acted oppressively or unfairly toward minority shareholders. This new ground for action is limited to closely-held corporations because of the greater danger of "strike suits" in the case of larger, publicly-held corporations. Other remedies, of course, will continue to be available to shareholders of such larger corporations. A derivative suit may be maintained (section 14A:3–6), and in an appropriate case, a receivership action may be brought (section 14A:14–2). Moreover, under some of the circumstances enumerated in paragraph 14A:12–7(1) (c), our courts of equity, independent of statutory authority, may appoint a receiver and cause the dissolution of a corporation. See *In re Collins-Doan Co.*, 3 N. J. 382, 393 (1949); *Roach* v. *Margulies*, 42 N. J. Super 243, 245 (App. Div. 1956); *Freidus* v. *Kaufman*, 35 N. J. Super 601, 612 (Ch. Div.) affirmed o.b., 36 N. J. Super 321 (App. Div. 1955).

Paragraph 14A:12–7(1) (c) borrows from the Model Act and the California, Minnesota, and South Carolina acts. The Model Act permits an action to be brought by a shareholder if the acts of directors or those in control are illegal, oppressive, or fraudulent, or if corporate assets are being misapplied or wasted. Model Act § 97 (1969 rev.). California and Minnesota add the concept of abuse of authority and unfairness toward minority shareholders. Calif. G.C.L. § 4651 (E); Minn. B.C.A.

§ 301.49(3). South Carolina permits an action to be brought if the acts of the directors or those in control of the corporation are oppressive or unfairly prejudicial to the corporation or any shareholder and adds the concept "whether in his capacity as a shareholder, director, or officer of the corporation." S.C. B.C.A. § 12–22.15(a)(4). These additional words reflect the fact that in a closely-held corporation oppressive conduct often takes the form of freezing-out a minority shareholder by removing him from his various offices or by substantially diminishing his power or compensation; in the absence of such language, the courts might feel constrained to look exclusively to direct injury to the shareholder's stock interest. Folk, Review of the Delaware Corporation Law at p. 344 (1968). The Commission agreed that in the context of a closely-held corporation our courts should be free to look beyond direct harm to the value of a shareholder's investment and to consider all pertinent factors.

The danger that paragraph 14A:12–7(c) might be abused is minimized by the fact that the remedies under this section are discretionary and that if the court determines that an action was brought arbitrarily, vexatiously, or not in good faith, it may award expenses, including counsel fees, to the other side as provided in subsection 14A:12–7(10).

Subsection 14A:12–7(4) authorizes the appointment of a custodian as one remedy under this section. This concept is not new; our equity courts have appointed custodial receivers in cases of dissension when harm was threatened to the corporation, but generally only during the pendency of litigation. See *In re New Jersey Refrigerating Co.*, 95 N.J. Eq. 215, 22-23 (E. & A. 1923); *Freidus v. Kaufman*, 35 N.J. Super 601, 612 (Ch. Div.), affirmed o.b., 36 N.J. Super 321 (App. Div. 1955); 16 Fletcher, Corporations § 7713 and New Jersey cases there cited. See also *Roach v. Margulies*, 42 N.J. Super 243 (App. Div. 1956), a derivative action in which the court approved appointment of a "special fiscal agent" in lieu of a custodial receiver.

Both Delaware and Pennsylvania provide for the appointment of a custodian as an alternative to dissolution in the event of deadlock. Each provides merely that the custodian shall have the powers and title of a receiver but that his authority is to continue the business

of the corporation and not to liquidate it unless otherwise ordered by the court. Del. G.C.L. § 226; Pa. B.C.L. § 513.1. Subsection 14A:12–7(4) goes further by empowering the custodian to exercise the powers of the board and officers but permits such power to be exercised through or in conjunction with the existing board or officers, as determined by the court or the custodian. This permits the existing corporate structure to be left intact and, in appropriate cases, allows its business to continue to be managed in the normal fashion. See *Roach v. Margulies, supra*, 42 N. J. Super at 246.

Subsection 14A:12–7(3) permits the appointment of a provisional director. This concept is new in New Jersey. Presumably, such a device will be used principally in cases of director deadlock. Both California and Missouri permit the appointment of a provisional director for any corporation; Delaware limits such appointment to closely-held corporations. Calif. G.C.L. § 819; Mo. B.C.L. § 351.323; Del. G.C.L. § 353. Each of these jurisdictions provides for removal of a provisional director by order of the court or by consent or vote of a majority of the voting shares of the corporation. Subsections 14A:12–7(3) and 14A:12–7(4) permit such removal of either a custodian or provisional director unless otherwise ordered by the court. The Commission felt it necessary to empower the court to prohibit removal since such power might be exercised by a majority in bad faith to frustrate the power of the court to determine all underlying facts.

Subsection 14A:12–7(8) empowers but does not require the court to order the sale of the plaintiff's stock to the corporation or to the holders of one-half or more of the corporation's stock if the corporation or such holders seek such a solution. California, Connecticut, and West Virginia provide for such a stock purchase in lieu of involuntary dissolution but limit the persons who may purchase to majority shareholders. Under those statutes, unlike subsection 14A:12–7(8), sale is mandatory rather than discretionary with the court. Calif. G.C.L. § 4658; Conn. S.C.A. § 33-384; W. Va. G.C.L. § 31-1-81. South Carolina and Great Britain permit such a purchase either by shareholders or the corporation but do not make the order to sell mandatory. S.C. B.C.A. § 12-22.23(A)(4); English Companies Act § 210.

68. N. J. S. 14A:12–8 is amended to read as follows:

14A:12-8 Effective time of dissolution.

A corporation is dissolved

(a) when the period of duration stated in the corporation's certificate of incorporation expires *and the corporation files a certificate of dissolution in the office of the Secretary of State pursuant to section 14A:12–5.1*; *or*

(b) upon the proclamation of the [Governor] *Secretary of State* issued pursuant to section 54:11–2 of the Revised Statutes; or

(c) when a certificate of dissolution is filed in the office of the Secretary of State pursuant to sections 14A:12–2, 14A:12–3, 14A:12–4 or 14A:12–5, except when a later time not to exceed 30 days after the date of filing is specified in the certificate of dissolution; or

(d) when a judgment of forfeiture of corporate franchises or of dissolution is entered by a court of competent jurisdiction.

COMMISSIONERS' COMMENT—1972

This section has been amended to reflect the fact that a corporation whose period of duration as specified in its certificate of incorporation has expired does not become dissolved until it has filed a certificate of dissolution. See comment to section 14A:12–5.1 and see section 14A:12–1, as amended.

69. N. J. S. 14A:12–9 is amended to read as follows:

14A:12-9 Effect of dissolution.

(1) Except as a court may otherwise direct, a dissolved corporation shall continue its corporate existence but shall carry on no business except for the purpose of winding up its affairs by

(a) collecting its assets;

(b) conveying for cash or upon deferred payments, with or without security, such of its assets as are not to be distributed in kind to its shareholders;

(c) paying, satisfying and discharging its debts and other liabilities; and

(d) doing all other acts required to liquidate its business and affairs.

(2) Subject to the provisions of subsection 14A:12–9(1), and except as otherwise provided by court order, the corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred. In particular, and without limiting the generality of the foregoing,

(a) the directors of the corporation shall not be deemed to be trustees of its assets and shall be held to no greater standard of conduct than that prescribed by section 14A:6–14;

(b) title to the corporation's assets shall remain in the corporation until transferred by it in the corporate name;

(c) the dissolution shall not change quorum or voting requirements for the board or shareholders, nor shall it alter provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws;

(d) shares may be transferred *until the record date of the final liquidating distribution or dividend to shareholders*;

(e) the corporation may sue and be sued in its corporate name and process may issue by and against the corporation in the same manner as if dissolution had not occurred;

(f) no action brought against any corporation prior to its dissolution shall abate by reason of such dissolution.

(3) The right of the corporation to sell its assets and the right of a shareholder to dissent from such sale shall be governed by Chapters 10 and 11 in the same manner as if dissolution had not occurred.

(4) A dissolved corporation may condition the payment to its shareholders

(a) of any partial liquidating distribution or dividend on the surrender to it of the share certificates on which the distribution or dividend is to be paid for endorsement to reflect such payment; or

(b) of the final liquidating distribution or dividend on the surrender to it for cancellation of the share certificates on which the distribution or dividend is to be paid.

COMMISSIONERS' COMMENT—1972

Paragraph 14A:12–9(2) (d) has been amended to make it clear that shares may not be transferred after the record date of the final liquidating distribution or dividend to shareholders. This date may not be more than 60 days prior to the actual date of the distribution. Section 14A:5–7.

Subsection 14A:12–9(4) has been added to codify the common practice of corporations of endorsing share certificates during the period when a corporation is in dissolution and of requiring the surrender for cancellation of share certificates prior to payment of the final distribution to shareholders.

70. N. J. S. 14A:12–12 is amended to read as follows:

14A:12-12 Notice to creditors; filing claims.

(1) At any time after a corporation has been dissolved, the corporation, or a receiver appointed for the corporation pursuant to this chapter, may give notice requiring all creditors to present their claims in writing. Such notice shall be published 3 times, once in each of 3 consecutive weeks, in a newspaper of general circulation in the county in which the registered office of the corporation is located and shall state that all persons who are creditors of the corporation shall present written proof of their claims to the corporation or the receiver, as the case may be, at a place and on or before a date named in the notice, which date shall not be less than 6 months after the date of the first publication.

(2) On or before the date of the first publication of the notice as provided in subsection 14A:12–12(1), the corporation, or the receiver, as the case may be, shall mail a copy of the notice to each known creditor of the corporation. The giving of such notice shall not constitute recognition that any person to whom such notice is directed is a creditor of the corporation other than for the purpose of receipt of notice hereunder.

(3) As used in this section, "creditor" means all persons to whom the corporation is indebted, and all other persons who have claims or rights against the corporation, whether liquidated or unliquidated, matured or unmatured, direct or indirect, absolute or contingent, secured or unsecured.

(4) Proof of the publication and mailing [required] *authorized* by this section shall be made by an affidavit filed in the office of the Secretary of State.

COMMISSIONERS' COMMENT—1972

Subsection 14A:12–12(4) has been amended by substituting the word "authorized" for the word "required" so as to eliminate any inference that a corporation is obligated to notice its creditors.

71. N. J. S. 14A:12–13 is amended to read as follows:

14A:12-13 Barring of claims of creditors.

(1) [Except as otherwise provided in this section and elsewhere in this chapter, any] *Any* creditor as defined in subsection 14A:12–12(3) who does not file his claim as provided in the notice given pursuant to section 14A:12–12, and all those claiming through or under him, shall be forever barred from suing on such claim or otherwise realizing upon or enforcing it *except, in the case of a creditor who shows good cause for not having previously filed his claim, to such extent as the Superior Court may allow*

(a) against the corporation to the extent of any undistributed assets; or

(b) if the undistributed assets are not sufficient to satisfy such a claim, against a shareholder to the extent of his ratable part of such claim, out of the assets of the corporation distributed to him in liquidation or dissolution.

(2) This section shall not apply to claims which are in litigation on the date of the first publication of the notice pursuant to section 14A:12–12.

COMMISSIONERS' COMMENT—1972

Subsection 14A:12–13(1) has been modified to provide that a creditor who for good cause fails to file his claim as prescribed by section 14A:12–12 may nonetheless be permitted to bring his claim against the corporation to the extent of undistributed assets or to follow the corporate assets into the hands of the corporation's distributee-shareholders.

The substance of paragraph 14A:12–13(1) (a) was previously contained in subsection 14A:12–15(2); paragraph 14A:12–13(1) (b) is new.

The operation of paragraph 14A:12–13(1) (b) will be similar to the law applicable to distributions by ordinary fiduciaries, which permits a creditor who has failed to present his claim for payment to proceed

against the distributees "and recover such proportion of his claim as ought to be paid out of the legacy or distributive shares". N. J. S. A. 3A:24–13. Under that statute, such an action must be brought on a refunding bond given by the distributee, but it is well settled that the failure of a fiduciary to obtain such a bond does not free the distributee from the obligation to refund. *Fidelity Union Trust Co. v. Carter,* 121 N.J. Eq. 78, 79 (Ch. 1936); *Harris v. White,* 5 N.J.L. 422, 500 (Sup. Ct. 1819); *see generally* 7 N.J. Practice, Clapp, Wills and Administration § 1729 (3rd Ed. 1962).

It was the view of the Commission that it is important to compel all creditors who may reasonably be expected to file their claims to do so within the prescribed time and to provide for the barring of the claim upon failure to do so. On the other hand, the Commission recognized that there will be certain classes of claims which at the time of the notice to creditors might not be known either to the corporation or to the "creditor", such as products liability claims, the cause of action for which might not accrue until several years after the date of the order barring creditors.

The earlier provision of Title 14 regarding orders barring creditors provided only that the creditor would be barred as "against the trustees in dissolution, or the receiver and against the corporation"; it did not provide a bar as against shareholders. R.S. 14:13–11. Similarly, prior case law indicates that a creditor may follow distributed assets. See *N. J. Title Guarantee & Trust Co. v. Berliner,* 136 N.J. Eq. 162, 167 (Ch. 1945).

This section should be compared with § 105 of the Model Act (rev. 1969) and N.Y.B.C.L. § 1007.

72. N. J. S. 14A:12–15 is amended to read as follows:

14A:12-15 Jurisdiction of the Superior Court.

[(1)] At any time after a corporation has been dissolved in any manner, a creditor, as defined in subsection 14A:12–12(3), or a shareholder of the corporation, or the corporation itself, may apply to the Superior Court for a judgment that the affairs of the corporation and the liquidation of its assets continue under the supervision of the court. The court shall have power to proceed in a summary manner or otherwise upon such application, and shall make such orders and judgments as may be required, including, but not limited to, the continuance of the liquidation of the

corporation's assets by its officers and directors under the supervision of the court, or the appointment of a receiver of the corporation, who shall be vested with all the powers provided in Chapter 14 to be exercised by receivers appointed to liquidate the affairs of a corporation.

[(2) For good cause shown, and so long as the corporation has not made complete distribution of its assets, the Superior Court may, in an action pending under subsection 14A:12–15(1) or otherwise, permit a creditor who has not filed his claim within the time limited by section 14A:12–13, or who has not begun suit on a rejected claim within the time limited by section 14A:12–14, to file such claim, or to bring such suit, within such time as the court shall direct.]

COMMISSIONERS' COMMENT—1972

This section has been amended by deleting subsection 14A:12–15(2). The substance of this subsection has been included by amendment to subsection 14A:12–13 (1).

73. N. J. S. 14A:12–19 is added as follows:

14A:12-19 Dissolution upon liquidation.

No corporation shall be completely liquidated and all of its assets distributed to its shareholders unless provision is made for the dissolution of the corporation and the payment of all fees, taxes, and other expenses incidental thereto.

COMMISSIONERS' COMMENT—1972

This section is new. It compels a corporation which is about to liquidate and distribute all assets to its shareholders not only to pay taxes for the current year but also to provide for dissolution and the payment of all fees incidental thereto. This new section will not preclude a corporation from being kept in existence, even though partially liquidated, so long as sufficient assets are left to enable it to pay taxes and fees. Its purpose is to prohibit by-passing the dissolution procedures prescribed by statute by paying taxes through the year of liquidation, then failing to pay taxes thereafter and permitting the charter to be forfeited for non-payment of taxes. Such a practice frustrates the purposes of Chapter 12 of the B.C.A., and causes an undue administrative burden in the offices of the Secretary of State and the Corporation Tax Bureau.

See section 14A:6–12, which, as amended, imposes personal liability on directors who violate this section. See also N.J.S.A. 54:10A–12.

74. N. J. S. 14A:14–15 is amended to read as follows:

14A:14-15 Notice to creditors.

(1) [At any time after his appointment,] *The* [the] receiver [may] *shall, within 30 days following the date of his appointment,* give notice requiring all creditors to present their claims in writing. Such notice shall be published twice, once in each of two consecutive weeks, in a newspaper of general circulation in the county in which the registered office of the corporation is located and shall state that all persons who are creditors of the corporation shall present written proof of their claims, *under oath,* to the receiver at a place and on or before a date named in the notice, which date shall not be less than 6 months after the date of the first publication. *By order of the Superior Court, the time for giving such notice to creditors and the time within which creditors shall be required to file proofs of claim may be extended or limited, or the giving of such notice to creditors may be entirely excused.*

(2) Any creditor who does not file his claim as provided in the notice given pursuant to subsection 14A:14–15(1), and all those claiming through or under him, shall be forever barred from suing on such claim or otherwise realizing upon or enforcing it except, in the case of a creditor who shows good cause for not having previously filed his claim, to such extent as the Superior Court may allow

(a) against the corporation to the extent of any undistributed assets; or

(b) if the undistributed assets are not sufficient to satisfy such a claim, against a shareholder to the extent of his ratable part of such claim, out of the assets of the corporation distributed to him in liquidation or dissolution.

[(2)] *(3)* On or before the date of the first publication of the notice as provided in subsection (1) of this section, the receiver shall mail a copy of the notice to each known creditor of the corporation. The giving of such notice shall not constitute recognition that any person to whom such notice is directed is a creditor of the corporation other than for the purpose of receipt of notice hereunder.

[(3)] *(4)* Proof of the publication and mailing required by this section shall be made by an affidavit filed in the office of the Clerk of the Superior Court.

COMMISSIONERS' COMMENT—1972

Subsection 14A:14–15(1) has been modified to make it mandatory for the receiver to give notice requiring creditors to present their claims in writing. This is in contrast to the former provision of such subsection making the giving of such notice optional with the receiver. Flexibility has been retained, however, by the addition of the last sentence to this subsection giving the Superior Court wide powers concerning the notice requirement.

There has been reinstated in subsection 14A:14–15(1) the requirement that creditors present their claims under oath. This requirement had existed under Title 14 in both the dissolution (R.S. 14:13–2) and receivership (R.S. 14:14–15) proceedings but had been deleted from both sections in Title 14A. See 1968 Commissioners' Comment to subsection 14A:12–12(1).

Because there are often no records of the debtor to assist the receiver in determining the accuracy of claims, the under-oath requirement will act as a deterrent to spurious claims. Since the directors and officers of a dissolved corporation would be available to verify the accuracy of claims submitted in a voluntary dissolution proceeding, the under-oath requirement has not been reinstated in subsection 14A:12–12(1).

Subsection 14A:14–15(2) adds a new requirement to the insolvency chapter barring creditors who do not submit their claims within time. This subsection, however, contains an exception for claims not filed within time if good cause can be shown and corresponds with the amendment to subsection 14A:12–13(1). The Commissioners' Comment to section 14A:12–13 should be consulted.

75. N. J. S. 14A:14–21 is amended to read as follows:

14A:14-21 Distribution of assets; priorities.

(1) After payment of all allowances, expenses and costs, and, *subject to the laws of the United States and to subsection 14A:14–21(3),* the satisfaction of all liens upon the funds of the corporation to the extent of their lawful priority, the creditors

shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors. The creditors shall be entitled to distribution on debts not due, making in such case a rebate of interest, when interest is not accruing on the same.

(2) The surplus funds, if any, after payment of the creditors and the costs, expenses and allowances aforesaid, and the preferred stockholders, shall be divided and paid to the general stockholders proportionately, according to their respective shares.

(3) In any distribution to creditors [under this section,] all persons doing labor or service of any character, in the regular employment of the corporation, shall be entitled to priority of payment for the wages, not to exceed $600. for each claimant, due them respectively for all labor, work and services performed within three months before the institution of a receivership action under this chapter. A claim under this subsection 14A:14–21(3) shall have priority over all other claims against the corporation, but shall be subordinate to (1) a security interest in personal property perfected [more than two months next preceding] *prior to* the date when the receivership action was instituted, *which perfected security interest cannot be set aside by the receiver under the provisions of this Chapter,* (2) [a security interest in personal property for money loaned or goods purchased within two months next preceding the date when the receivership action was instituted, (3)] mortgages upon the real property of the corporation, and [(4)] *(3)* all claims entitled to higher priority by law.

COMMISSIONERS' COMMENT—1972

The amendment to subsection 14A:14–21(1) makes distributions under this section explicitly subject to the laws of the United States to take into account 31 U.S.C.A. § 191, which provides whenever any person indebted to the United States is insolvent, the debts due to the United States shall be first satisfied. The binding force of this federal statute in New Jersey insolvency proceedings has long been recognized. *Lerman v. Lincoln Novelty Co.*, 130 N.J. Eq. 144 (Ch. 1941); *Decker v. Decker Building Material Co.*, 118 N.J. Eq. 177 (Ch. 1935); *Bowes v. United States of America*, 127 N.J. Eq. 132 (Ch. 1940).

The provisions of 31 U.S.C.A. § 191 inevitably result in a different order of priority in distributions under a state receivership proceeding as opposed to a bankruptcy proceeding. While taxes and debts due the United States have priority over other distributions in a state receivership proceeding, the Bankruptcy Act has its own priorities for taxes and debts due the United States, § 64(a)(4) and (5), and the provisions of 31 U.S.C.A. § 191 are thus not applicable in bankruptcy. 4 *Collier, Bankruptcy*, § 67, at 338 (14th ed. 1971).

The inclusion in subsection 14A:14–21(1) of the phrase "subject to subsection 14A:14–21(3)" and the deletion of the phrase "under this section" in subsection 14A:14–21(3) are intended to make clear that the case law under Title 14 which gave employees' wages priority in insolvency over existing liens created by other statutes has been followed. See, e.g. *Appel v. Republic Footwear, Inc.*, 70 N.J. Super. 335 (Ch. Div. 1961) and cases there cited; *Decorative Utilities Corp. v. National Motor Trucking Corp.*, 123 N.J. Eq. 48 (Ch. 1938) and cases there cited; *Fitzgerald v. Maxim Powder Mfg. Co.*, 33 Atl. 1064 (Ch. 1896).

There has been deleted from subsection 14A:14–21(1) the provision excepting mortgage and judgment creditors from the rule of proportionate payment of creditors. This provision has been construed as preferring judgment creditors only if they have acquired liens on the property of the insolvent corporation. *Doane v. Millville Ins. Co.*, 45 N.J.Eq. 274 (E. & A. 1889). It has been deleted as unnecessary and as not taking into account the subsequently enacted provision of present 14A:14–13, originally L. 1919, c. 208, p. 455, which invalidates judgment liens acquired within four months prior to insolvency. It similarly ignored the other powers of a receiver to attack the judgment or mortgage as preferential, Section 14A:14–14, or as a fraudulent transfer, Sections 14A:14–10 and 14A:14–11. If a mortgage or a judgment lien survives these tests, it would still be paid ahead of general creditors as a valid lien under subsection 14A:14–21(1).

Subsection 14A:14–21(3) has been modified to provide that the only security interest that is subordinate to the employees' wage priority is a security interest perfected prior to insolvency which cannot be set aside by the

receiver under this Chapter, as for example a preference under 14A:14–14.

Unlike the Bankruptcy Act, Chapter 14 does not contain specific priorities for taxes or rent. However, by creating liens for taxes and rent which are recognized in insolvency, the provisions of other statutes achieve the same effect. Thus, N.J.S.A. 54:4–106, N.J.S.A. 54:14–5, and N.J.S.A. 54:49–1 provide that various forms of state and municipal taxes shall be a preferred debt in insolvency, while landlords have a lien for one year's rent under N.J.S.A. 2A:42–1 and a lien for distress under N.J.S.A. 2A:33–1. The Commission did not intend this section to affect case law under Title 14, which gave employees' wages priority over both taxes and rent, while taxes were given priority over the landlord's rent claim. See *Philadelphia Dairy Products Co., Inc. v. Summit Sweet Shoppe, Inc.*, 113 N.J.Eq. 458 (Ch. 1933); *Decorative Utilities Corp. v. National Motor Trucking Corp.*, 123 N.J. Eq. 48 (Ch. 1938).

76. N. J. S. 14A:14–25 is amended to read as follows:

14A:14-25 Reorganization under act of Congress; rights of certain shareholders.

In any case where a plan of reorganization of a corporation provides for any action to be taken, which, if taken *pursuant to any provisions of this act* [voluntarily on the vote of the shareholders of a corporation not in reorganization], would entitle dissenting shareholders to payment of the value of their shares, such action may be taken by such corporation in reorganization without payment to shareholders of the value of their shares.

COMMISSIONERS' COMMENT—1972

This section has been amended to broaden the class of corporate actions to include all corporate actions under this act giving rise to dissenters' rights, whether or not a shareholder vote is required.

77. N. J. S. 14A:14–26 is amended to read as follows:

14A:14-26 Reorganization under act of Congress; certificates.

When any plan of reorganization provides for any action to be taken, which, if taken *pursuant to any provisions of this act* [voluntarily on the vote of the shareholders of a corporation not in reorganization], would require the filing of a certificate or other document in the office of the Secretary of State, such certificate or other document shall be executed on behalf of the corporation by the persons specified in subsection (2) of section 14A:14–24 and

shall be filed in the office of the Secretary of State. Such certificate or other document shall recite that its making and filing are authorized pursuant to a plan of reorganization, and shall make reference to the proceeding in which the plan of reorganization was ordered or confirmed.

COMMISSIONERS' COMMENT—1972

This section has been amended in the same manner and for the same reasons as section 14A:14–25.

78. N. J. S. 14A:15–3 is amended to read as follows:

14A:15-3 Additional miscellaneous fees.

The Secretary of State shall also charge and collect for:

(1) filing an application to reserve a *specified* corporate name and issuing a certificate of reservation	$20.00
if application is for the first name available for corporate use among not more than three specified names	*$25.00*
(2) filing a notice of transfer of a reserved corporate name	$10.00
(3) filing an application by a foreign corporation to register its corporate name	$35.00
(4) filing an application by a foreign corporation to renew the registration of its corporate name	$35.00
(5) filing a statement of cancellation of shares	$25.00
(6) filing a statement of reduction of stated capital	$25.00
(7) filing a certificate as to the acquisition of the shares or a class of shares of a domestic corporation	$30.00
(8) issuing a certificate of standing, including registered agent and registered office	$10.00
(9) issuing a certificate of standing, same as above, but including incorporators, officers and directors, and authorized shares	$20.00
(10) issuing a certificate of standing, listing charter documents	$20.00
(11) issuing a certificate of availability of corporate name (1 to 3 names)	$10.00

(12) filing a certificate of registration of fictitious name $25.00

(13) filing a certificate of renewal of registration of fictitious name $25.00

(14) filing a certificate of correction, in addition to any applicable license fee $10.00

[(12)] *(15)* all other certificates issued or papers filed, but not otherwise provided for $10.00

[(13)] *(16)* corporate information searches or lookups —in excess of five names per day—per name $1.00

COMMISSIONERS' COMMENT—1972

This section has been revised to provide appropriate filing fees for filing a certificate of correction pursuant to subsection 14A:1–6(5), for reserving a corporate name when up to three names are submitted in the application under section 14A:2–3, and for filing a certificate of registration of a fictitious name and renewal thereof under section 14A:2–2.1.

79. This act shall take effect the first day of a calendar month occurring not less than 90 days after enactment.

80. Commissioners' comments as to the several sections of this act are included for information only and shall not be deemed part of the statute.

SENATE LABOR, INDUSTRY AND PROFESSIONS COMMITTEE

STATEMENT TO

SENATE, No. 1063

STATE OF NEW JERSEY

DATED: MARCH 22, 1973

The comments and final report of the Corporation Law Revision Commission appended to and printed with the bill adequately explain its provisions.

FISCAL NOTE TO

SENATE, No. 1063

STATE OF NEW JERSEY

DATED: FEBRUARY 1, 1973

Senate Bill No. 1063 amends and supplements the "New Jersey Business Corporation Act" by providing expanded services and changes that should make the State a more attractive one in which to incorporate or for present corporations to continue to operate.

The office of the Secretary of State estimates that enactment of this legislation should increase the revenues of the State by $50,000.00 in fiscal 1973–74, anticipated to be the first year the changes would be applicable.

The Division of Budget and Accounting estimates that State revenues should increase by about $5,500.00 in fiscal 1974–75 as a result of enactment.

In compliance with written request received, there is hereby submitted a fiscal estimate for the above bill, pursuant to P. L. 1962, c. 27.