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## NEW JERSEY BUSINESS CORPORATION ACT DEVELOPMENTS

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**In 2009 and early 2010, New Jersey adopted several amendments to provisions of the New Jersey Business Corporation Act (the "Act"). These amendments were recommended for adoption by the New Jersey Corporate and Business Law Study Commission, which is continuing to review the Act for further changes. There remains one additional amendment proposed by the Study Commission that awaits further legislative action. A number of the amendments are patterned on Delaware law.**

The amendments to the Act are as follows:

### **Plurality Voting Standard May Be Varied in the By-laws**

Section 14A:5-24 was amended to permit variations from plurality voting for the election of directors by the inclusion of a provision in a corporation's by-laws. Prior to the amendment, the Act required that a variation could only be included in the corporation's certificate of incorporation. With majority voting becoming more common, this change provides greater flexibility for corporations to adopt and modify voting standards based solely on a board determination. The change may also now provide shareholders with the opportunity to seek a change in voting

standards by shareholder vote alone on a by-law amendment to the extent that a shareholder pursues such a proposal.

### **Directors May Condition Resignation Upon the Occurrence of Subsequent Events**

Section 14A:6-3 was amended to permit director resignations to take effect upon the occurrence of subsequent events. The change was made to provide greater flexibility to New Jersey corporations that adopt majority voting standards. Thus, a sitting director of a New Jersey corporation could submit an irrevocable resignation that would take effect only if the director failed to receive the requisite vote at the stockholder meeting. The amendment also provides that "[a]ny resignation which is contingent upon a director failing to receive a specified vote for re-election shall provide that the resignation is irrevocable."

### **Boards May Now Authorize Officers to Make Certain Equity Grants**

Section 14A:8-1 was amended to allow a board of directors (or a committee of the board) to authorize by resolution one or more officers to designate (a) officers and employees of the corporation who would receive grants of shares of stock, rights or options and/or (b) the number of shares, rights or options to be received by designated officers and

employees. Historically, the grant of equity awards required the approval of the board of directors or a board committee. The statutory change affords greater flexibility to boards or committees as they address compensation and equity awards. This flexibility might, for instance, allow officers to provide equity grants out of a pre-approved pool to employees in conjunction with monetary awards that do not necessarily require board approval. The board or a committee of the board must still specify the total number of shares, rights or options that the specified officers may award. Officers who are delegated this authority are prohibited from making grants to themselves.

### **Merger or Consolidation with Other Business Entities**

Section 14A:1-2.1 was modified to expand the scope of the definition of "other business entity." This change broadens the list of entities that may engage in mergers or consolidations with New Jersey corporations. Historically, parties to mergers or consolidations with New Jersey

corporations were limited to corporations, partnerships and limited liability companies. The definition of other business entity has been expanded now to include statutory trusts, business trusts or associations, real estate investment trusts, common-law trusts, national associations, or any other unincorporated businesses. These changes were designed to make New Jersey law more consistent with that of other commercial states.

#### **Electronic Transmission of Notices**

Section 14A:1-8 was amended to include electronic transmission as a permitted method for corporations to provide most notices that are contemplated under the Act. As a general matter, notices to shareholders may only be provided by electronic transmission when a shareholder consents to receive notices in that manner. The Act defines electronic transmission as "any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved and reviewed by a recipient, and that may be directly reproduced in paper form by that recipient through an automated process." Prior to the adoption of the amendment, the Act did not expressly contemplate delivery of a notice that was not in tangible form. New Jersey corporations are now

expressly permitted to take advantage of technological changes that allow for faster, cheaper and possibly more efficient means of delivery of notices. Electronic delivery was recently approved by the Securities and Exchange Commission as a permitted method for the delivery of proxy materials by public companies under the Securities Exchange Act of 1934.

#### **Expedited Filings by the Division of Commercial Recording**

Section 52:16A-38 was amended to provide for expedited one and two hour service by the Division of Commercial Recording. This expedited service applies to, among other things, requests for certificates of good standing, certified documents and availability of corporate names, and the filing of certificates of incorporation, certificates of amendment, certificates of merger and uniform commercial code statements. The Division of Commercial Recording will establish a fee schedule for the expedited requests and filings.

#### **Elimination of 10-Day Waiting Period for Non-Unanimous Shareholder Approval**

There remains one additional amendment proposed by the Study Commission that awaits further legislative action. The Study Commission has recommended that Section 14A:5-6

be amended to eliminate the 10-day notice period to non-consenting shareholders who would have been entitled to notice of a meeting to vote on action when shareholders owning the requisite number of shares authorize the action without a shareholder meeting. Under existing law, the corporate action in question could not be made effective until the 10-day period expired. The notice period was intended to afford non-consenting shareholders an opportunity to contest corporate action that was approved without a meeting. However, the 10-day waiting period has, at times, created inefficiencies in transactions and delayed closings and frustrated corporations that needed to implement the corporate action sooner than 10 days after approval (e.g., financings that involved an amendment to the certificate of incorporation). The 20-day notice period to non-consenting shareholders that is required for merger or acquisition transactions covered by Chapter 10 of the Act that are approved without a shareholder meeting would be retained.

**If you have any questions about the recent changes to the New Jersey Business Corporation Act, or any other matter, please feel free to contact Jeffrey M. Shapiro at Lowenstein Sandler at 973.597.2470.**

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