STATE OF MAINE
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FIRST REGULAR SESSION

Executive Summary
of the

COMMISSION TO ENCOURAGE INCORPORATIONS IN MAINE

December 1999

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COMMISSION TO ENCOURAGE INCORPORATIONS IN MAINE

Executive Summary

The Commission to Encourage Incorporations in Maine was created by 1999 Resolve, chapter 67. The commission was asked to consider creating a state corporations law that would give greater rights to shareholders than they enjoy under current Maine law or under the laws of other states. The purpose of such a law would be to encourage shareholders to convince corporations to reincorporate in Maine.

Commission members reviewed the development of the current Maine law on incorporations and received background information on the services provided by the Secretary of State's Corporations Division. They also talked with a pension fund official at TIAA-CREF, a public pension fund serving teachers and other educators, about possible interest in a shareholder-friendly state law.

Although the Commission did not have sufficient information to make a recommendation on the proposal to create a shareholder-friendly law, it did take the following actions:

- Encouraged the Secretary of State to continue developing resources for providing information and allowing filing of corporate documents over the Internet;
- Expressed support for the Maine State Bar Association's potential project to review and update the Business Corporations Act and transmitted to the Judiciary Committee a letter from the Bar Association inviting legislative participation in the project; and
- Wrote a letter to an institutional investor group, inviting them to develop a proposed shareholder-friendly law and submit it to the Joint Standing Committee on Judiciary.

I. Introduction

Incorporation is the process by which an organization or person becomes a legally-recognized entity known as a corporation. As a general rule, a business can incorporate in any state, whether or not it conducts business in that state. The law of the state in which the business is incorporated governs many of the operations of the corporation, including the method of raising funds for the corporation, the relationship between shareholders and the corporation and the duties and liabilities of the Directors.

The State of Delaware has actively worked to encourage businesses to incorporate there. The self-proclaimed "Incorporating Capital of the World," Delaware holds the incorporation papers for more than 290,000 businesses, including almost 60% of Fortune 500 companies. Delaware reaps the benefit of this incorporation activity in the form of fees and taxes, as well as in increased legal employment. Over 20% of Delaware's General Fund revenues come from corporate fees and from franchise taxes, which are collected from businesses incorporated in the State even if they conduct no business activity there.

During the First Regular Session of the Maine Legislature, a proposal was introduced to create a commission to study ways to encourage businesses to incorporate in the State of Maine.[1] The sponsor of the proposal, Senator Richard A. Bennett, proposed that the group consider creating a unique state corporations law: a law that would give greater power to shareholders than other state laws. This law could result in an increase in incorporations in Maine, and additional revenue for the state, if shareholders were able to persuade corporations in which they hold stock to reincorporate in Maine. The Commission was also directed to examine other ways to increase incorporations in Maine.

The Commission reviewed the development of the current Maine law on incorporations, received background information on the services provided by the Secretary of State's Corporations Division, and talked with the Corporate Governance Director of TIAA-CREF, an institutional shareholder who takes an active part in improving the performance of companies in which it holds stock.

Although the Commission did not have sufficient information to make a recommendation on the proposal to create a shareholder-friendly law, it did take the following actions:

- Encouraged the Secretary of State to continue developing resources for providing information and allowing filing of corporate documents over the Internet;

[1] LD 1972, Resolve, to Establish a Commission to Encourage Incorporations in Maine.

- Expressed support for the Maine State Bar Association's potential project to review and update the Business Corporations Act and transmitted to the Judiciary Committee a letter from the Bar Association inviting legislative participation in the project; and
- Wrote a letter to an institutional investor group, the Stanford Institutional Investor Forum, inviting them to develop a proposed shareholder-friendly law and submit it to the Joint Standing Committee on Judiciary.

II. Where Businesses Incorporate and Why

Closely-held businesses, i.e., businesses whose shares are not publicly traded, generally incorporate in the state where their owners and their businesses are located. Publicly-held corporations, on the other hand, are not necessarily associated with any one state and may choose their state of incorporation for other reasons. According to James Zimpritch, an attorney who specializes in corporate law at the law firm of Pierce Atwood, in Portland, Maine, corporations choose among states based on the following factors:

- Substance of the state law -- Is it a modern, flexible law that enables the corporation to carry on its business? Are there other attractive provisions, such as protection from liability for directors?

- Certainty and predictability of the law -- Is there a well-established body of case law interpreting the language of the statute?

- Acceptance within the investment community -- Would the investment community have concerns about the state? Would explanations and assurances be needed?

- Cost -- Are the fees and taxes imposed on incorporation in line with those of other states?

- Administrative ease -- Is the administrative agency responsive? Is it convenient to obtain services and file papers there?

The state of Delaware, says Mr. Zimpritch, fares well when evaluated in light of these factors. The law in Delaware is continually reviewed and updated as needed to keep the law modern and flexible. It has also been extensively reviewed and interpreted by the Chancery Court, a specialized court that handles most corporate litigation. That Court has a great deal of expertise in Delaware's corporate law, and because it is not a court of general jurisdiction and proceeds without a jury, such cases are often dealt with expeditiously.

Delaware is also well-known within the investment community. Half the companies traded on the New York Stock Exchange and 60% of Fortune 500 companies are incorporated in Delaware. As for cost, Delaware's fees are in line with those of other states. Its annual franchise tax is based on the value of the corporation and is capped at $150,000 per year. Delaware's Division of Corporations is considered to be a modern, speedy, high-tech office that provides services until midnight to accommodate the needs of its national clientele.

In contrast to the law of Delaware, Maine's corporate law has been amended only as problems arise, rather than being routinely reviewed and updated. According to Mr. Zimpritch, Maine lacks a comprehensive body of case law interpreting the Maine Business Corporation Act, leaving many questions unanswered. While the Commission did not hear complaints about Maine's court system, fees or administrative services, there was no feeling these are factors that would draw additional corporations to incorporate here.

III. Benefits to the Incorporating State

The state of Delaware collected $278.3 million from corporate franchise taxes and $22.4 million from corporate fees in 1994. This represented over 20% of its General Fund revenues. The corporations also contribute to the employment of lawyers and legal support staff needed to advise corporations on Delaware law and to litigate suits that are brought in the state.

If Maine were to attract a number of additional corporations to incorporate here, Maine would collect additional fees and might enjoy additional legal employment. The following is a list of potential financial benefits that Maine could derive from increasing the number of corporations incorporated in the State.

Incorporation Fee	One-Time Fee for Filing Articles of Incorporation: $75
Annual Report Fee	Annual Fee: $60
Fee for Additional Filings, Certificates, Services	Occasional: $20 to $105
Stock Fee	One-Time (additional payments are made if the corporation authorizes issuance of additional stock): Based on par value of authorized stock: • Par value not more than $2 million: $30 • Par value not more than $20 million: $600 plus $150 for each million over $2 million • Par value over $20 million: $3,300 plus $70 per million over $20 million
Franchise Tax	Maine does not currently have a general corporate franchise tax. Delaware has a maximum tax of $150,000
Economic Development	Potential for additional employment of: • Lawyers (Delaware has 2800 lawyers in a population of 735,000 -- 1 in 262.5 people; Maine has 3000 lawyers in a population of 1,242,000 -- 1 in 414 people) • Support staff • Legal supply companies Additional sales and income taxes from additional work Possible relocation of businesses to Maine

IV. Shareholder Friendly Law

The proposal to enact a shareholder-friendly law as a part of, or an option to, the Maine Business Corporation Act is intended to attract publicly-held corporations whose shareholders seek an active voice in corporate affairs. Such a law might give shareholders more power to impact corporate affairs by, e.g., changing the way decisions are made in a corporation or by changing the structure of the Board of Directors.

In recent years, many large institutional investors, such as pension funds, have taken an interest and a more active role in the affairs of corporations in which they own stock. According to Ken Bertsch, Director of Corporate Governance for TIAA-CREF, the largest pension fund in the world, the increased activity is partly an economic matter and partly a legal necessity.

The legal necessity is created by interpretive bulletins released by the United States Department of Labor, the federal agency that oversees pension fund management. The Department considers voting on corporate issues affecting the value of fund investments to be an aspect of fund management. Therefore, a fund manager has a fiduciary duty to exercise prudence and loyalty when voting by proxy on issues such as reincorporation or repeal of a “poison pill” arrangement. Prior to departmental interpretations stating that proxy voting is an aspect of fund management, Mr. Bertsch told the Commission, such voting was not always given a great deal of attention.

Pension fund managers also have an economic reason to participate in corporate decision-making. With hundreds of millions of dollars to invest, pension fund managers for funds like TIAA-CREF and the California Public Employees Retirement System (CalPERS), may not have an option to sell stock in companies that are not performing well. TIAA-CREF, for example, invests $160 billion in U.S. stocks, and holds stock in 3,000 U.S. companies. Finding alternative investments is not always easy, so managers focus instead on changing how the company is managed or who manages it. This may be done in a variety of ways, such as electing new directors, changing the corporate bylaws that determine how directors are chosen or how other decisions in the corporation are made.

The ability of shareholders to make these changes is affected by the corporation’s Articles of Incorporation and bylaws and by the laws of the incorporating state. For example, a bylaw provision that allows cumulative voting may improve the likelihood that institutional shareholders’ goals will be achieved. Because Articles, bylaws and laws that determine the governance of a corporation so greatly affect the ability of shareholders to achieve their goals, shareholder groups are focused on improving them. The Council of Institutional Investors, which includes managers of state pension funds and other non-profit and governmental pension funds, sets forth a list of guiding principles for corporate governance. It includes many provisions designed to ensure accountability of the board of directors and independence of the directors from corporate managers and to protect shareholder voting rights.

The proposal considered by the Commission would place corporate governance provisions favorable to shareholders in state law, so that all corporations would be subject to them without further action to place them in the Articles or Bylaws.

While the Commission did not have draft legislation in front of it for consideration, Senator Bennett did provide a list of possible shareholder-friendly provisions, for discussion purposes. Those provisions might include:

- Allowing shareholder action by consent;
- Allowing cumulative voting;
- Prohibiting multiple classes of stock and providing that each share gets one vote;
- Prohibiting disenfranchisement of shareholders who own more than a certain percent of value;
- Eliminating impediments to shareholder derivative suits;
- Allowing cumulative voting;
- Allowing public shareholders to serve on nominating committees;
- Requiring that a certain percentage of Directors of a corporation with a controlling shareholder be independent, nominated by independent shareholders;
- Requiring that salary increases for management be tied proportionately to dividend increases;
- Requiring that a corporation be run for the owners and prohibiting "stakeholder" provisions; and
- Prohibiting the corporation from leaving the state for 10 years; and allow leaving only if approved by an 80% vote of shareholders.

Representatives of active institutional shareholders were sent the list of proposals, and their reactions are set forth in Exhibit C. While they approve of the principles of greater shareholder power, they had some concerns about the specific proposals and could not say at this time that their organizations would take immediate advantage of a shareholder-friendly Maine law.

The Commission believed that the idea of proposing a law might be worth further consideration, provided it was an option and did not destabilize current Maine corporations. A shareholder group that might be interested in developing a law for consideration was identified and invited to submit a proposal to future Legislatures, if they were interested. This was considered to be the best way to gauge the level of interest among shareholder groups and to obtain a draft for consideration. A copy of the letter sent to that shareholder group, the Stanford Institution Investor Forum, is attached as Exhibit D.

V. Updating the Current Law

The Maine Business Corporations Act, enacted in 1971, was developed over a 6-year period by the Corporations Section of the Maine State Bar Association (MSBA). The Section's subcommittees, with the assistance of a University of Maine School of Law professor, based the law in part on the Model Business Corporations Act and in part on the South Carolina Business Corporations Act. Delaware and New York laws were also consulted for limited purposes.[2]

The law has been amended many times since 1971, but has not been thoroughly reviewed. According to James Zimpritch, the Business Law Section of the MSBA will present a proposal to the MSBA in January of 2000 to initiate another thorough review of the law. Although it is not known what provisions might be changed, Mr. Zimpritch pointed out that the participants in the review process would probably compare Maine law to the latest version of the Model Act, which was comprehensively revised in 1984.

The Commission encouraged a review of the current law by the Bar Association, but expressed some concern that legislators might not see the language of a lengthy new law until it is introduced. The chair of the Business Law Section of the Maine State Bar Association wrote to the Commission inviting legislative participation. A copy of the letter is attached as Exhibit E. The Commission discussed various methods of keeping informed of the Bar Association's activities, including the possibility of appointing some type of liaison to the Bar or having legislators who are members of the Bar Association participate as individuals. Commission members decided that, since the authority of the Commission expired at the end of the year, it was best to leave the consideration of legislative involvement in the Bar Association project to the Joint Standing Committee on Judiciary, since that committee has longer-term existence and authority over corporate law legislation.

VI. Administration of the Incorporations Process

The Commission heard information from the Corporations Division of the Office of the Secretary of State, the state agency that administers the incorporation process in Maine.

The Division performs a variety of functions related to business entities and nonprofit corporations, including filing of incorporation documents and annual reports, maintaining records of service and trade marks, and filing records of security interests in personal property under the Uniform Commercial Code. Additional information on the operations of the Division is found in Exhibit F.

The Division employs 20 full-time staff members and one half-time member and has a biennial budget of approximately $2.8 million. The Division collects $9 million of revenue for the General Fund from fees, including incorporation and annual report filing fees and stock authorization fees.

The function of the Division in the incorporations process is purely ministerial, according to Tim Poulin, Director of the Division. In contrast to the legal staff of the

[2] James B. Zimpritch, Maine Corporation Law and Practice, 1991.

Delaware Corporations Division, the Maine staff are not lawyers and do not review the filings for technical compliance with the statute. Filings are reviewed only to ensure completeness.

At its last meeting, the Commission received a presentation by Dan Gwadosky, Maine's Secretary of State, on the efforts of his office to make services available to the public via the Internet. The Secretary of State's Office, like many of Maine's state agencies, makes many services available through InforME. Established by law in 1998, InforME is a public-private partnership that offers technical and administrative services to state agencies to help them make their services available on a state Webpage. Each agency determines whether to participate and what information and services to provide via the Internet.

Currently, the Corporations Division provides more than 150 forms via the Internet for the public to download, fill out and file. It publishes a Guide to Incorporation and Maine Marks and enables people to search a state database of corporate names to determine whether a certain name is available for use as a new corporation. These services are provided free of charge.

The division would like to offer additional services, such as electronic filing of corporate and other documents. Those services are on hold, however, until issues of security and authentication can be resolved. Currently, state law requires certain corporate filings, such as the incorporation papers and annual reports, to be filed with the signature of the person representing the corporation. Signatures received over the Internet, or digital signatures, are not acceptable under current law. A study commission that is meeting during this interim is expected to make recommendations on digital signatures, which may clear the way for development of electronic filing systems.

In the meantime, the division will examine ways to improve Internet services by enabling people to fill out the forms on computer as well as downloading them. It may also look at whether some types of forms are acceptable without signatures.

One additional issue that may need to be resolved before Internet filing is a reality is the issue of security for credit cards that may be needed to pay filing fees.

VII. Other Efforts to Improve Corporation Laws

Julie Flynn, Director of the Bureau of Corporations, Elections and Commissions of the Secretary of State, briefed the commission on legislation that will be proposed in the upcoming session to improve Maine law. The first is an update of Article 9 of the Uniform Commercial Code, the law that governs the filing of liens and other matters related to secured business transactions.

The other is a change to Maine law to equalize treatment between corporations and other types of business entities and to allow mergers among different types of business entities. These are aspects of our law that could be a deterrent to businesses filing in the most advantageous form or that could cause a corporation to file out-of-state, according to Ms. Flynn.

Current filing fees for limited liability companies are significantly higher than they are for corporations -- $250 versus $105 for initial filings. The proposal will equalize costs to provide greater choice of entity.

Current law also does not allow mergers among different types of business entities. To merge a corporation with a limited liability company (LLC), for example, the owners might be required to form a corporation and an LLC in Delaware, merge them in Delaware and then file to do business in Maine as a foreign limited liability company. Forcing this result is not beneficial for the companies or the State, which loses the incorporation. When the LLC law was first passed, it was not clear how 2 unlike entities could merge. Since then, other states have devised a way to make it work, and Maine can take advantage of that experience.

APPENDIX A

Resolve 1997, chapter 124

Draft Resolve to Support MSBA Update of the Maine Business Corporations Act

Whereas, corporations formed in Maine need to be governed by a law that allows them to operate smartly and efficiently in order to compete effectively in today's national and international markets; and

Whereas, the Maine Business Corporations Act, the law that governs how corporations organize and manage their affairs, was enacted 30 years ago; and

Whereas, there have been many changes in corporate activity, management and finance since enactment of the original law; and

Whereas, many of the laws that formed the basis for Maine's Business Corporations Act have been modified to react to those changes; and

Whereas, the Maine law has not been comprehensively examined in 30 years; and

Whereas, the Maine State Bar Association may undertake a project to comprehensively review and update the Corporations Act; and

Whereas, the Legislature finds that representatives of the public interest should be involved in the review and updating effort; now therefore, be it

Sec. 1. Support. Resolved: That the Maine State Legislature encourages and supports the Maine State Bar Association in its efforts to propose an updated Maine Business Corporations Act, for the purpose of acilitating business activity in the State of Maine; and

Sec. 2. Appointment of Liaisons. Resolved: That the President of the Senate shall appoint one member of the Senate and the Speaker of the House shall appoint one member of the House to serve as liaison to the Bar Association committee reviewing the Corporations Act; and

Sec. 3. Per Diem and Expenses. Resolved: That the legislators appointed as liaisons may receive the legislative per diem and expenses for each meeting of the Bar Association committee; and

Sec. 4. Report to Committee. Resolved: That the legislators appointed as liaisons shall, from time to time as appropriate, report on the Bar Association committee's progress to the Joint Standing Committee of the Legislature with jurisdiction over corporate law matters; and

Sec. 5. Involvement of Affected Parties. Resolved: That the Maine State Bar Association endeavor to ensure that all parties affected by the corporations act be represented in its deliberations, including small businesses, shareholders of private and public corporations, and the courts; and

Sec. 6. Goal of Revision. Resolved: That the committee endeavor to make the Maine Business Corporations Act a modern law that encourages Maine-formed corporations to continue to be incorporated here and encourages other Maine businesses formed out of state to move their incorporations here.

Sec. 7. Appropriation. Resolved: That the following funds are appropriated for the following purpose:

LEGISLATURE	**00-01**	**01-02**
Personal Services		
All Other		

Per diem and expenses for 2 liaisons to the Maine State Bar Association project to review, revise and update the Maine Business Corporations Act

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APPENDIX B

Summary of Senator Bennett's Concept Draft Bill

Summary of Senator Bennett's Concept Draft
Organized by Topic

Shareholder Voting, Derivative Suits
- Allow shareholder action by consent
- Allow cumulative voting
- Prohibit multiple classes of stock; Each share gets one vote
- Prohibit disenfranchisement of shareholders who own more than a certain percent of value
- Eliminate impediments to shareholder derivative suits

Directors -- Election, Composition of Board
- Allow cumulative voting
- Prohibit staggered or classified Boards
- Allow public shareholders to serve on nominating committees
- Require that a certain percentage of Directors of a corporation with a controlling shareholder be independent, nominated by independent shareholders

Pay for Directors, Officers, Managers
- Require that salary increases for management be tied proportionately to divided increases
- Require that directors be paid all or mostly in stock; prohibit pensions, endowments, consulting fees
- Prohibit change-of-control packages, such a golden parachutes
- Prohibit repricing of stock downward

Other Provisions
- Limit use of "poison-pill" anti-merger or anti-takeover provisions
- Require that a corporation be run for the owners; prohibit "stakeholder" provisions
- Prohibit the corporation from leaving the state for 10 years; and allow leaving only if approved by an 80% vote of shareholders

APPENDIX C

Comments from Institutional Shareholders and Investment Managers

Comments from Institutional Shareholders and Investment Managers

<table>
<tr><th>Organization</th><th>Comments</th></tr>
<tr><td>State of Wisconsin
Investment Board (SWIB)
13th largest U.S. public pension fund with assets of $65 billion; $49 billion invested in equities, especially in small-caps
Active in shareholder rights movement, although more often acts by negotiating with management and Board rather than sponsoring resolutions or running competing candidates for director</td><td>Sandy Nicolai
Director, Investor Relations Program
SWIB would support most of the concepts listed in the draft, with modification of the poison pill provision
SWIB has never taken on the issue of reincorporation. They would not actively pursue a program to get a company reincorporated in Maine, but they would not object to reincorporation here</td></tr>
<tr><td>TIAA-CREF
(Pension fund for teachers)</td><td>Ken Bertsch
Director of Corporate Governance

Will provide comments to Commission via telephone</td></tr>
<tr><td>California Public Employees
Retirement System (CalPERS)
Largest U.S. public pension fund, with assets of $160 billion
Leader in shareholder rights movement
Engages in a wide range of activism, including running a competing slate of candidates for Board of Directors</td><td>Kayla Gillan

Did not respond to letter and phone calls</td></tr>
</table>

Council of Institutional Investors • 100-member organization representing public pension funds and other public and private investment funds with combined assets of more than $1 trillion • Promotes good corporate governance • CII's policies and principles were included in the packet mailed to Commission members	*Ann Yerger* *Director of Research* • Shareholders would likely applaud the type of bill being considered, but corporations would loath it • Shareholders don't really have the power to force a corporation to reincorporate in a different state • Yerger believes this would discourage corporations from incorporating in Maine and that they would continue to be more interested in Delaware
Lens Investment Management, LLC • Portland-based "activist money managers" with institutional fund clients • Invests in stock that is underperforming, then works with managers and directors to achieve change that will improve the value of the stock	*Nell Minow, Principal* • Great idea, but it would be a long-shot; you'd have to add some sweeteners for the corporation as well as making it attractive for shareholders • Shareholder proposal to reincorporate would not be binding on directors • Delaware also has sophisticated judiciary which would be hard to duplicate • Benefit to Maine would be jobs, and collection of revenue from taxes and fees
Kahn Investments (private investment manager)	*Alan Kahn, Founder* • Has been enthusiastic about having some state adopt such a law for quite some time • Host state would get revenue from franchise tax; tax would be created at the same time as the law and would be paid primarily or exclusively by out-of-state businesses • Grandfathering existing corporations would avoid opposition from home corporations

	• To see if shareholders would make the effort, need to invite and have a dialogue with prominent major institutional investors, e.g., CalPERS • Proxy card is the clout that shareholders have; shareholder can also approach management to discuss reincorporation
Relational Investors, LLC (private investment manager)	Ralph Whitworth Did not respond to letter and phone calls
Ned Regan **Jerome Levy Economics Institute,** **Bard College**	*Ned Regan, Professor* First reaction is that it is doubtful that any shareholder activist would try to get a company to reincorporate in Maine; they would be working against their own interest

APPENDIX D

Letter to the Stanford Institutional Investors Forum

APPENDIX E

Letter from Mary Schendel, Chair of the Business Law Section of the Maine State Bar Association

APPENDIX F

Information about the Corporations Division of the Office of the Secretary of State