

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

COMMERCE COMMITTEE
PUBLIC HEARING

STATE CAPITOL
HARRISBURG, PA

IRVIS OFFICE BUILDING
ROOM 523

WEDNESDAY, NOVEMBER 10, 2021
10:00 A.M.

PRESENTATION ON HOUSE BILL 2057
TITLE 15: BUSINESS CORPORATION LAW & RELATED PROVISIONS

COMMITTEE MEMBERS PRESENT:

HONORABLE BRAD ROAE, MAJORITY CHAIRMAN
HONORABLE MIKE ARMANINI
HONORABLE ROBERT BROOKS
HONORABLE VALERIE GAYDOS
HONORABLE MIKE JONES
HONORABLE SHELBY LABS
HONORABLE CHRIS QUINN
HONORABLE PERRY STAMBAUGH

HONORABLE MICHAEL DRISCOLL, ACTING MINORITY CHAIRMAN
HONORABLE JOSEPH CIRESI
HONORABLE DARISHA PARKER
HONORABLE PERRY WARREN

MEMBERS PRESENT VIRTUALLY:

HONORABLE KEITH GREINER
HONORABLE MICHAEL PUSKARIC
HONORABLE CHRISTOPHER RABB

COMMITTEE STAFF PRESENT:

JENNIFER WEETER
EXECUTIVE DIRECTOR
MCCLAIN FULTZ
RESEARCH ANALYST
HEATHER RODGERS
LEGISLATIVE ADMINISTRATIVE ASSISTANT II

BETH HORNE-BEACHY
EXECUTIVE DIRECTOR
INDIRA RIDGEWAY
RESEARCH ANALYST

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*Pennsylvania House of Representatives
Commonwealth of Pennsylvania*

I N D E X

TESTIFIERS

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WILLIAM H. CLARK, JR. CHAIR AND REPORTER, TITLE 15/BUSINESS ASSOCIATIONS COMMITTEE SENIOR COUNSEL, FAEGRE DRINKER BIDDLE & REATH LLP.....	7

SUBMITTED WRITTEN TESTIMONY

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(See submitted written testimony and handouts online.)

P R O C E E D I N G S

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MAJORITY CHAIRMAN ROAE: Good morning. It's
exactly 10:00, so I am calling this hearing of the Commerce
Committee to order. House Bill 2507 pertains to the
Pennsylvania Business Corporation Law which is in Title 15.
With this legislation, Pennsylvania Law would be updated so
that it is more uniform with the laws in other states'
court decisions, comments from the PA Department of State
and making outdated language more modern are the driving
needs for this legislation.

Other states require businesses to file annual or biannual reports, but in Pennsylvania it's ten years. Some businesses are formed in other states, but they operate in PA also. Stockholders should know what their rights are with transactions such as mergers. Things like mandatory board meetings are very challenging when there're situations like COVID-19, but businesses do need to be able to conduct business. These types of things and others are addressed in the legislation. There is even some simple things in the legislation, such as replacing the term, microfilm, with copies.

23 Most people don't want microfilm today. There's
24 other stuff. Parts of the current law states, "His duties
25 as the director," as if all directors must be men. The

1 legislation changes it to, "The duties of a director," to
2 reflect the fact that women serve on boards also.

3 So, today we're going to have with us -- let me
4 find my stuff here. Yeah, we have with us William
5 Clark, Jr., and he's going to be giving a -- do you have a
6 PowerPoint presentation?

7 MR. CLARK: Yes.

8 MAJORITY CHAIRMAN ROAE: Okay. And then, also
9 before we start, Chairman Galloway is going to be delayed a
10 little bit, but if Acting Democratic Chair, Representative
11 Driscoll has any opening comments?

12 REPRESENTATIVE DRISCOLL: Thank you, Chairman.
13 And, welcome, Mr. Clark, for your participation in today's
14 public hearing. We certainly look forward to it.

15 Title 15 plays an important role in the strength
16 and vitality of Pennsylvania's business climate. The work
17 of the Pennsylvania Bar Association over the past few years
18 to comprehensively review and modernize Pennsylvania's
19 business corporation law is very important to our ability
20 to attract and retain businesses in Pennsylvania.

21 House Bill 2057 represents an extensive and much
22 needed overhaul of Title 15, which I'm certain will support
23 current and future business growth in Pennsylvania. In
24 short, the bill is good for business. Thank you for your
25 hard work and the work of your committee. I look forward

1 to both hearing your overview today and working in a
2 bipartisan way to advance this measure.

3 MAJORITY CHAIRMAN ROAE: Thank you,
4 Representative Driscoll. And it looks like you're ready,
5 Mr. Clark, so any time you would like to begin.

6 MR. CLARK: Sure. [inaudible]. Sorry. Aha,
7 that sounds much better. All right. I'm an old guy. You
8 can tell by the white hair.

9 Thank you all for your attention and for coming
10 today to learn about all this. Jen, if we could get the
11 PowerPoint up, we'll get started. There it is. All right.
12 Great. Thank you. Okay.

13 What I'd like to do today is provide for you an
14 orientation, both to Title 15 and also to House Bill 2057,
15 obviously, and give you, hopefully, a basic understanding
16 of what's going on in the bill, why it looks the way it
17 does, and the reasons for how it's been constructed and the
18 provisions that it contains.

19 So, let's begin with an overview of Title 15 in
20 the next slide. As you can see, there's quite a bit that
21 is housed within Title 15. There are a series of
22 provisions at the beginning of the Title which are Chapters
23 1 through 4, which have provisions that apply to all forms
24 of entities that can be created under Pennsylvania law.
25 And then, after you move into Chapter 5, and through the

1 end of the title, there are specific statutes dealing with
2 various types of entities. So you'll see, for example,
3 that the business corporation law is Chapters 11 through
4 19, the nonprofit corporation law is Chapters 51 through
5 59. In the 8,000s, in Chapters 82, 84, 86 and 88 are
6 statutes on unincorporated entities which include general
7 partnerships, limited partnerships, limited liability
8 companies and things.

9 Our focus today, if we can click once, are these
10 three sets of provisions. Now, why is that? And, why the
11 focus on those statutes in particular? Let's go to the
12 next slide, please. Over the past dozen years or more,
13 there have been a series of major revisions to Title 15,
14 beginning, first of all, in 2013 when the nonprofit
15 corporation law was revised, and the new statute dealing
16 with unincorporated nonprofit associations was added as
17 Chapter 91.

18 Then, the next year, the entity transactions law,
19 which is a statute that tells you how to do a merger or a
20 conversion of entities from one form to another was
21 enacted. And along with Chapter 3, Chapters 2 and 4 were
22 also enacted. And then in 2016, the most recent amendment
23 of Title 15 completely redid three major entity laws
24 dealing with unincorporated entities: Uniform Partnership
25 Act, Uniform Limited Partnership Act, Uniform Limited

1 Liability Company Act.

2 So, all of that has happened recently, or
3 certainly within the last decade or so. But you'll notice,
4 in that list there's nothing about business corporations.
5 And so let's go to the next slide, because if you back up
6 to the first slide that I began with, you'll see that over
7 the past ten years or more, we've taken care of revisions
8 of all the statutes that are grayed out on this slide.
9 But, that leaves, basically, the business corporation law
10 as well as some amendments that the Department of State
11 would like to see made to its particular filing provisions.
12 So, that's how we come today to now be focused on the
13 business corporation law.

14 When the unincorporated entity laws were enacted
15 in 2016, the Bar Association realized that it was time to
16 change its focus. And, it had been quite a while since
17 we'd visited the business corporation law, but
18 there's -- only so much time and energy can be devoted to
19 these kinds of endeavors. And it's a lot of work, but we
20 recognize that the BCL really needed to be looked at, at
21 this point.

22 The hope, actually, is that once we pass House
23 Bill 2057, we will have basically created the entire
24 infrastructure of Title 15, and we will have in place basic
25 state-of-the-art statutes for all of our entity forms. And

1 ideally, we will then be in a position where, instead of
2 coming to you with 200 pages or more, we can come to you
3 with very discrete amendments. We would actually like to
4 come to you every two years. I probably shouldn't tell you
5 that, because then you won't want to do this to hold off
6 that exercise. But, it -- obviously it would be much
7 easier to deal with. And, as both of the representatives,
8 the Chair and the Minority Chair, have already pointed out,
9 this is important for Pennsylvania generally, for our
10 economy. And it's not a partisan issue. It's just keeping
11 the infrastructure rolling and in good shape.

12 So, let's now go to the next slide. And I want
13 to just highlight for you a couple of points about
14 corporation law, generally. What is going on in the
15 business corporation law? The business corporation law is
16 focused on the relationship between the people who run a
17 corporation and the people who own the corporation. So,
18 the focus of the business corporation law is the -- on the
19 relationship. We -- lawyers refer to it as the internal
20 affairs of the entity. It's how the people have
21 responsibility to shepherd and superintend the investment
22 that's been made in the business, behave themselves and
23 conduct the affairs of the corporation and how they relate
24 to the owners.

25 That's important, because what we're dealing with

1 in Title 15 does not involve a lot of issues that,
2 honestly, I think we'd all recognize are much more -- I
3 don't want to say interesting. They're
4 certainly -- actually, I don't know a good way to describe
5 them; hot button, potentially partisan. Title 15 does not
6 deal with employees really at all. There's nothing about
7 wages, benefits. There's nothing about unionization,
8 collective bargaining. There's just none of that. Title
9 15 doesn't deal with Tort liability. There's nothing to do
10 with defective products. There's nothing to do with
11 environmental liabilities in Title 15. There's nothing to
12 do with criminal law.

13 Instead, the focus is on the governance of the
14 entity. And really, the focus is on creating a structure
15 and a framework that will promote the most effective
16 running of a business, right? So, the idea is that we want
17 to ensure that our businesses in Pennsylvania are run in a
18 way that is as harmonious as possible in the relationship
19 between the directors and the shareholders. And so that's
20 the focus of all of this.

21 Now, where does the corporation law come from?
22 Let's go to the next slide. There are four major sources
23 of the changes in House Bill 2057 that were looked to by
24 the Bar Association. So, over the past five years or more,
25 the Title 15 committee of the Bar Association has been

1 following changes that have occurred in the Delaware
2 corporation law, changes in the Model Business Corporation
3 Act. We've looked at the ALI Principles of Corporate
4 Governance, and we've looked at a product from the Uniform
5 Law Commission which produced in 2013 the Uniform Business
6 Organizations Code. And, I am going to show you samples of
7 what we've taken from each of those sources, to give you a
8 sense of how the law is developing and what the focus has
9 been, really nationally, around the country.

10 Most of you probably are aware that Delaware sets
11 the lead in corporation law in the United States. That has
12 historically been the case for almost 100 years at this
13 point. It's interesting to reflect on why that's the case
14 and why Delaware has developed that dominance. It is today
15 the case that over half of Delaware's annual state budget
16 is paid by fees for corporations that are incorporated
17 under Delaware law. There is a tax that Delaware imposes
18 on every corporation incorporated in Delaware. It's called
19 the franchise tax, and it produces an enormous amount of
20 money.

21 And, what it has done is given Delaware an
22 interest in striking a balance between the needs of
23 businesses on the one hand and investors on the other hand,
24 the needs of directors. And so, Delaware has become the
25 very adept at balancing these issues and this -- these

1 questions of the relationship within a corporation between
2 its management and owners. And so, it's a source of the
3 law generally around the country and certainly here in
4 Pennsylvania.

5 The Model Business Corporation Act which is
6 prepared by the American Bar Association has been adopted
7 in roughly 34 states around the country. It largely tracks
8 the Delaware model, and most of the provisions that we have
9 taken from Delaware are also things that were in the Model
10 Act. So, we're actually taking from both the Model Act and
11 Delaware. The ALI principles I'll talk a little bit more
12 about in a minute. They actually have been blessed by the
13 Pennsylvania Supreme Court in an interesting decision, but
14 we'll get to that shortly.

15 But, I'm going to actually begin by showing you a
16 provision that's in 2057 from the Uniform Business
17 Organizations Code. And, this is the one issue that, if I
18 were asked today, what might you hear about, what might you
19 hear people talking about, it's going to be this issue of
20 annual reports. So, let's go to the next slide.

21 Pennsylvania is in a very interesting position.
22 We are the lone outlier on the issue of annual reports. In
23 every state except Pennsylvania, every entity that's
24 created under that state's law must make a filing every
25 year, simply to confirm that it's alive, and also to

1 provide basic information. Essentially an address for the
2 business, and the name of at least one person who is
3 involved in managing the affairs of the business. And
4 that's just the rule everywhere except Pennsylvania,
5 interestingly.

6 Now, what is the most significant real-world
7 effect of the annual report? In each of those states other
8 than Pennsylvania, if a business fails to file an annual
9 report, what it means is that the state will come in and
10 mark its records to do what's called administratively
11 dissolve the corporation. It doesn't mean that the
12 corporation ceases to exist, but it's no longer considered
13 to be in good standing under the laws of the state. And
14 most importantly -- and this is the one real-world
15 consequence of all of this. When a business is
16 administratively dissolved, its name is no longer
17 protected.

18 So, let's assume for a moment that Representative
19 Driscoll has incorporated a corporation ten years ago, and
20 we have -- and it's in Pennsylvania, so we're under the
21 current system. And, let's assume that Representative Roae
22 wants to come along and organize a new business, and it
23 just so happens that Representative Roae would like to use
24 as the name for his corporation the name that
25 Representative Driscoll has used, okay? Pennsylvania law

1 protects the name of Representative Driscoll's corporation,
2 so Representative Roae cannot appropriate it, because he
3 was -- his corporation was in place first. However, there
4 are two provisions in Pennsylvania law that create a
5 mechanism whereby Representative Roae can actually obtain
6 the name of Representative Driscoll's corporation. We have
7 a system in Pennsylvania that says that every ten years, if
8 Representative Driscoll's corporation has not made any
9 filing with the Corporation Bureau, then its name becomes
10 available unless every ten years Representative Driscoll's
11 corporation makes a filing to say it's still alive.

12 So, if ten years go by and the corporation fails
13 to make that filing in Pennsylvania, the name becomes
14 available. That's very different than the situation in
15 every other state, where the annual report requirement
16 applies, because if you miss an annual report, then you
17 will be administratively dissolved, and your name becomes
18 available much earlier than every ten years. And, that's
19 generally accepted all around the country as a better rule,
20 because it's placing the burden, first of all, on the
21 existing company simply to comply with a fairly simple
22 filing. But, it also encourages the formation of new
23 businesses. It makes it easier to bring new corporations
24 to life, whereas in Pennsylvania you have to wait every ten
25 years for the name to free up.

1 There's actually another way you can also get a
2 name in Pennsylvania. The statute says that if you can
3 prove, by getting a certificate from the Department of
4 Revenue that, in my example, Representative Driscoll's
5 corporation has not filed a tax return for three years,
6 Revenue will give you a certificate, and you can then take
7 that to the Department of State and take the name. But if
8 you think about that, that's really kind of a nuisance.
9 You have to deal with Revenue, get them to give you the
10 certificate, then you go to State. And of course the
11 corporation may have filed a tax return even though it is
12 delinquent in its three-year filing.

13 So, it's a very complicated, very strange system
14 that has been in place for a very long time. You know,
15 this goes back probably 100 years or more. And so the
16 proposal is to make a change. And, Jen, let's go to the
17 next slide.

18 Because, what House Bill 2057 proposes is to
19 adopt the annual report provisions that were developed in
20 the Uniform Business Organizations Code. So, we've
21 actually looked to the Uniform Law Commission -- excuse
22 me -- and its work in creating what is generally recognized
23 as what should be kind of the standard approach and the
24 standard language.

25 And so, under the new system we would adopt

1 essentially exactly what every other state already does.
2 So, if a Pennsylvania entity does not file an annual report
3 within six months after it's due, then the entity is
4 administratively dissolved. And, there is also a provision
5 that says that if a foreign entity is registered to do
6 business in Pennsylvania, it can have its registration
7 administratively terminated if it doesn't register its
8 name. But, that's not as much of an issue as the domestic
9 entities. Now, next slide, Jen.

10 So, this is a change, right? This is probably
11 the one change that Pennsylvania businesses will notice,
12 and so we want to make sure that you understand it. And, I
13 also want to make sure you understand that because we're
14 aware that it's a change, we have made a number of extra
15 additions to the provisions on annual reports to ease the
16 transition, and to help Pennsylvania businesses get
17 comfortable with it.

18 So first of all, the effective date of the annual
19 report requirement is delayed for a year beyond the
20 effectiveness of the bill itself. So, everything in 2057
21 except the annual report provision will take effect under
22 the normal rules, but the annual report is delayed.

23 Secondly, as we've talked to the Department of
24 State about this -- and I should say that the Department of
25 State is very interested and very supportive of the annual

1 report provisions. But, we've focused them on how to ease
2 this transition, and they have agreed that they should
3 undertake to provide notice to every entity that's required
4 to file an annual report every year for the first five
5 years after all this takes effect. That will hopefully get
6 people's attention and begin to educate them on the need to
7 file the annual reports.

8 And then in addition, Department of State agrees
9 that even though the annual report filings will be required
10 when the law takes effect, they will hold off for three
11 years taking any action to administratively dissolve
12 corporations. Again, the thought is to help people
13 understand the benefits of the system, and also get used to
14 the additional requirement, so they won't administratively
15 dissolve anyone until at least four years after the bill is
16 enacted.

17 And then finally, Department of State also agrees
18 that for nonprofit entities, nonprofit corporations, and
19 unincorporated nonprofit associations and LLCs that are
20 nonprofits there should be no filing fee. So, for
21 nonprofits the filing fee is waived really in perpetuity.
22 There -- meaning that there is just an expressed provision
23 that the nonprofit entities do not pay. So, that's the
24 annual report provision.

25 Now, let me show you some samples of the other

1 things before we open things up for questions. I think one
2 of the things that will be most useful to Pennsylvanians is
3 a new provision on ratifying defective entity actions. I
4 have found instances where clients that I've worked with
5 have uncovered problems in their records and issues that
6 they couldn't demonstrate clearly. They couldn't show that
7 an action had been properly taken, and so the ratification
8 provision is designed to deal with actions that a
9 corporation or any other form of entity purported to take,
10 like issuing new shares of stock for example, or approving
11 a merger, or approving an amendment of its articles of
12 incorporation. Anything that is a major event in the life
13 of a corporation that was either not properly authorized,
14 or the entity is unable to demonstrate that it was properly
15 authorized.

16 So, this is a set of provisions that are designed
17 to both help when we know there's a problem, and also to
18 remove any uncertainty where there is a suspicion that
19 there is a problem, but we can't actually demonstrate or
20 know exactly what happened. That may be because it
21 happened a while ago. Records could be lost. All kinds of
22 things can happen.

23 But, the Model Act and Delaware have both adopted
24 this provision. There have actually been at least two
25 Delaware publicly traded corporations that have used the

1 Delaware ratification provision already to fix problems
2 that they became aware of.

3 Two points about all of this. First of all,
4 if -- when the ratification is approved, and you look at
5 the records in the Department of State for the entity, and
6 they are incorrect or need to be fixed, there is a
7 requirement in the ratification section that provides for a
8 filing to fix the public record, so that everything that's
9 available to the public and anyone who is dealing with the
10 corporation will know that things have been fixed.

11 Secondly, ratification always requires approval
12 of the people in charge of the corporation and, in most
13 instances, also requires approval of the owners of the
14 entity, just to make sure that their interests are
15 protected appropriately.

16 Okay, let's go to the next example. This again
17 comes from Delaware and the Model Act. And we've lived
18 through a very interesting time in the last number of
19 years, right? Think back to Hurricane Katrina, Superstorm
20 Sandy, COVID-19, the wildfires in California. And, there
21 seems to have been a lot of emergencies and disasters, and
22 that has caused people to focus on the question of, how do
23 we keep going? We've learned that emergencies can be
24 unexpected, unpredictable, but it's interesting that we've
25 learned that society can be very resilient. And in

1 particular, it's hard to imagine how we would have gotten
2 through COVID-19 for example without the internet and the
3 ability to Zoom meetings and to keep things functioning.

4 And so the question is, are the entity laws
5 sufficiently up to date that they deal properly with
6 emergencies when they may arise? And, it's interesting to
7 note that the provision giving emergency powers to
8 corporations came into the law back in the 1950s, which
9 is -- sadly, I can remember actually being in elementary
10 school in the '50s, and we had air raid drills, and we had
11 to get under our desks. I mean, you may remember that, but
12 there was an intense fear and worry that nuclear war would
13 disrupt business, and how do we keep things going? Now,
14 that's less of a worry today, but it's still a concern, and
15 obviously there are all these other problems that could
16 arise. Let's go to the next slide.

17 The first thing that 2057 does is to expressly
18 recognize an emergency may involve an epidemic or a
19 pandemic. If you read the existing provision in the BCL,
20 it really very clearly suggests that people were thinking
21 about a nuclear war, and of course we have moved on from
22 that. And now the test is made clear that for purposes of
23 the corporation law, emergency exists when you are unable
24 to assemble a quorum of the board of directors. And that
25 formulation has been adopted, because it also recognizes

1 what we've learned from COVID-19. So, corporations can
2 assemble their board via the internet and using Zoom, and
3 if they can, then there's no reason to provide special
4 governance rules, because everything is working properly.

5 But, if for example the electrical grid gets
6 knocked out, or -- I think it was just yesterday Comcast
7 lost service across most of the country for a couple hours.
8 I mean, all of these kinds of things can happen, and if you
9 can't get in a quorum of the board, then you ought to be
10 able to adjust your affairs appropriately. So, the
11 provision is made when there is an emergency to delay
12 shareholder meetings and payment of dividends, and to
13 permit the officers to take actions that otherwise might
14 require approval of the board and things. So, that's
15 emergencies.

16 Let's now go to the next slide, and the final
17 source of provisions that are included in 2057 -- major
18 source is the ALI Principles of Corporate Governance. Back
19 in the late 1990s -- I think it was '96 -- the Pennsylvania
20 Supreme Court issued an opinion that confirmed that the
21 Business Judgment Rule applies in Pennsylvania, and it
22 endorsed generally the ALI Principles of Corporate
23 Governance. And, the court said that it had studied the
24 work that the American Law Institute had done in particular
25 sections which happen to relate to derivative suits. But,

1 the court also suggested that further provisions of the ALI
2 principles are subjects that properly should find their way
3 into the law of Pennsylvania.

4 So, picking up on that development, that opinion
5 from 1996, House Bill 2057 adds to the statute an expressed
6 statement of the Business Judgment Rule which was the
7 actual issue before the court in the case. It was called
8 Cuker v. Mikalauskas. And, the Business Judgment Rule was
9 something, interestingly, that was not, and is not today
10 even, actually articulated in the statute. But, it's an
11 important rule that the courts have developed and have
12 applied for over 100 years, right? The whole purpose of
13 the Business Judgment Rule is to keep courts from becoming
14 embroiled in business decisions and business fights.

15 So, there have actually been cases long ago, back
16 in the late 1800s in Pennsylvania where shareholders have
17 sued directors, complaining that the directors made a bad
18 decision in building a new plant, right? And the court
19 looked at that and said, what do we know about building a
20 plant in your corporation, right? It doesn't make sense
21 for us as a court to come along and second guess. In fact,
22 the basic theory of the corporation law is that the
23 directors should be encouraged to take risks, because it's
24 by taking risks that you build the value of a business, and
25 you build our economy, and you try new products that are

1 untested and may not work, but if you do it properly,
2 that's to be encouraged.

3 And so, the last bullet on the screen is the way
4 the Business Judgment Rule actually is articulated. If the
5 directors act on an informed basis -- right? So they've
6 done their homework and know what's going on, and they're
7 acting in good faith, and the decision they're taking does
8 not involve self-dealing. So they're not on both sides of
9 the transaction, and their whole motivation would be
10 suspect. But, if they are disinterested, informed and
11 acting in good faith, as long as there is some plausible
12 basis for the decision that the directors have taken, that
13 should be good, or at least the court shouldn't second
14 guess it, because this will help build the Pennsylvania
15 economy. Taking risk is good. It's why we have, you know,
16 the tech world that we live in. It's why we have
17 automobiles. I mean, it's why we have basically
18 everything, is because people were visionaries and willing
19 to take risks. So, that's all here.

20 I'd like to stop at this point. I'd like to
21 thank you again for your attention. I do believe very
22 strongly that what Representative Roae and Representative
23 Driscoll said at the beginning is true and very important.
24 We have tried to construct these amendments in a way that
25 we think is good for Pennsylvania, is good public policy,

1 and we hope that you will give us your kind and thoughtful
2 consideration. And, thank you very much. We -- I, on
3 behalf of the Bar Association, really appreciate your time
4 and your taking interest in this.

5 MAJORITY CHAIRMAN ROAE: Well, thank you for your
6 testimony and PowerPoint presentation. I had a -- just a
7 general question. I might have missed it at the beginning,
8 but the recent revisions to Title 15 in 2013, 2014 and
9 2016, I assume the Pennsylvania Bar Association was
10 actively involved with those as well.

11 MR. CLARK: Sorry, yes. They came out of the
12 same operation that produced 2057. Yes. It -- let me just
13 say a word about that. It's a committee of lawyers from
14 across the state. Obviously there are lawyers from
15 Philadelphia and Pittsburgh, but there are also lawyers
16 from mid-state, several -- couple lawyers from Harrisburg.
17 There's a lawyer from Erie, lawyers from Wilkes-Barre. We
18 have tried to get representation from all corners of the
19 state, because we want to make sure that when we propose
20 amendments they are things that represent good public
21 policy, not just for large, publicly traded companies.
22 There are probably 200 Pennsylvania corporations that are
23 publicly traded in the securities markets. The largest
24 Pennsylvania publicly traded company is Comcast. But then
25 there are even more small companies and local businesses.

1 And so, we have been very careful to try and get the
2 perspective of both the really big and the smaller to craft
3 rules that will work generally for the economy.

4 So yes, it comes out of the Pennsylvania Bar
5 Association. It's a group of probably 25 lawyers that have
6 been working together for a long time.

7 MAJORITY CHAIRMAN ROAE: Okay. Well, we're going
8 to open up for questions now. First on the list is
9 Representative Stambaugh.

10 REPRESENTATIVE STAMBAUGH: Thank you for -- yes,
11 thank you. This is on? Yeah, it is now. Thank you. That
12 was very clearly presented, believe it or not. So,
13 congratulations to whoever put your PowerPoint together.

14 It was --

15 MR. CLARK: I'm actually not sure I do believe
16 it.

17 REPRESENTATIVE STAMBAUGH: Just --

18 MR. CLARK: My wife cautioned me that I should be
19 very deliberate. And mostly that's -- I said to her, I
20 don't -- I'm not worried about my audience out there.
21 I'm -- you know, if I tried to explain it to you or the
22 kids, you would walk away. But, these are dedicated public
23 servants that I'll be talking -- I'm getting myself in
24 trouble, aren't I? Sorry.

25 MAJORITY CHAIRMAN ROAE: This probably is one of

1 the most exciting hearings we ever had in all of our years
2 in Harrisburg.

3 MR. CLARK: Boy, I really hope that's not true.

4 MAJORITY CHAIRMAN ROAE: But go ahead,
5 Representative Stambaugh.

6 REPRESENTATIVE STAMBAUGH: But -- and -- yeah.

7 Anyway, the question deals with emergency --

8 MR. CLARK: Yes.

9 REPRESENTATIVE STAMBAUGH: -- hours of
10 corporations. I assume that is presidential or
11 gubernatorial disaster declaration would trigger those.

12 MR. CLARK: There is a -- an expressed statement
13 that a disaster declaration by -- and let me just tell you.
14 It's a state emergency under Federal or state law covering
15 a geographic area in which the corporation has its
16 principal office or a significant regional officer --

17 REPRESENTATIVE STAMBAUGH: Okay.

18 MR. CLARK: -- operation.

19 REPRESENTATIVE STAMBAUGH: Okay.

20 MR. CLARK: Yes.

21 REPRESENTATIVE STAMBAUGH: Thank you. Thank you.

22 MAJORITY CHAIRMAN ROAE: Representative Brooks?

23 REPRESENTATIVE BROOKS: Thank you, Chairman. I
24 have two questions. One, I thought you said in the
25 beginning -- now we have a bill, but I thought you said in

1 the beginning that you looked at this as putting together
2 several different bills for us to vote instead of just this
3 one. Was that because it would be easier to do it that
4 way, or --

5 MR. CLARK: So, we put together one bill, and as
6 we were putting it together we looked at a variety of
7 sources, right? So, what the ALI principles deal with are
8 not always the same issues that Delaware and the Model Act
9 have been making changes on.

10 So, what we are trying to do is to
11 comprehensively review the business corporation law, on the
12 hope that when 2057 passes we'll be in a position where
13 we'll be able to address just individual issues more easily
14 rather than large bills. The problem here is that we
15 haven't had the opportunity to look at the Business
16 Corporation Law for ten or 15 years, because of all the
17 other things that we were getting done. And, now that
18 we've gotten it all done, hopefully our task will be much
19 easier.

20 But, does that make sense? There -- so there are
21 various sources all funneling in various issues to kind of
22 tune up the whole BCL.

23 REPRESENTATIVE BROOKS: It's a pretty massive
24 job, I'm sure.

25 MR. CLARK: Yes, it was, and I -- maybe I could

1 just say a word of thanks to the Bar Association and to all
2 the people who participated, too. Because, it's a labor of
3 love by a lot of folks uncompensated, and not kind of
4 coming out of a partisan orientation at all, but wanting to
5 reflect their experience.

6 And what's -- you know, I mentioned that this
7 doesn't deal with employee issues and Tort liability and
8 things. In a lot of areas of the law, lawyers work -- for
9 example in labor relations, lawyers either work for
10 management, or they work for employees. And in Tort law,
11 generally lawyers work for plaintiffs or defendants. In
12 the area of corporation law it's very different, because
13 all of the lawyers that have been participating have
14 actually worked both for management at times, and on other
15 times for shareholders, right? Remember the tension in the
16 corporation law is between the responsibilities of
17 management and the owners. And we work both sides,
18 basically because rather than the issues being of a more
19 partisan or focused nature, right? Like you're either a
20 management/employer lawyer, or you're an employee lawyer.
21 In the corporation law, it's all financial interests that
22 are more mixed together, and it doesn't evenly divide
23 management versus owner. So, I actually think that that's
24 a good way to do this, because it brings us together, and
25 we all understand the issues, I think a little bit better,

1 because of our experience on both sides.

2 REPRESENTATIVE BROOKS: I think governance is the
3 real key. But now, I have two Pennsylvania companies.

4 MR. CLARK: Yes.

5 REPRESENTATIVE BROOKS: And I file 990s every
6 year, and I pay taxes every year, but this year I got two
7 requests for this ten-year refiling to make sure I keep
8 my -- I thought you said if you didn't do those things for
9 ten years they -- but I do all those things, and they still
10 pretend like I don't exist. So, they send me the notice
11 that I have to turn in this report or that I could
12 basically be nonexistent. I don't understand that.

13 MR. CLARK: And I don't have a good answer for
14 you. If you have made a filing in the Corporation Bureau
15 in the last ten years, you do not need to make that filing.
16 I don't personally know how much attention State put into
17 culling the list before they sent out that notice, but I'd
18 be happy to --

19 REPRESENTATIVE BROOKS: So you --

20 MR. CLARK: -- help you.

21 REPRESENTATIVE BROOKS: -- you would stick with
22 what you said rather than --

23 MR. CLARK: Yes.

24 REPRESENTATIVE BROOKS: -- what's happening to
25 me?

1 MR. CLARK: Right.

2 REPRESENTATIVE BROOKS: I -- it's not a big deal,
3 so I went ahead and filed and paid and everything, just
4 simply because I didn't want to take the risk. But I agree
5 with you. It's probably the state isn't that good at
6 figuring these things out.

7 MR. CLARK: Well --

8 REPRESENTATIVE BROOKS: And maybe that's why you
9 want to change it.

10 MR. CLARK: Well, it is. And, we want to --
11 State is very interested in having a better handle on the
12 entities that still exist and are important for
13 Pennsylvania because they're doing things. And we
14 really -- none of us -- no one in Pennsylvania really
15 knows, of the millions of entities that have been created
16 for the last 200 years, which ones are still active. And
17 the annual report system is going to significantly help
18 that, and it's going to really significantly enable us to
19 get a better handle on the Pennsylvania economy.

20 Of course, as you can imagine, getting ready for
21 that is one of the reasons why we've delayed the
22 effectiveness of the annual report itself for a year,
23 because there's going to need to be computer programming
24 and things, and we're going to need to test it to make sure
25 it works, and then we're going to have another three years

1 when people's names are not going to be at risk while we
2 learn to sort it all out. But eventually, the brave new
3 world hopefully is one that we'll enjoy living in.

4 REPRESENTATIVE BROOKS: The one thing that I'm
5 kind of concerned about is, you said, you know, with the
6 change, for the first four or five years they'll give you
7 notice of having to file. But, you know, I believe they've
8 got to give you notice all the time, simply because it's
9 important that people have some kind of notice to make sure
10 it happens. Fortunately, I have accountants that --

11 MR. CLARK: Right.

12 REPRESENTATIVE BROOKS: -- worry about that kind
13 of thing, but, you know, I do believe notice becomes a very
14 important part of any --

15 MR. CLARK: So, I would be more than happy to
16 raise that issue with State. In fact we will, to suggest
17 to them that rather than just for five years it be an
18 ongoing obligation. I have no real fight with that. You
19 know, it's all a public service for Pennsylvania
20 businesses.

21 REPRESENTATIVE BROOKS: Thank you.

22 MAJORITY CHAIRMAN ROAE: Okay. Next we have
23 Representative Jones.

24 REPRESENTATIVE JONES: Thank you, Chairman. I
25 thought you did a very good job as well, so tell your wife

1 you did a great job, especially given the dry nature -- the
2 inherently dry nature of this -- of the material. I have a
3 few things here. I just -- I -- hopefully you can answer
4 them fairly quickly. Mainly just some sanity checks. One
5 dovetails with Representative Brooks' concern there at the
6 end.

7 You know, the name of a corporation can --
8 especially -- any corporation, but a small business,
9 it -- you know, it's pretty important.

10 MR. CLARK: Yes.

11 REPRESENTATIVE JONES: So, I'm less -- I mean,
12 obviously there's all kinds of precautions, waiting five,
13 six years, whatever this adds up to, to implement it. But,
14 once it's implemented, if taken at face value, this is
15 saying, you don't file the report, we're going to start to,
16 nearly immediately -- I'm not sure what the right word was.
17 It wasn't -- I guess --

18 MR. CLARK: Dissolve.

19 REPRESENTATIVE JONES: -- administratively
20 dissolve.

21 MR. CLARK: Yes.

22 REPRESENTATIVE JONES: Not the corporation -- and
23 that there be -- you have like six months after the due
24 date. Well, I can see some scenarios where, you know, it's
25 sort of a one-man band, and the person gets sick, or

1 they're not aware of this, or whatever. I think there
2 ought to be -- so, I see no reason we'd have to be in that
3 much of a hurry to administratively dissolve. So, I just
4 want to echo my colleague's comments.

5 Do you have to show that you just exist, or that
6 you have activity?

7 MR. CLARK: It -- merely filing the form is
8 enough of an indication that you're still out there.

9 REPRESENTATIVE JONES: So, even if you had no
10 transaction? I mean, I have a --

11 MR. CLARK: If you --

12 REPRESENTATIVE JONES: -- a business much smaller
13 than Rep Brooks' I'm pretty sure, since mine has zero
14 revenue, but -- the last couple years. But, I wouldn't
15 really want to lose the name.

16 MR. CLARK: No, you wouldn't.

17 REPRESENTATIVE JONES: And I --

18 MR. CLARK: You want to keep the name.

19 REPRESENTATIVE JONES: And I don't really want to
20 get rid of it, because I might need it, you know, down the
21 road. Okay.

22 MR. CLARK: May I --

23 REPRESENTATIVE JONES: Yeah.

24 MR. CLARK: Sorry. I didn't explain or lay out
25 for you the full system. There is also provision that the

1 department must send notice to an entity when it's moving
2 to dissolve it, which hopefully will also, you know, be a
3 more targeted message to the entity.

4 REPRESENTATIVE JONES: Yeah, and that might
5 even -- you know, maybe should require, like picking up the
6 phone or something, too. I don't know. We're not going to
7 have to resolve it all here, but it ought to be a fairly
8 high bar to take somebody's name in short order. If you
9 haven't heard from them from three years, that's a little
10 different. So that's -- I think --

11 MR. CLARK: No, I -- and --

12 REPRESENTATIVE JONES: -- we've made that --

13 MR. CLARK: -- as I said, I'm happy to review all
14 this with --

15 REPRESENTATIVE JONES: Yeah, we --

16 MR. CLARK: -- State, but --

17 REPRESENTATIVE JONES: I think we have a -- well,
18 certainly Rep Brooks and I would agree and appreciate that.

19 MR. CLARK: Most would.

20 REPRESENTATIVE JONES: Is it -- you -- what if
21 you're sitting there, and you're filing tax returns, and
22 you're doing all kinds of other things that make it very
23 clear that you exist, but you don't fill this form out?
24 They take your name anyway?

25 MR. CLARK: That's the way it works in every

1 other state. Yes.

2 REPRESENTATIVE JONES: Okay. And then speaking
3 of other states, if a state has its name -- if -- for
4 whatever -- if a business is doing business here, but
5 they're not a Pennsylvania corporation, this still applies
6 to them?

7 MR. CLARK: If --

8 REPRESENTATIVE JONES: If they're approved to do
9 business here?

10 MR. CLARK: If it's a Delaware corporation
11 that -- and there are a lot of Pennsylvania businesses that
12 are incorporated in Delaware, right? And if they're doing
13 business in Pennsylvania of a certain amount or nature,
14 then they're required to register with the Department of
15 State as a foreign company. And if they do not file an
16 annual report, then they have their registration
17 terminated, which means that their name again frees up.
18 But, as soon as they reregister and make up the deficiency,
19 their name is protected again.

20 REPRESENTATIVE JONES: Yeah.

21 MR. CLARK: So it -- and --

22 REPRESENTATIVE JONES: Yeah, because you can have
23 a -- I mean, in the extreme. I don't want to get too in
24 the weeds, but I just want to sanity check. I can --

25 MR. CLARK: Yeah.

1 REPRESENTATIVE JONES: -- theoretically have the
2 right to my name in 49 states, but Pennsylvania revokes it,
3 and somebody comes in and grabs it for use in Pennsylvania?

4 MR. CLARK: Yes, and that's actually the rule in
5 49 states already.

6 REPRESENTATIVE JONES: Okay.

7 MR. CLARK: It's --

8 REPRESENTATIVE JONES: I mean, obviously, I
9 assume it's not a huge problem, or they wouldn't be doing
10 it. I just think it feels a little bit like a solution
11 looking for a problem. But, I do understand there's
12 some -- maybe some bad actors out there floating around if
13 they're not active.

14 My last question on the emergency, the paying of
15 dividends in particular under an -- do you just simply have
16 to say an emergency exists, or you have to demonstrate that
17 you couldn't function? Because, you know, COVID, we had an
18 emergency for a year and a half, but there was no reason
19 not to pay dividends.

20 MR. CLARK: Yes. And, you only get the benefit
21 of the emergency statute for those periods when you cannot
22 assemble a quorum of your board of directors. So COVID for
23 example actually, for most corporations, was probably not
24 an emergency, because of the world in which we live now
25 with Zoom. So --

1 REPRESENTATIVE JONES: Are you confident that the
2 bill as proposed clarifies that? That it's not -- really
3 doesn't much --

4 MR. CLARK: Yes.

5 REPRESENTATIVE JONES: -- matter whether our
6 Governor did or did not declare something? It matters
7 whether you can or can't do business and cut an electronic
8 payment for a dividend, for example?

9 MR. CLARK: Yes. That's -- the basic question is
10 whether you can assemble a quorum of your board. And if
11 you can, then there's no reason why we need to change any
12 of the rules. But as I suggested, you know, if Comcast is
13 down for a month -- won't happen, but if the electric grid
14 is down, you know, after a hurricane, and you don't have
15 electricity, you can't get on the internet, then you've got
16 a real emergency. And at that point, for as long as you
17 can't assemble a quorum of your board, you have an
18 emergency.

19 REPRESENTATITVE BROOKS: Yeah, so you can't,
20 again, issue a dividend without the board approving the
21 dividend. That's the key.

22 MR. CLARK: Yeah, that's the problem. So --

23 REPRESENTATIVE JONES: No, that -- I appreciate
24 that. Because, the mere existence of an emergency, you
25 know, doesn't mean you can't, you know --

1 MR. CLARK: Do things.

2 REPRESENTATIVE JONES: -- have a Zoom meeting --

3 MR. CLARK: Right.

4 REPRESENTATIVE JONES: -- or cut a dividend
5 check. You know, I just wanted to clarify --

6 MR. CLARK: Right.

7 REPRESENTATIVE JONES: -- that it needs to go
8 beyond just an emergency, but an emergency that's
9 preventing you from doing business. Thank you.

10 MR. CLARK: That's exactly what we're trying to
11 say. Yes.

12 MAJORITY CHAIRMAN ROAE: Representative Gaydos?

13 REPRESENTATIVE GAYDOS: Thank you, Mr. Chair.
14 And also, thank you, Mr. Clark, for addressing this. It's
15 certainly -- as somebody -- my -- like myself who has
16 worked with a lot of startup companies, companies do come
17 and go. And, sometimes waiting ten years to release those
18 records and have somebody else have a name of a company --
19 I mean, I know -- minor thing -- is good. So, I commend
20 you for attempting to --

21 MR. CLARK: Right.

22 REPRESENTATIVE GAYDOS: -- to clean this up. My
23 colleagues actually asked some of the questions that I have
24 concerns about as well. And I know, you know, if 49 other
25 states that do things that -- sometimes that's an

1 indication that it's something that we should be doing.

2 But, I also believe, you know, the old adage of, if
3 everybody jumps off a bridge, are you going to do that,
4 too? But in this case I know that's a little different.

5 But, my concern is, again, the amount of
6 paperwork and notices going back and forth. And as a small
7 business owner, it's just -- it -- sometimes it's really
8 just exacerbated by, you know -- or -- excuse me. Not
9 exacerbated, but it's exhaustive to have paperwork
10 going -- coming and going, and having to file these things.

11 In this, on Page 9 -- so it says, the Department
12 of State is required to deliver notice to each entity to
13 file an annual report for the first five years after the
14 annual report takes place. But then it says, this --
15 they're prohibited from administratively dissolving until
16 three years after the annual report and then, similarly,
17 prohibited three years from terminating the registration.
18 Seems like there's a lot of overlap there, and there's a
19 lot of paper going forth. And if you have to do it every
20 year, then every five years, and then it's every three
21 years, I -- how does that -- I mean, maybe I need like a
22 matrix to kind of figure that out.

23 MR. CLARK: Yeah. Let me try, quickly. So, a
24 year after the bill passes, the annual report kicks in.

25 REPRESENTATIVE GAYDOS: Okay.

1 MR. CLARK: And at that point, for the next five
2 years, State has to notify every entity that has the
3 obligation that they need to file. So they'll send out a
4 notice for five years to all those Pennsylvania businesses,
5 right? And for the first three years after it takes
6 effect, businesses that don't respond and don't make the
7 filing will not lose the right to their name. So, State is
8 delayed from really fully implementing the system until
9 three years. Then, at the three-year point they'll begin
10 to take the names away, but they're still required to give
11 notice for another two years to just encourage and prod
12 people along.

13 This is what they proposed, and they think that
14 they can make this work and that it is the right system.
15 But it -- you know, I've already heard enough comments that
16 if people want to, you know, get State's view on this we
17 can have further discussions.

18 REPRESENTATIVE GAYDOS: Actually I -- that
19 actually sounds reasonable. So, I'm not objecting to it.
20 It just -- as a small business owner, it's sort of -- you
21 know, we're subjected a lot of times to death by a thousand
22 cuts, and --

23 MR. CLARK: Understood.

24 REPRESENTATIVE GAYDOS: -- you know, sometimes
25 when people say that, oh, it's only \$10, or it's only a

1 filing fee, it's only -- you know, it just -- and a year
2 can go by, and in a small business, particularly a startup
3 company, a year goes by really quickly, and here you're
4 filing paperwork again. And so it is frustrating, but I do
5 understand the need for this to be done, so I commend you
6 for your efforts in looking at it and --

7 MR. CLARK: And --

8 REPRESENTATIVE GAYDOS: -- willingness to address
9 these issues.

10 MR. CLARK: Yeah. If I can make one comment? I
11 would be willing to bet that you may have some portfolio
12 companies that are incorporated in Delaware or in other
13 states. And, the only thing I would offer is that they are
14 already subject to this nonsense.

15 REPRESENTATIVE GAYDOS: Yes, correct.

16 MR. CLARK: Right? So --

17 REPRESENTATIVE GAYDOS: Correct.

18 MR. CLARK: -- this nuisance is something that
19 they at least are used to dealing with.

20 REPRESENTATIVE GAYDOS: Correct.

21 MR. CLARK: Yes.

22 REPRESENTATIVE GAYDOS: Correct. Thank you.

23 MR. CLARK: Yeah.

24 MAJORITY CHAIRMAN ROAE: Representative Parker?

25 REPRESENTATIVE PARKER: Hi. Thank you. And you

1 do have a great wife. One of the things I just want to ask
2 was -- I don't know if you can hear me. Maybe that's
3 better. Has NFIB or an organization similar been consulted
4 for you to get to this point?

5 MR. CLARK: We have not recently been in contact
6 with the NFIB. The prior bills as they were moving
7 through, in fact, were reviewed with NFIB, the Chamber, the
8 PICPA, the accountants; you know, a variety of groups.
9 Honestly, we're at the beginning of the process. I would
10 not expect any problem from them at all. I mean, my view
11 would be that we have tried to construct something that
12 they would be very strongly in support of. But, I can't --
13 I cannot tell you today that that's the case.

14 REPRESENTATIVE PARKER: I mean, for this type of
15 situation, I would highly recommend that you just involve
16 and include them. Because I'm thinking of -- personally,
17 from my district there are many, many small businesses.

18 MR. CLARK: Yes.

19 REPRESENTATIVE PARKER: And I'm just thinking of
20 the -- There -- a lot of different paperwork that they have
21 to file on a daily basis, or even for when they would have
22 to apply for certain things. It's just to give everybody a
23 fair option before something like this happens. And even
24 for the warning and a notification of what you, you know,
25 recommended today. So, I just definitely would like to

1 make sure that they're included, because each one of
2 the -- those organizations have small business components,
3 and even small business supports for which are proposed.
4 And so I just want to make sure that they're included.

5 MR. CLARK: Thank you. We will definitely pursue
6 that. Very good.

7 REPRESENTATIVE PARKER: Absolutely.

8 MR. CLARK: Very good, Counsel. Thank you.

9 MAJORITY CHAIRMAN ROAE: And also, you know,
10 different organizations, they monitor the legislation that
11 we're working on here, just like the --

12 MR. CLARK: Yes.

13 MAJORITY CHAIRMAN ROAE: -- Bar Association does.
14 So, if people want to weigh in, they will. And then also,
15 the committee staff, you know, usually seeks input from
16 different organizations that might be impacted and asks for
17 input. And sometimes organizations send input, you know,
18 when they're not asked, which is good, too. And -- but
19 yeah, hopefully everybody that wants to weigh in will weigh
20 in.

21 I don't see any other members that have
22 questions, and we do have session in about five minutes.
23 Is there anybody else? No? Okay. So, all right. Well,
24 thank you again, sir, for your --

25 MR. CLARK: Thank you.

1 MAJORITY CHAIRMAN ROAE: -- testimony, and I
2 appreciate it. And, I will adjourn this hearing.

3 MR. CLARK: Thank you very much.

4

5 (The hearing concluded at 11:00 a.m.)

1 I hereby certify that the foregoing proceedings
2 are a true and accurate transcription produced from audio
3 on the said proceedings and that this is a correct
4 transcript of the same.

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