

Improving New Jersey's M&A environment

Tax and legal changes would create a favorable climate

BY —
JOHN AIELLO

Merger and acquisition activity declined substantially in New Jersey in 2009. The administration of Gov. Chris Christie took a step in the right direction by voting on March 16 to end the 4 percent corporate tax surcharge, but more can be done. I offer the following five specific solutions:

- **Create and maintain a favorable tax environment for business, while addressing tax issues implicated by mergers and acquisitions.** First, allow tax attributes to survive a merger. The current New Jersey rule provides that tax attributes of a target company, including tax credits and net operating losses, cannot be carried forward and do not survive a transaction unless the target company survives. This rule should be amended so that an acquirer can take advantage of these tax attributes. Otherwise, deal structures are utilized that are not always the most appropriate for the transaction.



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Second, adopt the so-called “single sales factor” rule to determine business income allocable to and taxable by New Jersey. Other states have adopted the “single sales factor” rule that focuses only on sales that occur within their borders. New Jersey, which takes into account property, payroll and sales in New Jersey in allocating business income, should embrace this rule as well. Otherwise, the state will continue to discourage companies from locating a significant part of their work force and property in New Jersey.

- **Facilitate compliance with the N.J. Industrial Site Remediation Act by fostering the new Licensed Site Remediation Professional (LSRP) program.** Compliance with the Industrial Site Remediation Act (ISRA) has been a burden in certain M&A transactions, resulting in time delays and additional expense. Under the Site Remediation Reform Act (SRRRA) adopted by the New Jersey legislature in 2009, a Licensed Site Remediation Professional, not the state’s Department of Environment Protection, supervises the remediation of sites and issues a final determination. This program was created to expedite the process and should be supported and developed to eliminate costly and time-consuming delays associated with ISRA compliance.

- **Amend the New Jersey Business Corporation Act to make it more consistent with the Delaware General Corporation Law.** Over the years, the New Jersey Business Corporation Act (NJBCA) has been revised to be consistent with the Delaware General Corporation Law (DGCL), which is considered very flexible when structuring a merger or acquisition transition or otherwise addressing governance matters that relate to such transactions. More can be done to improve the NJBCA by making it more consistent with the DGCL.

- **Provide a dedicated forum for the resolution of business disputes.** The time has come to create a specialized court in New Jersey that can adjudicate the unique aspects of a business dispute. This expansion of an already excellent court system would distinguish New Jersey as a state where, among other things, business disputes can be promptly addressed, which is oftentimes vital to successful resolution.
- **Improve responsiveness of state government.** Currently, tax clearance certificates, which are oftentimes the linchpin to completing a corporate transaction, are issued by the Division of Taxation, but must be processed by the Division of Revenue to complete a transaction. Better communication between the Division of Taxation and the Division of Revenue through improved information technology systems will result in a better environment for transactions in New Jersey.

Implementing these measures will play an important role in returning New Jersey to its former status as a national business leader. New Jersey has significant resources and should be in a better position to attract acquirers of companies currently doing business here, and to otherwise facilitate merger and acquisition transactions taking place in New Jersey. These transactions can make capital available to New Jersey companies that have the potential to grow and create job opportunities for the talented and hard-working people who reside here. — M&A

John A. Aiello, chair of Giordano, Halleran & Ciesla's Corporate and Securities Law Practice Area, focuses his practice on corporate and securities law matters, including mergers and acquisitions. He is a member of the Board of Directors and past chair of the Business Law Section of the New Jersey State Bar Association and a member of the Board of Directors of the Association for Corporate Growth, New Jersey Chapter. He can be reached at jaiello@ghclaw.com. The author acknowledges John C. Genz, CPA, MST of Amper Politziner & Mattia, LLP for his input on tax issues.