

Client Alert

AUGUST 2009

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Summary of 2009 Amendments to the Connecticut Business Corporation Act

Amendments (the “Amendments”) have recently been made to the Connecticut Business Corporation Act (the “CBCA”) and will take effect on October 1, 2009. The following memorandum summarizes the most significant of these amendments.

The majority of the Amendments can be sorted into one of three categories: (1) Shareholder Action; (2) Directors’ Matters; and (3) Appraisal Rights. The Amendments are summarized according to these categories, with additional significant amendments discussed in a fourth category, (4) Other Significant Amendments.

(1) Shareholder Action

Currently, under Section 33-698 of the CBCA, notice of a proposed shareholder action must be given not less than twenty nor more than fifty days before the date that consents are to become effective. The Amendments completely strike that requirement. However, under the Amendments, when actions are taken by less than unanimous written consent, non-consenting shareholders—including non-voting shareholders—must be notified in writing of the action taken by the corporation within ten days of the delivery to the corporation of written consents sufficient to take the action or on any later date tabulation of consents is completed if so provided by the certificate of incorporation, bylaws or resolution of the board. The CBCA currently allows one-tenth of the voting power of all shares to demand—at least five days in advance—that an action not be taken by written consent; if such a threshold is met, the action needs to be decided at a meeting of the shareholders. This requirement is also deleted by the Amendments. Furthermore, under Section 33-697 of the CBCA, the Superior Court is currently able to order a meeting to be held by any corporation upon application of a shareholder entitled to participate in an annual meeting where no such meeting was held within the earlier of six months after the end of the corporation’s fiscal year or for fifteen months after its last annual meeting. Under the amended Section 33-697, the Court may only do so if directors were not elected by written consent in lieu of such a meeting during that same time period.

While the CBCA currently requires unanimous written consent for a director to be elected without a meeting of the shareholders, the Amendments will permit a corporation’s certificate of incorporation to provide that directors may be elected by less than unanimous written consent, unless the corporation’s certificate of incorporation authorizes shareholders to cumulate their votes when electing directors, in which case directors may not be elected by less than unanimous written consent.

Under current Section 33-698 of the CBCA, the record date for determining shareholders entitled to take action by written consent without a meeting is the date that the first shareholder signs the consent. The Amendments change this requirement such that the record date will be established as the first date on which a signed written consent is delivered to the corporation. However, unless the bylaws specify, and if prior board action is required respecting the action to be taken without a meeting, the record date is the close of business on the day the board resolved to take the prior action.

CLIENT ALERT

Summary of 2009 Amendments to the Connecticut Business Corporation Act

CONTINUED



(2) Directors' Matters

Under current Section 33-739 of the CBCA, initial directors' terms expire at the first shareholders meeting at which directors are elected, and all other directors' terms expire at the subsequent annual shareholders meeting following their election. The Amendments allow the certificate of incorporation (or a public corporation's bylaws) to specify shorter terms. Furthermore, despite a director's term expiring, he or she can currently continue to serve until a successor is elected and qualifies or until there is a decrease in the number of directors; the Amendments will allow a corporation's certificate of incorporation (or a public corporation's bylaws) to specify otherwise.

Under Section 33-744 of the CBCA, a vacancy that occurs on the board may be filled by the shareholders or by a majority of the remaining directors. The Amendments specify that where a vacant office was held by a director elected by a voting group of shareholders, and where that office is filled by the directors, only the directors elected by that voting group will be entitled to fill the vacancy. This is in addition to the current requirement that if the same vacancy is filled by the shareholders, only the holders of shares of that voting group are entitled to vote to fill the vacancy.

Finally, the Amendments make some changes regarding the election of directors of a public corporation. Currently, unless a public corporation's certificate of incorporation provides otherwise, directors will be elected by a plurality of votes cast by shares entitled to vote at a meeting at which a quorum is present. Under the Amendments, a public corporation may elect in its bylaws to choose directors by cumulative voting—allowing each share to cast as many votes for or against a candidate as there are director positions to be filled unless there are more candidates for election than the number of directors to be elected or the board determines with respect to a candidate before the notice of meeting is given that the individual's candidacy does not create a bona fide election contest. Where a director is elected by cumulative voting but receives more votes against than for election, the director's term will terminate on the earlier of ninety days from the date on which the voting results are determined or the date on which an individual is selected by the board of directors to fill that office.

(3) Appraisal Rights

Where corporate actions that trigger appraisal rights are to be approved by written consent, Section 33-860 of the Amendments requires that the corporation provide written notice to each record shareholder—including non-voting and non-consenting shareholders—that appraisal rights are, are not or may be available; if appraisal rights are or may be available, the corporation must include a copy of the Sections of the CBCA dealing with appraisal rights. Furthermore, if the corporate action is to be approved by less than unanimous written consent, a shareholder who wants to assert appraisal rights with respect to any class or series of shares may not execute a consent in favor of the proposed action with respect to that class or series of shares.

CLIENT ALERT

Summary of 2009 Amendments to the Connecticut Business Corporation Act

CONTINUED



Currently, if any holder of shares as of the date of the first announcement to shareholders of the principal terms of a proposed transaction exercises appraisal rights, the corporation must pay its estimation of the fair market value of those shares in cash to the holder in advance of the appraisal proceedings. Any person who acquires shares after that date is not entitled to any payment until the appraised proceedings are complete. The Amendments make it clear that this date may be prior to the date the corporate action became effective.

The Amendments expand the list of situations in Section 33-856 for which appraisal rights are not available to include shares that are issued by an open-end management investment company registered with the SEC under the Investment Company Act of 1940 where those shares may be redeemed at the holder's option at net asset value.

(4) Other Significant Amendments

(a) Communication/Delivery of Information

The Amendments also simplify and modernize delivery of information. The Amendments permit corporations to deliver financial statements electronically rather than just by mail if the corporation has permission to do so from the shareholder or, in the case of a public corporation, the corporation delivers the financial information in a manner permitted by applicable rules and regulations of the SEC.

Furthermore, where multiple shareholders share a common address, the Amendments permit the corporation to deliver only one copy of relevant written notices provided that each of the shareholders consents to delivery of a single copy and the notice is addressed to each shareholder individually or in a form to which each of the shareholders has consented. A shareholder's consent to receiving a single copy at the common address is deemed given upon the shareholder's failure to object by written notice to the corporation within sixty days of the corporation's notice of its intention to send single copies

(b) Merger

Currently, Section 33-818 of the CBCA allows a domestic parent corporation owning at least 90% of the voting power of each class and series of a domestic or foreign corporation subsidiary to merge the subsidiary into itself or another such subsidiary, or merge itself into the subsidiary, unless the certificate of incorporation of any of the corporations provides otherwise or, in the case of a foreign subsidiary, approval by the foreign subsidiary's board or shareholders is required by the law under which the subsidiary is organized. Subject to the same exceptions, the Amendments will permit a domestic parent to execute such a merger without the approval of the board or shareholders of the subsidiary.

(c) Dissolution

The Amendments eliminate the Section 33-896 requirement that the Superior Court must dissolve a corporation in a proceeding by a holder or holders of shares having voting power sufficient under the circumstances to dissolve the corporation pursuant to the

CLIENT ALERT

Summary of 2009 Amendments to the Connecticut Business Corporation Act

CONTINUED



certificate of incorporation. Also, where a shareholder or director establishes certain facts in a lawsuit that currently require the Court to dissolve a corporation, the Amendments permit rather than require the Court to dissolve the corporation. With respect to public corporations listed on the NYSE, AMEX or NASDAQ, or those held by at least 300 shareholders with a public float of at least \$20M (excluding shareholders owning more than 10% of the shares), the Amendments eliminate the Superior Court's authority and/or duty to dissolve.

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