

**Questions
or Assistance?**

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Recent Updates to Connecticut's Business Corporation Act

Connecticut has adopted a series of changes to its Business Corporation Act (Public Act 09-55) which implement many of the recent revisions to the Model Business Corporation Act. The Connecticut amendments will go into effect on October 1, 2009.¹

Public Companies

The following changes primarily affect public companies:

Optional Modified Plurality Voting for Directors.

The amendments permit a public corporation to adopt a bylaw which provides that directors will be elected by a plurality of the votes cast, but that a nominee who receives more "against" than "for" votes will only serve a maximum of ninety days, unless such person is re-appointed by the board of directors. This change reflects a recent trend among public companies, in response to shareholder pressure, to give shareholders a real choice in director elections, without adopting a full-blown majority voting standard. Shareholder activists have complained that the traditional plurality voting standard (i.e., whichever directors receive the most votes win, even if shareholders "withhold" a majority of the votes out of protest) disenfranchises them. However, public companies have resisted calls to switch over to a majority voting system, because it could lead to "failed elections" with no winners. As a compromise, many public companies have adopted a bylaw which retains

the traditional plurality voting standard, but modifies it by allowing shareholders to vote "for" or "against" candidates. A director who is elected by virtue of receiving a plurality of the votes, but who receives more votes "against" than "for", may continue to serve only until the board selects "any qualified individual" to replace that director, and in no event more than ninety days.

Under the Connecticut amendments, a "modified plurality voting" bylaw may be adopted by the board or by the shareholders, but if it is adopted by the shareholders, it can only be repealed by the shareholders. Consequently, boards of directors which anticipate that the company's shareholders may propose such a bylaw would be well-advised to adopt one so as to retain the ability to repeal it without having to obtain shareholder approval.

"Householding" of Shareholder Notices.

The amendments now permit corporations to send a single copy of notices or other reports to shareholders that share a common address so long as the shareholders have consented to single copy delivery. A shareholder's failure to object within sixty days of written notice by a corporation of its intent to send a single copy will be deemed to constitute consent.

Annual Financial Statements.

Public companies may satisfy the requirement to provide annual financial statements to their

shareholders by providing the same financial statements and using the same delivery methods that are permitted by the SEC.

Non-Public Companies

The following changes primarily affect private companies:

Shareholder Action by Written Consent.

Under current law, shareholder actions may be taken by less than unanimous written consent only if permitted by the company's certificate of incorporation and only so long as written notice is given to all shareholders at least twenty days prior. The amendments permit actions by less than unanimous consent without advance notice if authorized by the certificate of incorporation and so long as written notice is sent to non-consenting and non-voting shareholders within ten days after the company receives written consents sufficient to take the action. The new law also allows the election of directors by less than unanimous consent except for companies that permit cumulative voting.

The amendments permit the use of electronic transmissions for shareholder consents if the transmissions contain information from which the company can determine the date on which they were signed and that they were authorized by the shareholders or their agent or attorney-in-fact.

Public and Non-Public Companies

The following changes affect both public and private companies:

Appraisal Rights.

The amendments update the notice and information requirements applicable to appraisal rights to reflect the possibility under the new law that a transaction may be approved by written

consent without any advance notice to the non-consenting and non-voting shareholders. The new law also eliminates appraisal rights with respect to the shares of any SEC-registered open-end mutual fund that may be redeemed at the option of the holder at net asset value.

Judicial Dissolution.

Under the new law, public corporations are exempted altogether from judicial dissolution proceedings brought by shareholders. This differs from the current version of the Business Corporation Act, which requires a court to dissolve a corporation at the request of a shareholder in certain circumstances and permits it to do so in certain others. The amendments state that a court is not required to dissolve a corporation in any circumstances and a director is no longer authorized to seek judicial dissolution. A court will be permitted to dissolve a non-public corporation in a proceeding brought by a shareholder if it is established that:

- there is a management deadlock that cannot be resolved by shareholder action and threatens or causes irreparable injury to the company, or prevents the business and affairs of the company from being conducted to the advantage of the shareholders generally;
- the directors or those in control of the company are acting (or will act) in a manner that is illegal, oppressive, or fraudulent;
- the shareholders are deadlocked in the election of directors for two consecutive years; or
- the corporate assets are being misapplied or wasted.



Recommendations for Corporate Counsel

Public Companies.

Corporate counsel of public companies should:

- examine their shareholder constituencies and decide whether the board should adopt a modified plurality voting standard;
- assess how the company can take full advantage of the “householding” rules; and
- determine whether the company is delivering financial statements to its shareholders in a form, or by a means, that differ from what the SEC permits or requires.

Non-public Companies.

Corporate counsel of non-public companies should:

- review the company’s certificate of incorporation to ensure that it permits shareholder actions by less than unanimous consent, and to delete any prior notice requirements; and
- assess how the company can exploit the flexibility of receiving electronic consents from its shareholders.

Some Additional Thoughts on Director Elections

Recent studies show that a majority of the Fortune 500 companies have adopted a majority voting standard for directors. Our informal survey of the 19 Connecticut corporations that filed proxy statements with the SEC in 2009 indicates that

only two had a majority vote requirement for directors, while one had a board policy requiring directors who receive more votes against than for to tender their resignation, which the board could accept or reject. The remaining 16 had a plurality voting standard.

With the adoption of the “modified plurality vote” option in Connecticut, it is possible that the 16 Connecticut public companies that have a simple plurality voting standard will come under pressure from their shareholders to adopt a “modified plurality vote” bylaw.

Connecticut’s public companies should also bear in mind two other developments that could have an impact on board elections. Commencing January 1, 2010, brokers holding customers’ shares in “street name” will no longer be permitted to vote those shares in director elections without instructions from the actual shareholders.² Secondly, the SEC is considering adopting a regulation that would allow shareholders who own at least 1% of a company’s shares to include their nominees for up to a quarter of the total number of board seats on the ballots sent out by the company.³

¹<http://www.cga.ct.gov/2009/ACT/PA/2009PA-00055-R00SB-00963-PA.htm>

²<http://www.sec.gov/rules/sro/nyse/2009/34-60215.pdf>

³ <http://www.sec.gov/rules/proposed/2009/33-9046.pdf>

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