May 17, 2010

Connecticut Updates Business Corporation Act; Clarifies Director Obligations, Shareholder Rights

Connecticut has adopted legislation to update the Connecticut Business Corporation Act, which governs stock corporations formed under Connecticut law. Public Act 10-35 (the "Act") was adopted as part of the ongoing process of keeping Connecticut's corporation statutes current with changes in the Model Business Corporation Act, the national model act that has been adopted in more than 30 states, including Connecticut.

The Act was signed by Governor Jodi Rell on May 10, 2010. It will become effective on October 1, 2010. Among other things, the Act provides the following:

- **Directors' Standard of Conduct:** Connecticut has been unique among the 50 states in *requiring* the board of directors, when considering business combinations for public companies, to take into account the interests of other constituencies such as employees, customers, creditors and suppliers, as well as community and societal considerations.? Connecticut has also required the board of directors to consider the long-term and short-term interests of the corporation and its shareholders, including the possibility that those interests may be? best served by the continued independence of the corporation. The Act will now permit but not *require* the board of directors to take into account the interests of these other constituencies when considering a merger, share exchange, disposition of assets or other business combination.
- **"Force the Vote":** The Act permits a corporation to agree to submit a matter to a vote of its shareholders even if the board of directors, after approving the matter, changes its mind and determines that it no longer recommends the matter. The "force the vote" clause is sometimes included as a deal protection device in merger and acquisition agreements. A buyer may negotiate the right to compel the target company to submit the transaction to a shareholder vote, notwithstanding the board's withdrawal of its recommendation that the shareholders approve the transaction. The board may change its recommendation because of a "topping" bid by a third party or for other reasons. If the board withdraws its recommendation to the shareholders, it must state its reasons.

  The "force the vote" provisions would apply to mergers, share exchanges, asset sales, dissolutions and amendments to the corporation's certificate of incorporation. If the target is a Connecticut corporation, the "force the vote" clause will be expressly authorized by statute as of October 1.
- **Appraisal Rights (Notice):** The Act clarifies the financial statements required to be delivered to shareholders entitled to exercise appraisal rights. Appraisal rights may arise in connection with certain mergers, share exchanges, asset sales and amendments to the certificate of incorporation. The notice to the shareholders entitled to appraisal rights must be accompanied by the corporation's annual financial statements and the most recent quarterly financial statements (if any). If the corporation's annual financial statements are not reasonably available, the Act will permit Connecticut corporations to provide reasonably equivalent financial information. Shareholders may waive in writing their right to receive such financial information, either before or after the corporate action.
- **Equity Compensation:** The Act permits the board of directors to delegate to one or more officers the right to (1) designate the recipients of rights, options, warrants or other equity compensation awards that involve the issuance of shares; and (2) determine, subject to any limitations established by the board and, if applicable, the shareholders, the number of rights, options, warrants or other equity compensation awards and the terms thereof.? However, an officer may not use such authority to designate himself or herself, or any other person specified by the board, as a recipient of such rights, options, warrants or other equity compensation awards.

Prior to the Act, awards of rights, options, warrants and other equity compensation required the approval of the board of directors, not designated officers.

The legislation was supported by the Business Law Section of the Connecticut Bar Association, which monitors business entity legislation in Connecticut, in light of the advantages of having a modern form of corporation statute with rules similar to those in other states.

Our corporate law attorneys would be pleased to discuss the impact of these amendments on your corporation.