

NEWS ALERT

BUSINESS GROUP



Update to Connecticut Law: Amendments to Connecticut Business Corporation Act Effective October 1, 2017

By Edward B. Whittemore and Brian W. Fischer | September 18, 2017

Public Act No. 17-108, titled An Act Concerning Limited Liability Companies and Business Corporations (the "Act"), has amended the Connecticut Business Corporation Act ("CBCA"). Effective October 1, 2017, the Act amends the CBCA in the following areas: director standards of conduct and director liability, ratification of defective corporate actions, business opportunities, short form mergers, and forum selection. These changes, which are designed to maintain general conformity with the Model Business Corporation Act, are discussed in greater detail below.

DIRECTOR STANDARDS OF CONDUCT AND LIABILITIES

Under current law, directors of a Connecticut corporation are required to discharge their duties in good faith with the care of an ordinary prudent person under the circumstances and in a manner reasonably believed to be in the best interests of the corporation. The Act amends the CBCA to provide a new standard of care with which directors must act. Specifically, directors are required to discharge their duties with the "care that a person in a like position would reasonably believe appropriate under similar circumstances." The Act sets standards for liability of directors that are consistent with the common law "business judgment" rule, but does not codify the rule. It recognizes as defenses exculpatory provisions in a certificate of incorporation and the protective provisions in the CBCA governing director conflicting interest provisions.

RATIFICATION OF DEFECTIVE CORPORATE ACTS

The Act adopts a new statutory ratification procedure to ratify corporate actions that may not have been properly authorized, including the issuance of shares that may not have been properly issued or authorized (the "Ratification Statute"). The Ratification Statute reverses the common law holding that certain defective corporate acts are void and cannot be ratified and provides a safe harbor for the ratification of defective corporate acts. The Ratification Statute also provides that actions taken in reliance on the ratified action will also be ratified. The Ratification Statute procedure provides corporations with two alternative methods to ratify or validate corporate actions that are void or voidable under the common law: (i) a process of remedial action undertaken by the corporation through approval by its board of directors and, if necessary, by the shareholders of the corporation, or (ii) a judicial process for the ratification of the defective acts.

The Ratification Statute will enable a corporation to validate defective corporation acts without judicial involvement.

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Two concepts important to the function of the Ratification Statute are “defective corporate act,” which is the action to be validated, and “failure of authorization,” which is the failure in the original approval or authorization of the act. The term “defective corporate act” may include defects in elections or appointments of directors or in the issuance of stock of the corporation, including an issuance of shares in excess of the corporation’s total number of authorized shares.

The Ratification Statute will enable a corporation to validate defective corporation acts without judicial involvement. In order to be ratified, the defective corporate act must be approved by board resolution containing a summary of the act to be ratified, the time at which the act was taken and the nature of the defect. In instances where the defective corporate act would originally have required shareholder approval, the board of directors is required to submit the ratifying resolution to a vote of shareholders.

The Ratification Statute also contains detailed provisions for providing notice to, and seeking a vote of, shareholders where a stockholder vote would be required. In such cases, the corporation must provide notice to all current holders of the corporation’s valid stock and “putative stock” as well as to holders of valid stock and putative stock as of the time of the defective corporate act, in each case, whether such shares are voting or nonvoting shares.

The Ratification Statute also provides that, if the defective act being ratified would have required a filing with the Connecticut Secretary of the State’s office, the corporation is required to file a new instrument called a “certificate of validation.” The certificate of validation must set forth a copy of the ratifying resolution, the date of its adoption by the board of directors and, if applicable, the shareholders, the information that would have been specified in the filing that would otherwise be required, and if a certificate was previously filed with respect to the defective corporate act being ratified, the title and the date of the filing of such previously filed certificate and any certificate of correction thereto.

VENUE FOR JUDICIAL PROCEEDINGS

The Act adds a new section to the CBCA that permits the certificate of incorporation or bylaws of a Connecticut corporation to specify the forum or forums for the litigation of internal corporate claims. In the certificate of incorporation or bylaws the corporation may specify a court or courts within the State of Connecticut or “in any other jurisdictions with which the corporation has a reasonable relationship”; provided, that, the specified jurisdiction has personal and subject matter jurisdiction in order to hear the case. The statute does not apply to all claims that may be brought against a corporation. Rather, the statute defines “internal corporate claims” to include claims based upon a violation of a duty under the laws of Connecticut by a current or former director, officer or shareholder in such capacity, derivative actions or proceedings brought on behalf of the corporation, claims arising pursuant to the CBCA, or the corporation’s certificate of incorporation or bylaws, or claims governed by the internal affairs doctrine. Even if the specified forum is outside Connecticut, internal corporate claims would still be governed by the CBCA.

BUSINESS OPPORTUNITIES

The Act amends the CBCA to permit Connecticut corporations to include in their certificate of incorporation a provision that limits or eliminates a director’s or officer’s duty to present a business opportunity to the corporation. The elimination may be blanket in nature or extend to only specified classes or categories of business opportunities. The elimination may apply to officers of the corporation only if accompanied by action of qualified directors.

TWO STEP MERGERS

The Act amends the CBCA to eliminate the requirement for a shareholder vote to authorize a second-step merger that follows a public tender offer, subject to certain requirements. The new subsection will apply only to target corporations whose shares are listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the merger agreement.

A copy of [Public Act No. 17-108](#) may be found [here](#).

If you need additional information or have any questions relating to the recent amendments to the CBCA, please contact any of the following members of the Murtha Cullina LLP Business and Finance Department:

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