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Testimony of David A. Swerdloff, Vice Chair and Legislative Liaison
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**Senate Bill 440, An Act Concerning the Connecticut Business Corporation
Act**
**Senate Bill 441, An Act Concerning Standards of Conduct for Corporate
Directors**

Judiciary Committee
March 14, 2008

Senator McDonald, Representative Lawlor, members of the Judiciary Committee, thank you for the opportunity to appear before the committee to comment on Senate Bill 440, An Act Concerning the Connecticut Business Corporation Act, and Senate Bill 441, An Act Concerning Standards of Conduct for Corporate Directors.

My name is David Swerdloff. I am a partner with Day Pitney LLP in Stamford, where I practice in the areas of business and corporate law. I am the vice chair and legislative liaison of the Business Law Section of the Connecticut Bar Association (CBA). The Business Law Section includes 630 Connecticut attorneys interested in business and corporate law issues.

The CBA Business Law Section has discussed Senate Bills 440 and 441 with the offices of the Secretary of the State and the Connecticut Business and Industry Association. We have met with representatives of the Secretary of the State on the bills. Neither group objected to the proposed legislation.

Senate Bill 440. The CBA Business Law Section **supports** Senate Bill 440, An Act Concerning the Connecticut Business Corporation Act. On behalf of the section, I wish to thank the committee for raising Senate Bill 440. We believe the bill is important to Connecticut corporations, and I **respectfully ask that the committee amend the bill as described below and favorably report a substitute bill.** I have attached at the end of these written remarks a proposed amendment, and we can supply the committee and its staff attorneys with a marked-up copy of the bill.

Senate Bill 440 would amend the Connecticut Business Corporation Act (CBCA) to adopt recent changes to the Model Business Corporation Act (MBCA) concerning:

- (1) Appraisal rights,
- (2) Shareholder actions without a meeting,
- (3) Majority voting for directors,
- (4) Definition of expenses,
- (5) Notices to shareholders with a common address,
- (6) Judicial dissolutions and
- (7) Mergers of subsidiaries.

In addition, we are proposing an amendment to S.B. 440 that would allow Connecticut public corporations to make their annual financial statements available to shareholders on the internet, pursuant to regulations adopted recently by the U.S. Securities and Exchange Commission.

Connecticut adopted the MBCA in 1994. This bill is part of the ongoing process of updating Connecticut's corporation statutes and keeping them current with the MBCA. There are distinct advantages to Connecticut's adoption of the MBCA in its most current version. First, the model act promotes uniformity

among the states. As Connecticut is a small state with relatively little corporate case law, case law from other states can provide valuable insight to assist with interpreting the statute. Second, like the Uniform Commercial Code, the MBCA has an official commentary. These comments are a useful source of information to lawyers and the courts about the meaning and interpretation of the law. As the MBCA is updated, the official comments are updated as well.

The bill itself is quite lengthy, but the changes fall into several categories and can be summarized fairly succinctly. The bill, among other matters:

- clarifies the information to be included in the form supplied to shareholders with notice of the availability of appraisal rights;
- simplifies the procedure for shareholder action by written consent of fewer than all of the shareholders;
- provides that if directors are elected by written consent, a corporation is not required to hold an annual meeting of the shareholders;
- permits public corporations to adopt a bylaw that would allow the corporation's Board of Directors or shareholders to adopt a majority voting standard for the election of directors (without changing the current plurality voting default rule of the CBCA);
- adopts a universal definition of "expenses" and makes other conforming revisions to the CBCA to reflect this definition;

- enables a corporation to deliver one copy of documents to a “household,” if multiple shareholders share a common address and consent to such delivery arrangements;
- limits shareholder suits for the judicial dissolution of a corporation to private corporations and affords shareholders the right to seek judicial dissolution when actual or threatened irreparable injury to the corporation is demonstrated in the context of a directors’ deadlock, and
- clarifies that a domestic parent corporation may merge a subsidiary in which it has 90 percent of the voting power into itself or into another such subsidiary without the approval of the Board of Directors or shareholders of the subsidiary unless the certificate of incorporation provides otherwise or, in the case of a foreign subsidiary, such foreign subsidiary’s jurisdiction so requires.

We believe that Senate Bill 440 is necessary to ensure that Connecticut's corporate statutes remain current and up to date.

Senate Bill 441. The CBA Business Law Section **supports** Senate Bill 441, An Act Concerning Standards of Conduct for Corporate Directors. We believe the bill is important to corporations formed under Connecticut law, and I **respectfully ask that the committee favorably report the bill.**

This bill is designed to cure an unusual problem arising under our statutes dealing with business combinations. Section 33-756(d) currently requires directors of Connecticut public corporations considering sale to a third party or certain other business combinations to consider the impact on multiple constituencies, including employees, customers, creditors, suppliers and the community at large. It will often be appropriate for directors to consider these other constituencies in the context of a business combination. However, Connecticut is the only state that *requires* rather than *permits* directors to consider each of these other constituencies. This imposes a burden on directors of Connecticut corporations that directors of corporations organized under other state laws do not face. There are no standards to measure how a director fulfills his or her duties under this section. It is difficult to advise directors of Connecticut corporations on how to fulfill this statutory mandate.

The proposed bill would give directors the freedom to consider other constituencies in the context of a business combination. We believe this bill will make Connecticut a more attractive state for public corporations considering whether to organize under Connecticut law or to change their state of organization to Delaware or another jurisdiction.

Proposed Amendments to Senate Bill 440.

(An Act Concerning the Connecticut Business Corporation Act)

We would like to propose two amendments to Senate Bill 440.

First, a proposed section of the bill that is important to publicly held Connecticut corporations was inadvertently excluded from the draft bill. This amendment would permit public companies incorporated in Connecticut to make available their annual financial statements on the internet, in accordance with new SEC rules, rather than to mail their financial statements to shareholders. This language is not taken from the MBCA, but it addresses a concern of Connecticut public corporations wishing to follow new SEC rules on delivery of financial statements. This change is expected to save Connecticut public corporations substantial costs for printing and mailing annual reports that public corporations organized under other state laws need not incur. We believe this is an important amendment to the CBCA. Attached to this testimony is the proposed amendment to the bill.

Second, the raised bill included language with respect to appraisal rights that was taken from the MBCA but that changes the approach to appraisal rights taken under the CBCA since its adoption in 1994. The CBCA has varied from the MBCA in its determination that the right to be paid the value of shares would be the exclusive remedy for shareholders. The CBCA has retained separate language on this subject year after year, as other MBCA changes were adopted in Connecticut. The Connecticut language conforms to the approach taken by Connecticut courts as to exclusivity of the appraisal rights remedy. We do not

recommend changing this traditional approach now.

For that reason, we recommend that S.B. 440 be amended to **delete Section 4** in its entirety.

We respectfully request the committee to adopt these amendments in a substitute bill prior to approval.

Thank you for the opportunity to appear before the committee. I would be pleased to answer any questions you may have.

Proposed Amendment to Senate Bill 440

(An Act Concerning the Connecticut Business Corporation Act)

1. Delete Section 4 of S.B. 440.
2. Add the following amendment as a separate section of S.B. 440:

Subsection (c) of Section 33-951 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2008*):

(c) Such corporation shall [mail] deliver the annual financial statements to each shareholder within one hundred twenty days after the close of each fiscal year. Thereafter, on written request from a shareholder [who was not mailed] to whom the statements were not delivered, the corporation shall [mail him] deliver to such shareholder the latest financial statements. Any delivery of financial statements by electronic transmission permitted by this section must be in a manner authorized by the shareholder. A public corporation may fulfill its responsibilities under this section by delivering the specified financial statements, or otherwise making them available, in any manner permitted by the applicable rules and regulations of the United States Securities and Exchange Commission.