

The Development of Statutes for Ratification and Validation of Defective Corporate Acts

By Nate Emeritz*

Over the past five years, a growing number of states have adopted statutes authorizing ratification and validation of void or voidable corporate acts. These statutes have become important tools for the corporate technician and corporations pursuing financing, significant transactions, and greater certainty in the capital structure. Delaware provided the first model for ratification and validation statutes, and two other statutory models have since been promulgated by Nevada and the American Bar Association, with other states largely conforming to one of those models. The differences in legislative choices for these statutes are noteworthy for practitioners and states considering adoption of their own version of a ratification and validation statutory scheme. This article is not a comprehensive overview of any statute but rather a comparison of key elements of analogous statutes adopted in several jurisdictions, including the background, provisions, and application of these statutes.

Background of Ratification and Validation Statutes

In 2013, the Delaware General Assembly amended the Delaware General Corporation Law (the “DGCL”) to include new Sections 204 and 205 (together, the “Delaware Statutes”) which permit a Delaware corporation to restore certainty to the corporate foundation and capital structure as they were understood to have already existed.¹ Section 204 provides for self-help in the form of corporate ratification, while Section 205 provides for judicial recourse, particularly when the corporation cannot take advantage of Section 204 or Section 204 is alleged to have been improperly used.² Under the Delaware Statutes, corporate acts and shares of stock may be ratified, while certificates filed (or that should have been filed) with the Office of the Secretary of State (the “Delaware State Office”) may be validated.

The decision to adopt the Delaware Statutes followed experiences suggesting that the existing patchwork of potential remedies suffered from critical holes. In that regard, common law ratification was an important but oftentimes inadequate tool for the issues posed by technically defective corporate actions and capital stock. Those cases have been wrestled with for the better part of the past century³ and studiously documented by Delaware practitioners⁴

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¹ Although amendments to the DGCL typically take effect on August 1 of the year of adoption, and Sections 204 and 205 of the DGCL were adopted during the legislative session ending in mid-2013, those statutes did not become effective until April 1, 2014.

² H.R. 127, 147th Gen. Assem., (Del. 2013) (“*2013 Delaware Legislative Synopsis*”).

³ See, e.g., *Triplex Shoe Co. v. Rice & Hutchins, Inc.*, 152 A. 342 (Del. 1930).

⁴ C. Stephen Bigler and John Mark Zeberkiewicz, *Restoring Equity: Delaware’s Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 Bus. Law. 393 (2014) (“*Restoring Equity*”); C.

while resulting in a quagmire from which common law ratification was often unable to remove corporations to firmer ground. In particular, the implementation of common law ratification posed challenges to corporations and their counsel in classifying corporate actions and shares of stock, which suffer from technical defects, as void or voidable; remediating those defects in the capital structure and corporate foundation; preventing dated technical defects from undermining the validity of subsequent corporate actions that relied on those defective structural and foundational actions; and reaching a necessary degree of certainty with respect to each of the foregoing that was necessary in the applicable commercial context. As a result of the state of the common law, technical defects could pose significant barriers to obtaining legal opinions and consummating key corporate transactions without extensive handwringing and expense, even where solutions based in logic or practicality appeared to be available. Although the occasionally harsh technical treatment of void corporate actions by Delaware courts could be viewed as serving certain public policy goals, the situation could also lead corporations away from desired public policy objectives by discouraging them from shoring up their corporate foundations and capital structures, and thereby subjecting investors and other stakeholders to uncertainty.

Likewise, declaratory relief offered broad remedial support but, under some case law, imposed jurisdictional prerequisites, such as the existence of an actual controversy, which could have the effect of precluding judicial relief with respect to uncontested corporate defects.⁵ Policy issues underlying Delaware courts' hesitation to exercise jurisdiction over a declaratory judgment action was described by Chancellor Allen:

Stephen Bigler and Seth Barrett Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 Bus. Law. 1109 (2008) (“*Void or Voidable*”).

⁵ The history of declaratory judgment in the United States presents an interesting source of comparison to the judicial validation statutes. In short, approximately a century ago, state and federal judicial systems in the United States wrestled with the expansion of courts' jurisdiction and remedial power to permit declaratory judgment. This came on the heels of more than 50 years' experimentation with such laws in England. The early forms of English declaratory judgment were narrowly construed, until the legislature and the judiciary began adopting laws and court rules that permitted wide application. This experimentation in England allowed the United States to “enjoy the fruits of England's experience . . . charting the waters over which the applicant for a declaratory judgment must sail.” Edson Sunderland, *A Modern Evolution in Remedial Rights – The Declaratory Judgment*, 16 Mich. L. Rev. 69, 77 (Dec. 1917). Indeed, the solution had been giftwrapped: “Yet here is an effective, workable system, tried out under conditions identical with those in our own country, which marks an advance over previous doctrines comparable to the great reform which equity made over the harsh rules of the common law.” *Id.* at 89. Declaratory judgment was envisioned by an early proponent in the United States, Professor Edmund Borchard, as a supplement to the existing “elaborate procedure involving delay, uncertainty and considerable expense, when all that is desired is an authoritative determination of a simple issue of fact or of law,” by broadly “afford[ing] security and relief against uncertainty and doubt.” *Declaratory Judgments*, at 2, 4. As in 19th-century England, a cautious approach and narrow construction in the United States may have been driven by reasonable concerns with the judicial power and resources that could be expended under the auspices of a potent new statute, as well as the related concern with modifying the judiciary's traditional lawmaking position. In light of the similarities in the purpose, function, and concerns related both to declaratory judgment, and to judicial validation, experience with declaratory judgment may be a useful touchstone for the development of judicial validation statutes.

First, judicial resources are limited and must not be squandered on disagreements that have no significant current impact and may never ripen into legal actions seeking coercive relief. Second, to the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment. To address a matter before the facts surrounding the dispute are fully developed necessarily not only increases the risk of an incorrect judgment in the particular case, but risks, as well, an inappropriate or unnecessary step in the incremental law building process itself.⁶

The Delaware Supreme Court has more recently addressed the scope of declaratory judgment, explaining that Delaware courts will not “render advisory or hypothetical opinions” because the “underlying purpose of that principle is to conserve limited judicial resources and to avoid rendering a legally binding decision that could result in premature and possibly unsound lawmaking.”⁷

Special proceedings under the DGCL could also be pursued unilaterally by the corporation or certain stakeholders but were too targeted to fill in all gaps left by other remedies. For instance, Sections 111, 225 and 227 of the DGCL have been applied in efforts to resolve the validity of charter and bylaw provisions, stockholder votes, and stockholder rights, though in some cases, limits on the jurisdiction of declaratory judgment actions were also found to have similarly limiting effect on the court’s jurisdiction to engage in those statutory proceedings.⁸

Finally, equity could provide a remedy under certain circumstances but those principles often could not directly address the alleged technical missteps, and their application could be difficult to predict with great certainty. Although the Delaware Court of Chancery has equitable jurisdiction that may be exercised appropriately in connection with the technical claims, this was not an exact fit for disputes over compliance with the DGCL or organizational documents. To the contrary, the Delaware Supreme Court has stated that

[An] attempt to trivialize the unassailable facts of [a conversion of invalid preferred stock into common stock] as mere “technicalities” is wholly unpersuasive. The issuance of corporate stock is an act of fundamental legal significance having a direct bearing upon questions of corporate governance, control and the capital structure of the enterprise. The law properly requires certainty in such matters.⁹

⁶ *Schick Inc. v. Amalgamated Clothing and Textile Workers Union*, 533 A.2d 1235, 1239 (Del. Ch. 1987).

⁷ *XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014).

⁸ See, e.g., *Solak v. Sarowitz*, 153 A.3d 729, 736 (Del. Ch. 2016); *In re Native American Energy Group, Inc.*, 2011 WL 1900142, at *1 (Del. Ch. May 19, 2011); *Palmer v. Arden-Mayfair, Inc.*, 1978 WL 2506, at *6-*7 (Del. Ch. July 6, 1978).

⁹ *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991).

Indeed, the Delaware Supreme Court instructed, “Again, we emphasize that our courts must act with caution and restraint when granting equitable relief in derogation of established principles of corporate law.”¹⁰

An extensive examination of the case law and doctrinal development regarding these remedial options is beyond the scope of this article. Rather, the foregoing background is intended to briefly outline the context for the emergence of the ratification and validation statutes and may suggest potential directions and limitations for their development.

Three Models of Ratification and Validation Statutes

In that context of remedial options and their respective limitations, the Delaware legislature sought to provide corporations with the power to correct foundational defects and to do so with reasonable certainty. The Delaware legislature was also sensitive, however, to the equitable issues around ratification and the potential for abuse. The resulting Delaware Statutes, comprising a section for corporate self-help ratification and a section for judicial validation and intervention, have proven in their first five years to provide a sensible—if occasionally vexing—approach to issues that are often complex, technical, and striking at the heart of the rights, powers, and obligations of corporate stakeholders. In addition, Nevada and the MBCA provide distinct models for ratification and validation statutes, while other states have adopted statutes largely following one of these models.

Delaware: Two-Section Model

Sections 204 and 205 of the DGCL provide remedial tools to corporations and the judiciary, expanding beyond the limits of common law ratification and declaratory judgment. While Section 204 has become a relatively common tool in the Delaware corporate practice, Section 205 has developed in a more limited manner. Petitioners have asserted Section 205 as both a check on Section 204 and as an independent basis to seek judicial validation of corporate acts suffering from uncertain validity.

The Delaware Statutes have enjoyed a dynamic existence, having been subject to two rounds of legislative amendments and complex litigation that is discussed below. Key elements of the Delaware Statutes include:

- *Broad scope of the operative terms “defective corporate act” and “failure of authorization.”*¹¹ These terms provide the mechanism for the Delaware Statutes to cut through the sometimes murky distinction between acts that are void and voidable under common law and allow counsel to prepare resolutions (and validations when necessary) without nearly the degree of handwringing over how to characterize the corporate defect and whether it was susceptible of ratification. In addition, the Delaware Statutes expressly permit ratification of invalidly issued

¹⁰ *STAAR Surgical*, at 1137 n.2 (citing *Alabama By-Products Corp. v. Neal*, 588 A.2d 255, 258 (Del. 1991)).

¹¹ 8 *Del. C.* § 204(h)(1), (2).

shares, and when applicable, the Delaware Statutes expressly do not override common law ratification or eliminate corporations' ability to ratify defects by means other than the Delaware Statutes.

- *Retroactive effectiveness of ratified corporate acts at the validation effective time.*¹² The statute expressly makes corporate ratifications effective retroactively to the time when the company attempted to act in the first instance (or to another time specified by the board of directors).
- *Notice to stockholders of valid and putative stock as of the ratification and the defective corporate act.* The methods for giving notice under the Delaware Statutes are intended to correspond to other typical notice requirements under the DGCL and federal securities laws. Those requirements seek to ensure that stockholders are aware of any proposed or completed ratification that might impact their investment in the corporation.
- *Voting and quorum standards for board and stockholder action applicable to approval of the ratification.*¹³ The Delaware Statutes provide that a ratification may be approved in accordance with the voting and quorum standards applicable to board and stockholder actions at the time of the ratification, unless greater proportions or specific votes were required at the time of the defective corporate act, in which case such higher or more specific votes or quorum standards would apply to approval of the ratification.
- *Fixed period of 120 days to challenge ratifications under the Delaware Statutes.*¹⁴ This period may be analogized to a statute of limitations that provides aggrieved parties the ability to challenge the ratification, and corporations with repose regarding certain types of timely challenges to the ratified actions once the limitations period expires. Notwithstanding the expiration of the 120 days, conduct surrounding ratification and validation under Section 204 remains subject to equitable review just as would other corporate actions.¹⁵
- *Validation of acts requiring a certificate to be filed with the Secretary of State of the State of Delaware.*¹⁶ Section 204 expressly provides for validation of acts requiring the filing of a certificate with the State of Delaware, including

¹² 8 Del. C. § 204(f).

¹³ 8 Del. C. § 204(b), (d).

¹⁴ 8 Del. C. § 205(f).

¹⁵ 2013 Delaware Legislative Synopsis.

¹⁶ 8 Del. C. § 204(e).

circumstances where the prior certificate was correct as filed, was filed in a form that requires changes, and was not previously filed.¹⁷

- *Exclusive jurisdiction and broad judicial authority under Section 205 to resolve petitions for judicial validation and challenges to ratifications under Section 204.*¹⁸ Such claims may be brought by corporate stakeholders including any other person purporting to be substantially and adversely affected by the ratification.¹⁹

Kansas. In 2016, Kansas adopted ratification and validation statutes based on the model set by the Delaware Statutes.²⁰ Sections 6428 and 6429 of the Kansas General Corporation Code (the “Kansas Statutes”) became effective on July 1, 2016 as part of a broad revision of that corporation law.²¹ The Kansas Statutes largely track the Delaware Statutes with a few noteworthy differences. Differences between Section 6428, the corporate ratification statute, and Section 204 of the DGCL primarily arose after the 2018 amendments to the DGCL. Specifically, the Kansas Statutes omit the following concepts found in the Delaware Statutes: an express exception to the general requirement that a ratification be submitted to stockholders in the event there are no holders of valid shares;²² an express provision for a defective corporate act involving an act requiring a record date;²³ the express confirmation that corporate power, as used to define the scope of a defective corporate act, is not limited by the underlying failure of authorization;²⁴ and the inclusion in the definition of a failure of authorization of a failure to effect an act in compliance with disclosures.²⁵ The judicial validation analog in the Kansas Statutes also hews closely to Section 205 of the DGCL, while omitting a provision vesting the designated court with exclusive jurisdiction to hear and determine all actions brought under that Section 6429.²⁶

Oklahoma. On November 1, 2017, Sections 1055.1 and 1055.2 of the Oklahoma General Corporation Act (the “Oklahoma Statutes”) also became effective in the footsteps of the Delaware model.²⁷ Like the Kansas Statutes, the Oklahoma Statutes were enacted as part of

¹⁷ 8 *Del. C.* § 204(e)(3).

¹⁸ 8 *Del. C.* § 205(e).

¹⁹ 8 *Del. C.* § 205(a).

²⁰ *Kan. Stat.* §§ 17-6428, 6429.

²¹ This timing coincides with both the adoption of ratification and validation statutes in Delaware and elsewhere, but also with notable decisions by Delaware courts that were likely to (and have been found to) decrease certain types of corporate litigation that had previously been common in Delaware and involved far less technical issues. *See, e.g., In re Trulia, Inc. S’holder Litig.*, Consol. C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

²² *Kan. Stat.* § 17-6428(c); compare 8 *Del. C.* § 204(c)(2).

²³ *Kan. Stat.* § 17-6428(d); compare 8 *Del. C.* § 204(d).

²⁴ *Kan. Stat.* § 17-6428(h)(1); compare 8 *Del. C.* § 204(h)(1).

²⁵ *Kan. Stat.* § 17-6428(h)(2); compare 8 *Del. C.* § 204(h)(2).

²⁶ *Kan. Stat.* § 17-6429; compare 8 *Del. C.* § 205(e).

²⁷ 18 *Okla. Stat.* §§ 1055.1, 1055.2.

broad revisions to that state's corporation law. The Oklahoma Statutes are also very similar to the Kansas Statutes with a difference being that, like the Delaware Statutes, Oklahoma's judicial validation analog vests the designated court with exclusive jurisdiction to hear and determine all actions brought under that Section 1055.2.²⁸

Nevada: One-Section Model

Approximately two and half years after the Delaware legislature adopted the Delaware Statutes, Nevada's Revised Statutes Section 78.0296 (the "Nevada Statute") became effective on October 1, 2015. In contrast to the organization of the Delaware Statutes into two sections, the Nevada Statute addresses corporate ratification and judicial validation in a single section, consistent with an overarching theme explained to the Nevada legislative judiciary committee:

The Executive Committee found the Delaware provisions to be exceptionally wordy, confusing and unduly complicated. The [proposed Nevada Statute] condenses the concepts into a much more efficient and practical formulation that should distinguish Nevada from Delaware as providing the same flexibility while enhancing accessibility and clarity.²⁹

In addition to condensing these provisions into a single statutory section, the Nevada Statute shortens several key aspects found in the Delaware Statutes including omissions of: the defined terms "failure of authorization,"³⁰ "putative stock,"³¹ and "validation effective time;"³² a limitation to, or inclusion of, acts within the power of the corporation in the definition of "corporate act;"³³ and acts not taken in compliance with a plan or agreement from corporate acts that are susceptible of ratification.³⁴ Another difference, related to the omission of a "putative stock" defined term (the holders of which are excluded from the vote on a ratification in Delaware), is that the only stockholders excluded from the vote on a ratification in Nevada are those holding "shares issued or purportedly issued pursuant to the corporate act being ratified or validated."³⁵ Yet another difference, related to certificates of validation, is the lack of a requirement that the certificate set forth the same extensive description of the corporate act being ratified or the underlying failure of authorization.³⁶ The Nevada Statute also provides that notice of corporate ratification must be given within ten days of approval of such ratification (as

²⁸ 18 *Okla. Stat.* § 1055.2(E).

²⁹ Robert Kim, Chairman of the Executive Committee of the Business Law Section, State Bar of Nevada, Memorandum to Assembly Judiciary Committee re S.B. 446 (First Reprint), at 2 (May 5, 2015).

³⁰ *NRS* 78.0296(1); *compare* 8 *Del. C.* § 204(h)(2).

³¹ *NRS* 78.0296(7)(a)(3); *compare* 8 *Del. C.* § 204(h)(4).

³² *NRS* 78.0296(6); *compare* 8 *Del. C.* § 204(h)(6).

³³ *NRS* 78.0296(7)(a); *compare* 8 *Del. C.* § 204(h)(1).

³⁴ *NRS* 78.0296(1); *compare* 8 *Del. C.* § 204(h)(2).

³⁵ *NRS* 78.0296(2); *compare* 8 *Del. C.* § 204(d).

³⁶ *NRS* 78.0296(4)(a); *compare* 8 *Del. C.* § 204(e)(1).

compared to a requirement in Delaware that the notice be mailed “promptly”),³⁷ the ratified corporate act must be given retroactive effectiveness as of the date of the original corporate act unless otherwise determined by the court under this statute,³⁸ and the period to petition the court to challenge corporate ratification extends for 180 days after notice is given.³⁹

The Nevada Statute provides for application of any higher or more specific voting or quorum standards that may have applied at the time of the defective corporate act to board and stockholder approval of the ratification.⁴⁰ The court under the Nevada Statute is given jurisdiction to hear petitions filed by “any person adversely affected” and “to administer and provide equitable relief under this section, including, without limitation, the authority to confirm, nullify, modify or compel any ratification or validation taken or proposed to be taken pursuant to this section, including any filing, amendment or correction pursuant to subsection 4.”⁴¹ In similarly generic fashion, the Nevada Statute provides, “The provisions of this section shall not be construed to prescribe or circumscribe which facts and circumstances the court may consider or which remedies the court may grant in exercising its jurisdiction under this section.”⁴²

To my knowledge, as of publication of this article, no state has followed the one-section model established by the Nevada Statute.

MBCA: Multi-Section Model

In the winter of 2015, around the time that the Nevada Statutes became effective, the Corporate Laws Committee of the Business Law Section of the American Bar Association published a new subchapter of the Model Business Corporation Act providing a model for ratification and validation statutes (the “MBCA Statutes”).⁴³ Although the organization of that model is spread over seven statutory sections, the content of the MBCA Statutes generally hews more closely to the Delaware Statutes than the Nevada Statute including, for instance, by use of the “failure of authorization,”⁴⁴ “putative shares,”⁴⁵ and “validation effective time”⁴⁶ defined terms; the requirement of “prompt notice” of a ratification approved by the board of directors;⁴⁷

³⁷ NRS 78.0296(3); compare 8 Del. C. § 204(g).

³⁸ NRS 78.0296(6); compare 8 Del. C. § 204(h)(6).

³⁹ NRS 78.0296(5)(a); compare 8 Del. C. § 204(d).

⁴⁰ NRS 78.0296(2); compare 8 Del. C. § 204(b), (d).

⁴¹ NRS 78.0296(5); compare 8 Del. C. § 205(a), (b).

⁴² NRS 78.0296(5); compare 8 Del. C. § 205(d).

⁴³ Corporate Laws Committee, ABA Business Law Section, *Changes in the Model Business Corporation Act—Proposed Subchapter E of Chapter 1 Permitting Ratification of Defective Corporate Actions*, 71 Bus. Law. 93 (Winter 2015-16).

⁴⁴ MBCA § 1.45(c); compare 8 Del. C. § 204(h)(2).

⁴⁵ MBCA § 1.45(e); compare 8 Del. C. § 204(h)(4).

⁴⁶ MBCA § 1.45(g); compare 8 Del. C. § 204(h)(6).

⁴⁷ MBCA § 1.49(a); compare 8 Del. C. § 204(g).

flexible provisions for articles of validation including provision for filing new or altered articles in connection with the ratification;⁴⁸ and a 120-day period for seeking judicial relief under the MBCA Statutes.⁴⁹ The MBCA Statutes differ from the Delaware Statutes by explicitly including a violation of a corporate resolution in the definition of “failure of authorization”⁵⁰ and an express provision that any corporate action taken in reliance on a defective corporate action shall be deemed to be valid upon ratification of the preceding defective corporate action,⁵¹ and by excluding a provision that articles of validation need not be separately executed or include any statement required by another section⁵² and a provision applying any higher or more specific voting and quorum standards applicable to board or stockholder action at the time of the defective corporate act to the approval of the ratification.⁵³ Perhaps understandably, in light of the modeling function played by the MBCA Statutes, the MBCA Statutes omit a provision granting exclusive jurisdiction under the MBCA Statutes.⁵⁴

The official comments to the MBCA Statutes contain valuable information, such as confirmation that those statutes, like the Delaware Statutes, are to be non-exclusive means of ratification⁵⁵ and are to be applied broadly based on the definitions of a “defective corporate action” and “failure of authorization.”⁵⁶ The official comments also confirm a similar understanding to that in Delaware of “putative shares” as including “shares, rights, options or warrants.”⁵⁷ Finally, the official comments expressly note that information, required by Section 1.47(a)(1) to ratify a defective corporate action involving issuance of putative shares, may be satisfied by attaching a table such as a capitalization table listing those putative shares.⁵⁸ Several states have adopted ratification and validation statutes that are similar to the model set by the MBCA Statutes.⁵⁹

Texas. Although the ratification and validation statutes adopted by Texas (the “Texas Statutes”) became effective on September 1, 2015—months before the publication of the MBCA

⁴⁸ *MBCA* § 1.51; *compare* 8 *Del. C.* § 204(e).

⁴⁹ *MBCA* § 1.52(d); *compare* 8 *Del. C.* § 205(f).

⁵⁰ *MBCA* § 1.45(c); *compare* 8 *Del. C.* § 204(h)(2).

⁵¹ *MBCA* § 1.50(c).

⁵² *MBCA* § 1.51; *compare* 8 *Del. C.* § 204(e).

⁵³ *MBCA* § 1.48(a), (c), (d); *compare* 8 *Del. C.* § 204(b), (d).

⁵⁴ *MBCA* § 1.52; *compare* 8 *Del. C.* § 205(e).

⁵⁵ *MBCA* § 1.46 & official comment; *cf.* 8 *Del. C.* § 204(i).

⁵⁶ *MBCA* § 1.45 official comment.

⁵⁷ *MBCA* § 1.52 official comment; *MBCA* § 1.45(e); *cf.* 8 *Del. C.* § 204(h)(4).

⁵⁸ *MBCA* § 1.47 official comment. This is also common in my experience among practitioners using the Delaware Statutes.

⁵⁹ In addition to the state statutes discussed here, statutes following the MBCA’s multi-section model have been adopted by Connecticut (effective October 1, 2017), North Carolina (effective October 1, 2018), and Virginia (effective January 1, 2020).

Statutes, those statutes follow a structure that is similar to that of the MBCA Statutes.⁶⁰ The Texas Statutes were also amended to provide for certain technical improvements as of September 1, 2017.⁶¹ In that regard, the Texas legislature has applied several significant concepts from the Delaware Statutes to its version of the MBCA Statutes. Indeed, the bill analysis to the 2017 amendments to the Texas Statutes notes, “S.B. 1518 updates Texas corporate law, keeping it competitive with other leading business law states, including Delaware and the Delaware General Corporation Law[], and in sync with the Model Business Corporation Act.”⁶²

The original version of the Texas Statutes included key differences from the MBCA Statutes, which are similar to those in the Delaware Statutes. Those original aspects included its adoption of the requirement that any higher or more specific voting or quorum standards applicable at the time of the defective corporate act apply to approval of the ratification,⁶³ of detailed provisions for judicial proceedings,⁶⁴ and of a restriction after the validation effective time on claims that a corporate act should be invalid as a result of a failure of authorization identified in the board of directors’ ratification resolutions.⁶⁵ Amendments to the Texas Statutes adopted in 2017 further nudged the Texas Statutes away from the substance of the MBCA Statutes, such as Texas: explicitly including in the definition of “failure of authorization” a failure by the board of directors or an officer to give required authorization of a corporate act;⁶⁶ authorizing the board of directors to fix the validation effective time when a certificate of validation is not required;⁶⁷ and adding an statement that certificates of validation need not be separately executed or contain any statement required by any other provision.⁶⁸

Washington. Washington adopted ratification and validation statutes based on the MBCA Statutes, effective July 23, 2017 (the “Washington Statutes”).⁶⁹ Legislative commentary to the Washington Statutes observed both that “Delaware is considered a leading state for corporate jurisprudence,” and that the “American Bar Association (ABA) updated its model corporations

⁶⁰ *Tex. Bus. Orgs.* § 21.901 *et. seq.*

⁶¹ 2017 *Tex. Gen. Laws* ch. 75.

⁶² Texas Senate Research Center, Bill Analysis, SB 1518, 85th Leg. (July 11, 2017).

⁶³ *Tex. Bus. Orgs.* §§ 21.904, 907; *compare MBCA* § 1.48(a), (c), (d); *cf.* 8 *Del. C.* § 204(b), (d).

⁶⁴ *Tex. Bus. Orgs.* § 21.914(c), (d); *compare MBCA* § 1.52(b); *cf.* 8 *Del. C.* § 205(b), (d).

⁶⁵ *Tex. Bus. Orgs.* § 21.917(b)(1); *compare MBCA* § 1.52(d); *cf.* 8 *Del. C.* § 205(f)(1). This provision of the Texas Statutes is entitled “Statute of Limitations,” which expressly encapsulates the functional effect of the analogous provisions in the MBCA Statutes and the Delaware Statutes, but does not apply to claims that a ratification was not accomplished in accordance with the Texas Statutes.

⁶⁶ *Tex. Bus. Orgs.* § 21.901(4)(B); *compare MBCA* § 1.45(c).

⁶⁷ *Tex. Bus. Orgs.* § 21.901(8)(B); *compare MBCA* § 1.45(g).

⁶⁸ *Tex. Bus. Orgs.* § 21.908(c); *compare MBCA* § 1.51; *cf.* 8 *Del. C.* § 204(e).

⁶⁹ *Wash. Rev. Code.* § 23B.30.030(3) *et. seq.*

law to allow a corporation to retroactively validate or ratify authorization errors.”⁷⁰ Washington opted to follow the multi-section model established by the MBCA.

There are some key differences between the Washington Statutes and the MBCA Statutes including a requirement in Washington that the board of directors, if shareholder approval is required, either recommends ratification of a defective corporate action, or communicates the basis (e.g., conflict or other special circumstance) for making no recommendation.⁷¹ The Washington Statutes also include a provision specifically for requirements applicable to the notice that must be given to shareholders if they are asked to approve the ratification by written consent without a meeting.⁷² The Washington Statutes omit a few notable provisions that are found in the MBCA Statutes. That is, Washington does not state: that retroactive effectiveness of each ratified defective corporate action is to occur without regard to the period for challenging the ratification;⁷³ that “any other person claiming to be substantially and adversely affected by a ratification” has standing to seek judicial relief under the Washington Statutes;⁷⁴ or that the court is authorized to determine the validity of any putative shares or to modify or waive procedures related to ratification under the Washington Statutes.⁷⁵ The period for challenging ratifications under the Washington Statutes differs from the analogous period under the MBCA Statutes in that its measurement depends on the method for approving the ratification and that it is limited to 60 days from the validation effective time, the failure of approval of a proposed ratification, or the earliest shareholder consent approving a ratification.⁷⁶ And finally, the Washington Statutes expressly provide that the Washington Statutes are the exclusive basis for challenging the validity or effectiveness of a defective corporate action ratified under the Washington Statutes.⁷⁷

Corporate Ratification Self-Help

Corporate ratification statutes have proven to be an important tool in corporate practice, enabling greater certainty where such comfort was once difficult or even impossible to obtain. Corporate actors seeking certainty in making and receiving investments had long been hampered by holes in the previous patchwork of legal and equitable remedies applicable to certain void and voidable acts. But these statutes have provided expansive relief. The drafters of these statutes have been cognizant of issues affecting both public and private companies. For instance, provisions for giving notice and determining stockholders eligible to vote have been made to

⁷⁰ Washington Senate Committee on Law & Justice and House Committee on Judiciary, Final Bill Report, SB 5011, C 28 L 17 (July 23, 2017).

⁷¹ *Wash. Rev. Code* § 23B.30.030(3)(b); compare *MBCA* § 1.48(b).

⁷² *Wash. Rev. Code* § 23B.30.050(3); compare *MBCA* § 1.49.

⁷³ *Wash. Rev. Code* § 23B.30.060; compare *MBCA* § 1.50.

⁷⁴ *Wash. Rev. Code* § 23B.30.080(1); compare *MBCA* § 1.52(a).

⁷⁵ *Wash. Rev. Code* § 23B.30.080(1); compare *MBCA* § 1.52(3), (4).

⁷⁶ *Wash. Rev. Code* §§ 23B.30.080(3), (4); compare *MBCA* § 1.52(d).

⁷⁷ *Wash. Rev. Code* § 23B.30.080(4); compare *MBCA* § 1.52 & official comment.

synchronize with the federal securities filing practice⁷⁸ and record date concepts necessary for broad stockholder bases.⁷⁹ Likewise, private and startup companies that begin without significant legal budgets for corporate organization costs, but later achieve significant valuations, may take advantage of these statutes to correct technical foot-faults that occurred early in the business as honest mistakes and to engage with serious sources of financing that typically require great legal comfort. Although practice under each state's corporate ratification statute is not necessarily the same—and more so between statutes under different models, there are key issues that likely require attention under each statute. As discussed above, the approach to dealing with these issues may have subtle but critical differences.

Stockholder approval and notice. The terms and composition of the applicable stockholder vote is a critical aspect of the corporate ratification. Likewise, the notice to stockholders should comply with the requirements of the corporate ratification statute, including by identifying the defective corporate act and failures of authorization, and by providing adequate and timely notice. These requirements of the corporate ratification statute may impact the effectiveness and timing of the validity of the ratification. By way of example: consider a hypothetical class of convertible preferred stock is designated, shares of which are issued and later converted into common stock, and each such corporate act was defectively authorized.⁸⁰ In commentary regarding a similar hypothetical, Delaware practitioners previously noted that, under the Delaware Statutes, holders of the common stock issued in the defective conversion of the shares of preferred stock would not be included in the vote on ratification.⁸¹ Those shares of common stock were invalid as a result of both the defective conversion, and the fact that the preferred stock was defectively issued in the first place, and thus, in a ratification of the designation and subsequent conversion, those shares of common stock would be putative stock and not entitled to vote.⁸²

If that hypothetical is modified by assuming, first, that the conversion was not defectively authorized, and second, that the issuance of the shares of common stock is viewed as taking place at the time that the conversion is attempted and those shares are first identified as outstanding in the corporation's books and records, then the shares of common stock would be putative stock solely as a result of the initial defective designation and issuance of the preferred stock. In this modified scenario, in a ratification of the initial designation and issuance of the preferred stock under the Delaware Statutes, the shares of common stock would not be included in the vote because they remain putative stock. Under the Nevada Statute, however, those shares of common stock would appear to be included in the vote because they were not "shares issued or purportedly issued pursuant to the corporate act being ratified or validated."⁸³ Although states

⁷⁸ See, e.g., 8 Del. C. § 204(g).

⁷⁹ See, e.g., 8 Del. C. § 204(d).

⁸⁰ *Restoring Equity*, at 420-427 (providing this illustrative example by way of explanation of the Delaware Statutes).

⁸¹ *Restoring Equity*, at 427.

⁸² *Restoring Equity*, at 426.

⁸³ NRS 78.0296(2); compare 8 Del. C. § 204(d).

other than Delaware have not provided significant guidance regarding construction of their ratification and validation statutes, illustrative examples and comparisons among statutes may provide bases for practitioner commentary and further consideration.

Scope of the statutory power. The scope of “defective corporate acts” which are susceptible of ratification, as well as subsequent corporate acts that may be called into question as a result of a foundational defect, should be closely considered before any attempt is made to cure them using authority under a corporate ratification statute. Although subsequent corporate acts may be cured by ratification of the earlier act, it is not uncommon for further missteps to be discovered at corporations that have discovered one defect in the corporate foundation. In addition to the technical ramifications of a defective corporate act, the fiduciary implications related to the initial occurrence and later ratification of a defect may require pause to ensure interests of the corporation and stockholders are guiding the fiduciaries’ decisions.

This marks another foundational difference between the Nevada Statute and other ratification and validation statutes, in the definition of a corporate act that falls within the ambit of the statutory remedy. One way that the Delaware Statutes and the MBCA Statutes establish the scope of available remedies is by the definition of “defective corporate act” which is limited to, and expressly includes, acts within the power of the corporation.⁸⁴ The Nevada Statute, on the other hand, omits a defined term for “defective corporate act” and simply provides for ratification and validation of a “corporate act” which is any act or purported act of directors or stockholders, or act taken or purportedly taken by or on behalf of the corporation.⁸⁵ That definition leaves open questions regarding which acts within and beyond the power of a corporation fall within the Nevada Statute. As noted below with respect to litigation involving the Delaware Statutes, this question is as important as its foundational nature might suggest and has been subject to close consideration by the courts, legislature, and bar.

Full force and non-exclusivity of the statute. Resolutions may record both the equitable considerations and the technical bases for corporate ratification, and those purposes are best served by a comprehensive recitation of the failures of authorization. To ensure the effectiveness of the ratification process, where the corporate ratification statute is not that state’s exclusive means of ratification, it may be advisable for the corporation to adopt resolutions ratifying the defective corporate act under both the corporate ratification statute and common law.

Coordination with other law. As the knotty issues of corporate ratification statutes are being worked out, those statutes are also being coordinated with tax, employment, securities, and other laws, rules, and regulations at the state and federal levels. For instance, the timing of effectiveness and disclosure of corporate acts, including the ratification of defective corporate acts, receive great attention in multiple areas of the law.

State processing of certificates of validation. The state office assigned responsibility for recording the certificates of validation has also proven an important aspect of the corporate ratification process. In Delaware, for instance, the Delaware State Office has continued to

⁸⁴ 8 *Del. C.* § 204(h)(1); *MBCA* § 1.45(b).

⁸⁵ *NRS* 78.0296(7)(a).

assume its traditionally active and responsive role with respect to corporate filings. Unlike its approach to other certificates to be filed, however, the Delaware State Office has undertaken a more thorough review of the content of certificates of validation, which has been informed by its engagement with Delaware corporate practitioners.

Judicial Validation Proceedings

The breadth of judicial validation statutes, in combination with guidance that their remedial powers ought to be given “substantial leeway to shape an appropriate remedy,” provides an important companion to corporate ratification self-help.⁸⁶ Litigants and Delaware courts are increasingly examining and establishing the scope of Section 205 and its interplay with Section 204 and fiduciary principles.⁸⁷ Delaware practitioners pay close attention to Section 205 petitions and to the viewpoints announced by Delaware judges when resolving certain corporate formalities issues and, as a result, the Delaware bar is learning more about how its court will respond to some of the issues that come up in the “sausage making” involved in the process of effecting corporate transactions. Similarly, the Delaware judges’ views on appropriate procedure under Section 205 are becoming clearer and more predictable. To my knowledge, the Delaware Statutes are the only ratification and validation statutes that have been the subject of published judicial decisions, and that litigation has only occurred in Delaware courts to date. There are a few issues in particular that merit consideration for their ability to significantly affect litigation involving different states’ judicial validation statutes.

Scope of jurisdiction under the statute. The scope of considerations and determinations that a court may make, and remedies that a court may grant, under judicial validation statute mark the boundaries of any petition and proceeding under such a statute. Indeed, those markers of jurisdiction with respect to a petition for validation have largely been liberally placed by state legislatures, leaving the final decision of appropriate bounds to the court.

Judicial validation pursuant to an uncontested petition. Judicial validation statutes have provided authority to address petitions in non-adversarial proceedings that may not have been otherwise justiciable in a declaratory judgment action; petitioners and the Delaware courts have seized on that authority in judicial validation actions under Section 205, some of which were uncontested. In the first petition for judicial validation, the petitioner noted for the Delaware Court of Chancery that it believed it was unable to use Section 204 to ratify the defective corporate act at the heart of the petition.⁸⁸ Such exhaustion of self-help remedies, as well as the broad stockholder support generated for that petition, have emerged as common themes in the practice of petitions for judicial validation that are expected to be uncontested.⁸⁹ The broad scope of standing to bring a validation petition has also been utilized to permit successor

⁸⁶ *In re Numoda Corp.*, No. 121, 2015 (Del. Oct. 22, 2015) (ORDER).

⁸⁷ *See, e.g., CertiSign Holding, Inc. v. Kulikovsky*, C.A. No. 12055-VCS (Del. Ch. June 7, 2018) (addressing breach of fiduciary duty claims after a previous opinion resolved a petition for judicial validation of defective corporate acts related to the alleged inequitable conduct).

⁸⁸ *In re Trupanion, Inc.*, C.A. No. 9496-VCP, at 6 (Del. Ch. Apr. 28, 2014) (TRANSCRIPT).

⁸⁹ *See, e.g., In re Wine.com, Inc.*, C.A. No. 10401-VCG (Del. Ch. Apr. 16, 2015) (TRANSCRIPT).

corporations to obtain uncontested judicial recourse for actions by a predecessor entity, such as a defective conversion to a Delaware corporation.⁹⁰

Judicial validation pursuant to a contested petition. Other petitions under Section 205, however, have led to contested litigation where the Delaware Court of Chancery applied some of the key principles of the ratification and validation statutes.⁹¹ Those cases demonstrate that such litigation may be complex due to the technical issues in dispute and the interplay between plenary litigation and concurrent use of the Delaware Statutes to potentially moot claims after they've been raised by a petitioner.⁹² In one recent judicial validation action, the court confirmed the effectiveness of a certificate of validation that the corporation had adopted during litigation over the construction of a charter amendment providing for a reverse stock split.⁹³ The result of the certificate of validation was to retroactively give effect to the terms originally intended for that reverse split and moot technical litigation claims. The court was also asked to, and did, grant a petition for validation of a merger, which occurred a few years after the reverse split and was allegedly approved by stockholders based on a misunderstanding of the cap table due to the issues cleaned up by the certificate of validation. In another recent litigation, a stockholder brought claims challenging the authorization and disclosure related to a merger, and the respondent corporation submitted a counterclaim petition for judicial validation of the merger under Section 205.⁹⁴ Although the Court of Chancery granted that petition, related claims for breach of fiduciary duty were not automatically extinguished, but required separate resolution by the court.

Statutory amendments following litigation. Following certain judicial validation actions, the court's resolution of the petition has led to legislative amendments that now distinguish the Delaware Statutes from the statutes of other states. For instance, the 2018 amendments to the Delaware Statutes reflected themes that arose in judicial validation proceedings. Specifically, the definition of "failure of authorization" was amended to include a failure to authorize a corporate act in compliance with a "disclosure set forth in any proxy or consent solicitation statement,"⁹⁵ and the definition of "defective corporate act" was amended to confirm that the act

⁹⁰ See, e.g., *In re Belden Inc.*, C.A. No. 9842-CB (Del. Ch. July 8, 2014) (ORDER); *In re Beadles Lumber Co.*, C.A. No. 10247-VCL (Del. Ch. Oct. 24, 2014) (ORDER).

⁹¹ *In re Colfax Corp.*, C.A. No. 10447-VCL, at 37 (Del. Ch. Apr. 2, 2015) (TRANSCRIPT) (finding that a stockholder's assistance in judicial validation could provide a "quite substantial" benefit to the corporation); *In re Genelux Corp.*, 126 A.3d 644, 669 (Del. Ch. 2015) (holding that Section 205 does not authorize the Court of Chancery to invalidate a corporate act); *Knoll Cap. Mgmt L.P. v. Advaxis, Inc.*, C.A. No. 11417-VCN, at 6 (Del. Ch. Jan. 29, 2016) (denying motion to dismiss a petition, brought by a third-party spurned investor, seeking validation of a sale of stock that was abandoned and not properly approved by the issuing corporation); *In re Baxter Int'l Inc.*, C.A. No. 11609-CB, at 13, 20 (Del. Ch. June 22, 2016) (TRANSCRIPT) (validating a purportedly valid amendment to the certificate of incorporation).

⁹² See, e.g., *Colfax Corp.*, C.A. No. 10447-VCL (mooting technical claims by a petition for judicial validation of the underlying defective corporate act).

⁹³ *Almond v. Glenhill Advisors LLC*, C.A. 10477-CB (Del. Ch. Aug. 17, 2018).

⁹⁴ *Cirillo Family Trust v. Moezinia*, C.A. 10116-CB (Del. Ch. July 11, 2018).

⁹⁵ See S. 180, 149th Gen. Assem. § 8 (Del. 2018) (amending 8 *Del. C.* § 204(h)(2)).

must have been within the corporation’s power “without regard to the failure of authorization identified in [the ratification resolutions adopted by the board of directors].”⁹⁶ These amendments do not yet appear in the statutes of states following Delaware’s two-section model, nor do they appear in the MBCA Statutes.

Coordination of ratification and validation in litigation. In litigation involving technical claims, ratification and validation statutes may be used to rectify related defective acts. That litigation may include claims regarding the technical validity of a corporate act or its equitable nature when implemented by fiduciaries such as directors or officers. Alternatively, that litigation may be include a petition brought under a corporate ratification or judicial validation statute. In either case, a corporate ratification or judicial validation may be used to address the claims that initiated the litigation. Delaware courts have also noted that stakeholders may play an important role by assisting the corporation in addressing such issues. This also demonstrates the importance of coordination and understanding between groups that most frequently deal with corporate issues and those that are generally focused on litigation matters.

Takeaways

Ratification and validation statutes offer substantial assistance to corporations and their stakeholders, while filling a significant gap that existed in the toolbox of remedial options. Because there is great potential for both equity and mischief in the application of these statutes, the history, importance, and possibilities around these corporate defects and methods of redress are important considerations regarding their implementation. Such caution should not, however, deter corporations and courts from the appropriate application of the full force of these statutory powers. Just as common law ratification and declaratory relief have been asserted in circumstances testing their permissible bounds in pursuit of equitable solutions to technical defects, so too have these nascent statutes been made available to further the equity and certainty of corporate foundations, investments, and transactions.

⁹⁶ See S. 180, 149th Gen. Assem. § 7 (Del. 2018) (amending 8 *Del. C.* § 204(h)(1)).