

VOIDABLE CORPORATE ACTS

The First Decade of Statutes for Ratification and Validation of Defective Corporate Acts

By Nate Emeritz and Connor Lynch

Statutes permitting the ratification and validation of defective corporate acts first took effect in Delaware 10 years ago. During the past decade, other states have adopted analogous statutes, and there are now 20 states including Delaware that are developing the practice of ratification and validation through statutory amendments, case law, and practice. This article identifies developments related to ratification and validation laws that may guide further adoption, use, and refinement of such laws in their second decade.

Statutory Adoption

Overview

Sections 204 and 205 of the Delaware General Corporation Law (DGCL), providing for corporate ratification and judicial validation of void and voidable corporate acts, were adopted in 2013 and became effective on April 1, 2014. Those statutory provisions were viewed as important for corporate practice because of shortcomings in common law ratification, statutory declaratory judgment, and statutory correction of prior state filings. Section 204 of the DGCL (Section 204) provides for clear retroactive effectiveness of acts not effected in accordance with the DGCL or governing documents, and Section 205 of the DGCL (Section 205) allows for the corporation and relevant stakeholders to petition the Delaware Court of Chancery for validation

of corporate acts or declaration of validity of a ratification.

A corporate ratification under Section 204 requires board approval of detailed resolutions identifying the defective corporate act, the underlying failures of authorization, and related matters such as the date and affected shares. DGCL corporate ratifications also require notice to current and former holders of valid and putative shares and may require approval by current holders of valid shares and/or filing of a certificate of validation with the Delaware Secretary of State. Section 205 provides additional flexibility for the Delaware Court of Chancery to validate a wider range of corporate acts than the corporation may ratify under Section 204. These approaches to corporate ratification and judicial validation are generally followed by other states' statutes.

These DGCL provisions have become helpful and increasingly widely used tools in the corporate law toolbox. Analogous statutes have been adopted by 19 other states, largely tracking the format of either the DGCL provisions, or Model Business Corporation Act (MBCA) provisions.¹ Exhibit 1 shows the year in which each state's ratification and validation statute became effective.

Considerations for Non-Adopting States

As more states adopt ratification and validation statutes, in part on the basis that common law ratification is inadequate to the task of remediation of corporate defects, companies in states that have not adopted such a statute may face an increasing deficit in their ability to effectively ratify invalid corporate actions under common law. States that have been recognized as facilitating startup ecosystems, where

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Exhibit 1		
Year	Number	States
2014	1	Delaware (DGCL 204-205)
2015	2	Nevada (NRS 78.0296); Texas (TBOC 21.901-908)
2016	1	Kansas (KSA 17-6428-6429)
2017	3	Connecticut (CGSA 33-606-606g); Oklahoma (OSA 18-1055.1-1055.2); Washington (WRC 23B.30.010-080)
2018	1	North Carolina (NCGSA 55-1-60-67)
2019	2	Idaho (IC 30-29-145-152)
2020	3	Alabama (AC 10A-2A-1.45-1.52); Colorado (CRSA 7-103-106); Montana (MCA 35-14-145-152); Oregon (ORS 60.270-291)
2021	2	Nebraska (NRS 21-218.01-218.08); Virginia (VCA 13.1-614.1-614.8)
2022	2	Iowa (ICA 490.145-152); Maryland (MCCA 2-701-707)
2023	2	California (CCC 119); Pennsylvania (15 PCSA 221-229)
2024	1	Florida (FSA 607.0145-0152)
TOTAL	20	

it would be typical for startups to form hastily as a local entity and then convert to a Delaware entity to attract professional investment, might particularly be expected to need a ratification and validation statute to solve for corporate actions taken with the “move fast and break things” mentality.

A recent Pitchbook ranking of cities with startup ecosystems includes states that have not adopted such statutes: New York, Massachusetts, District of Columbia, Illinois, Utah, Georgia, Arizona, and Minnesota (though the Illinois legislature in 2021 considered and declined to adopt such legislation). In addition, approximately 20 other states following the MBCA have not adopted a ratification and validation statute but presumably could adopt a version of the MBCA model provisions without needing to “reinvent the wheel.”

Refinements in Statutory and Case Law

Since Sections 204 and 205 were adopted, the Delaware legislature and courts have further refined the ratification and validation laws through statutory amendments and case law.

Key Amendments and Related Provisions

Delaware amended its ratification and validation statute in 2015, 2018, and 2023. Three key refinements made by those amendments include the addition of Section 204(b)(2) for the ratification of a defective election of initial directors (Initial Board Provisions), clarification that invalid shares as of the board’s approval of the ratification have no voting power (Putative Share Provisions), and elimination of the requirement that a certificate of validation be filed in respect of a ratification related to a previously filed certificate that does not require any changes (No-Change COV Provisions).

- *Initial Board Provisions.* This addition was important because a foundational element of a statutory ratification is the existence of a board of validly elected directors, which may not be obtainable if the initial directors were invalidly elected and unable to authorize subsequent corporate actions. The Initial Board Provisions have generally been adopted by other states with a few exceptions (for example, Maryland, Nevada, Texas).

- *Putative Share Provisions.* This clarification was important, particularly for complex ratifications involving numerous defective corporate acts, because it avoided potential confusion in a situation where putative shares (without voting power) were ratified in one step of a ratification (with retroactive effect), thereby becoming valid shares (with voting power) that would be factored into the vote required for the ratification. Although most states have followed Delaware's approach to Putative Share Provisions, there are some interesting deviations. For instance, Oregon provides that putative shares have voting power if all outstanding shares are putative, and Pennsylvania provides that publicly listed putative shares have voting power.
- *No-Change COV Provisions.* This elimination marked an improvement in the efficiency of ratifications in Delaware, because certificates of validation cannot be expedited with the Delaware Secretary of State, which can prolong the completion of a ratification. In the case of a ratification where no change is made to the previously filed certificate, a certificate of validation that would only serve to confirm the contents and validity of the previous certificate was deemed surplus to requirements. This requirement was eliminated from the DGCL in 2023, and only Florida has similarly adopted a No-Change COV Provision. California, also seeking more efficient ratifications, has adopted provisions permitting a single certificate of ratification to be used in respect of multiple prior certificates.

These three provisions are some but not all of the important mechanisms in ratification statutes. Their adoption reflects the nationwide development and experimentation with such statutes, along with other interesting deviations from the DGCL, such as California's exclusions for dissolved corporations and fiduciary duty matters. These provisions are also important for legislatures and practitioners to keep

in mind when considering differences in statutes and potential refinements of new and existing ratification statutes.

Delaware and Non-Delaware Case Law

Section 205 provides the Delaware Court of Chancery with jurisdiction to hear petitions for validation and challenges to Section 204 ratifications. In such cases, Delaware courts have interpreted the DGCL provisions in important ways, such as requiring that a defective corporate act have been attempted for it to be susceptible of ratification² and admonishing parties that may seek to use invalidity as a source of leverage.³ More recently, the courts have also explained that the court may grant validation and other remedies even if the invalidity of the corporate action is only uncertain.⁴

The court may also hear a petition even if a petitioner has not exhausted its out-of-court, self-help options, though the court has dismissed such a petition where the corporation-petitioner could have solicited its stockholders for ratification.⁵ The Delaware Court of Chancery has also demonstrated a willingness to move as quickly as a matter of weeks on an uncontested, broadly supported petition for validation, while more closely examining contested petitions.

Other states' courts have also interpreted Sections 204 and 205, including the requirements for a defective corporate act which is susceptible of statutory ratification⁶ and non-Delaware courts' ability to exercise jurisdiction over a validation petition under Section 205.⁷ Texas courts have also examined similar questions about the scope of a defective corporate act,⁸ limits of the Texas ratification and validation statute with respect to *ultra vires* acts,⁹ and the requirement of detailed resolutions for statutory ratification.¹⁰ As ratification and validation statutes continue to be adopted and used, we expect further interpretation and refinement which may include interesting issues at the intersection of corporate and other laws, such as principles of comity and taxation.

Takeaways

Ratification and validation statutes have been an important addition to corporation statutes and the corporate law practice. Although these statutes have been explored most extensively in Delaware, we have also noticed an uptick in use of these laws outside of Delaware as familiarity increases. We expect to see further adoption, interpretation, refinement, and application in both Delaware and other states. We also expect that, as the market becomes increasingly aware of the benefits of these statutes, states without them may face pressure to provide their corporations and practitioners with this important corporate tool.

Notes

1. See Nate Emeritz, “The Development of Statutes for Ratification and Validation of Defective Corporate Acts” (Harvard Law School Forum on Corporate Governance, July 28, 2019) (discussing formats of ratification and validation statutes); *see also* Julia Reigel and Nate Emeritz, “Ratification and Validation Under New Section 119 of the California Corporations Code—A Practical Perspective” (Corporation Bulletin, Sept. 15, 2022) (discussing the California ratification and validation statute which generally tracks a third format, based on the Nevada statute, while also incorporating concepts from the DGCL).
2. *In re Numoda Corporation*, No. 121, 2015 (Del. Oct. 22, 2015) (ORDER).
3. *CertiSign Holding, Inc. v. Kulikovsky*, C.A. No. 12055-VCS (Del. Ch. June 7, 2018); *Almond v. Glenhill Advisors LLC*, C.A. No. 10477-CB (Del. Ch. Aug. 17, 2018 & Apr. 10, 2019).
4. *In re Lordstown Motors Corp.*, C.A. No. 2023-0083-LWW (Del. Ch. Feb. 21, 2023).
5. *In re 1847 Goedeker Inc., Consol.* C.A. No. 2022-0219-SG (Del. Ch. May 27, 2022) (TRANSCRIPT).
6. *Finnegan v. Baker*, No. 13-P-1995 (Mass. App. Aug. 14, 2015).
7. *Robertson v. Bohn*, No.: DBD-CV-15-6017926-S (Conn. Super. Aug. 8, 2016).
8. *Sterling/Suggs Ltd. Partnership v. Canyon Lake Island Prop. Owners Association*, No. 03-20-00131-CV (Tex. App.—Austin, Feb. 25, 2022).
9. *South Central Jurisdictional Conference of the United Methodist Church v. Southern Methodist University*, No. 05-21-00151-CV (Tex. App.—Dallas, July 26, 2023).
10. *Sister Initiative, LLC v. Broughton Maintenance Association*, No. 02-19-00102-CV (Tex. App.—Fort Worth, Feb. 13, 2020).