

Introduction

The Committee on Corporate Documents and Process and the Committee on Corporate Laws of the Section of Business Law of the American Bar Association have together developed a set of model forms of various documents associated with the formation and organization of publicly held corporations under the Model Business Corporation Act (the Model Act) and the Delaware General Corporation Law (the DGCL). This set includes:

- Model articles of incorporation for a public corporation in a Model Act state.¹
- Model bylaws for a public corporation in a Model Act state.
- Model certificate of incorporation for a publicly held Delaware corporation.
- Model bylaws for a publicly held Delaware corporation.
- Model charters for various committees of the board of directors (audit committee, compensation committee, and nominating/governance committee).

The forms of articles and bylaws tailored specifically to the Model Act and the accompanying commentary should be helpful for lawyers counseling businesses that are organized as corporations under the laws of any of the many jurisdictions that have followed the Model Act. No jurisdiction, however, has adopted that act without some modifications. Accordingly, the practitioner will have to consider whether any such modifications require changes to the model forms.

Because so many corporations are incorporated in Delaware, which does not follow the Model Act, the committees have also developed a model certificate of incorporation and bylaws for use by Delaware corporations under the DGCL.

In each instance (the Model Act forms and the Delaware forms), the model bylaws are drafted to be compatible with, and to be used in conjunction with, the corresponding model articles or certificate of incorporation. The model committee charters have been drafted to be compatible with both of the Model Act forms and the forms for Delaware corporations. They are also derived from and intended to be compatible with the commentary in the *Corporate*

1. Very simplified models of certificates or articles of incorporation can be found on the web sites of the secretary of state or equivalent office of many states. Models for Delaware and Virginia, for example, can be found at <http://corp.delaware.gov/incstk.pdf> and <http://www.scc.virginia.gov/division/clk/forms/scc619.pdf>.

Director's Guidebook (5th ed. 2007) published by the Committee on Corporate Laws, as well as the listing standards of the NASDAQ Stock Market and the New York Stock Exchange.

The model forms are designed for corporations whose common shares are listed on a national securities exchange. For any corporation with a limited number of shareholders, some of the model provisions of the articles or certificate of incorporation and the bylaws may be deleted as unnecessary. On the other hand, a closely held corporation may need additional provisions to address its internal governance.

More generally, the organizational documents of a public corporation represent a balancing of interests among different constituencies. The model forms presented here serve only as a guide to assist the lawyer in identifying issues and in drafting language to effectuate the parties' intent.

The comments accompanying the model Delaware forms include citations to pertinent Delaware court opinions, but the comments relating to the Model Act forms do not. The difference reflects that the Delaware forms deal with a single jurisdiction with a well-developed body of case law construing the Delaware statute, while the Model Act is interpreted in many jurisdictions, many with only sparse case law. The larger body of Delaware case law is due, in part, to some significant differences between the two corporate law regimes. The two statutes reflect somewhat divergent drafting philosophies: the Model Act is intentionally drafted to codify how issues are to be resolved, recognizing that judicial precedent in a particular state may be relatively scarce; the Delaware General Corporation Law, on the other hand, tends to avoid thorough codification, preferring to leave uncertain questions to judicial resolution in the first instance. Also, unlike the Delaware statute, the Model Act includes Official Comments intended to elaborate on the interpretation of the Model Act, much as judicial precedents might help clarify the interpretation of a statute.

The Committee on Corporate Laws of the American Bar Association's Section of Business Law is composed of active or former practicing lawyers, law professors, regulators, and judges, with corporate expertise, from throughout the United States and Canada. In addition to the *Corporate Director's Guidebook* and other scholarly writings, the committee is responsible for the development of the Model Business Corporation Act. The Model Act, first issued in 1950, has been adopted substantially or largely in its entirety by more than 30 states and in important respects by many other states. The Model Act has played an important role in the development of corporate law in the United States and elsewhere. The committee serves as the permanent editorial board for the Model Act, reviewing, revising, and updating its provisions on a continuing basis.

The roster of active committee participants during the development of the *Model Forms of Organizational Documents for Public Companies* (including appointed members, consultants, and liaisons from other ABA committees) is listed below.

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The mission of the Committee on Corporate Documents and Process (formerly known as the Corporate Practice Committee) of the American Bar Association's Section of Business Law is to study corporate organizational and other documentation and processes, including the preparation and publication of model corporate documentation and accompanying commentary. The Committee's Task Force on Public Company Organizational Documents, which has led the effort to develop the materials in this publication, has included the following individuals:

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