This is the third edition of The MBCA Newsletter. We have appreciated the feedback on our first two issues and have tried to incorporate the good suggestions we have received. We hope we can continue to develop this line of communication with our State Liaisons and state corporate law leaders to be good stewards of the Model Act and facilitate a better understanding of its provisions.

To that end and looking ahead to the next meeting of the Corporate Laws Committee in late March, we will be voting on proposed amendments to Chapters 7 and 10 of the Model Act to permit shareholders’ meetings to be conducted by remote participation without an actual physical location. The Committee spent considerable time discussing these amendments, particularly in light of technology developments, and has now published them for comment in the Winter edition of The Business Lawyer. I encourage you to review the amendments and pass on your thoughts. Also, at our next meeting, the Committee has plans to consider on second reading, a new chapter for the Model Act on benefit corporations. If approved, this chapter will be published for comment in the Summer edition of The Business Lawyer.

At our last meeting in 2018, we continued our progress on three important Committee publications – The Corporate Director’s Guide, Handbook for the Conduct of Shareholders’ Meetings and a new edition, the 5th, of the MBCA Annotated. These are projected for publication in 2019 and 2020, respectively. We also discussed and debated the proposed amendments mentioned above, as well as continued our analysis of the appraisal remedies provisions in the Model Act, including consideration of possible amendments. As a final mention, the Committee continued its work with the Committee on LLCs, Partnerships and Unincorporated Entities and the ABA’s Gatekeeper’s Task Force drafting fundamental principles for federal legislation which would mandate disclosure of beneficial ownership of corporations and other entities.

We remain focused on promoting adoption of the Model Act in general and the 2016 Revision in particular and supporting states in their efforts to adopt and maintain corporation laws based on the Model Act. In this issue, we have two pieces which relate to those purposes – a comment on the recent Chancery Court decision in Almond v. Glenhill Advisors LLC regarding validation of defective corporate acts under Section 205 of the Delaware General Corporation Law, which is similar to Section 1.52 of the Model Act, and “Adoption Strategies and Lessons Learned” from the 2016 Revision and other Model Act adoption efforts, which reprises a program we held last Fall.

As always, we would appreciate your feedback and input for future editions of The MBCA Newsletter. Please let us know if there are items you would like addressed. The newsletter is to highlight recent developments regarding the Model Act and the activities of the Corporate Laws Committee, along with noteworthy developments in U.S. corporate law. Your input will help us do that better.

Best regards,
David Martin
Committee Chair
In the years that followed the reverse stock split, DWR’s fortunes gradually began to rise, with DWR ultimately consummating an “offensive” financing transaction that involved, among other things, a conversion of all of the Series A preferred stock to common stock. With DWR on more solid financial footing, DWR’s board engaged in discussions with Herman Miller regarding the acquisition, and ultimately decided to sell the company for more than $170 million—a price that, in light of DWR’s performance in the not-too-distant past—was viewed to be highly favorable.

The acquisition was structured as a “short-form” merger pursuant to Section 253 of the DGCL, which generally provides that a corporation owning at least 90% of each class of outstanding stock of a subsidiary corporation that, but for the provisions of Section 253, would be entitled to vote on a merger may either merge the subsidiary into itself or merge itself into the subsidiary. Although the merger was by all accounts a success, the plaintiff, a cashed-out common stockholder of DWR, brought suit in the Delaware Court of Chancery, ultimately seeking to arrogate to itself a greater portion of the merger consideration.

The plaintiffs’ principal contention on this front was that, due to a technical defect that occurred in connection with the 2010 reverse stock split, the parent corporation in the short-form merger did not actually own more than 90% of the outstanding stock of a subsidiary corporation that, but for the provisions of Section 253, would be entitled to vote on a merger may either merge the subsidiary into itself or merge itself into the subsidiary. Although the merger was by all accounts a success, the plaintiff, a cashed-out common stockholder of DWR, brought suit in the Delaware Court of Chancery, ultimately seeking to arrogate to itself a greater portion of the merger consideration.

The defective corporate acts at issue in Almond arose in the context of litigation arising out of Herman Miller’s 2014 acquisition of Design Within Reach, Inc. (“DWR”). In 2009, in the wake of the great recession, DWR was facing severe financial distress. At that time, it secured a financing transaction pursuant to which it issued shares of common stock and Series A preferred stock collectively representing more than 90% of its outstanding capital stock in exchange for $15 million. In the next few years, DWR continued to struggle. During this period, its stock was trading on the pink sheets like a penny stock. In 2010, to address the issues with trading, DWR undertook a 50:1 reverse stock split of each of its common stock and its Series A preferred stock.
preferred stock would convert to common stock in the event of a reverse split of the common stock. For example, if the conversion ratio pre-split were 1:1, following a 50:1 reverse split of the common stock, the Series A preferred stock would convert at a 50:1 ratio post-split. The certificate of designation did not, however, provide for any corrective adjustment in the conversion ratio in the event of a simultaneous reverse split of the Series A preferred stock itself. As a result, following the 2010 reverse stock split—which was effected for each of the common stock and preferred stock at a 50:1 ratio—the Series A preferred stock’s conversion ratio, by the plain terms of the instrument, was effectively reduced by a factor of 2,500:1, an outcome that was both unintended by and unbeknownst to the relevant parties at that time.

After the plaintiffs challenged the validity of the merger, DWR’s board and post-merger stockholder, acting pursuant to Section 204 of the DGCL, approved resolutions ratifying various defective corporate acts and putative stock, including those relating to the reverse stock splits and the subsequent conversion of the Series A preferred stock to common stock. In response to plaintiff’s claims challenging the ratification, DWR filed a counterclaim seeking to have the Court validate the defective corporate acts identified in the ratification resolutions under Section 205.

In a post-trial opinion, the Court reviewed each of the factors enumerated in Section 205(d)—namely, whether the defective act was originally approved or effectuated with the belief that the approval or effectuation complied with the DGCL, the certificate of incorporation or bylaws; whether the corporation and its board had treated the act as valid and whether any person has acted in reliance on the public record on the public record that such defective corporate act was valid; whether any person would be harmed by a ratification of the act (other than any harm that would have resulted had the act always been valid); whether any party would be harmed by the failure to validate the act; and any other factors the court deems just and equitable. The Almond Court found that each of these factors “weigh[ed] overwhelmingly in favor of judicial validation of the defective corporate acts.”

First, the Court noted that the reverse split was originally approved with the belief that it complied with the relevant provisions of the DGCL and DWR’s organizational documents. The Court further noted that, if it went uncorrected, the defect would have “gutted” the value of the Series A preferred stock. Second, the Court found that the parties had treated the challenged acts as valid (without regard to the defect), noting that DWR had publicly disclosed them in press releases and with government agencies and that the public (including investors and counterparties) acted in reliance on their validity. Third, the Court determined that no party would be harmed by the ratification—and, in doing so, rejected plaintiffs’ claim that they would be harmed (i.e., through the loss of their damages claim), noting that Section 205(d) specifically directs the Court to exclude any harm that would have resulted had the defective act been valid. Fourth, the Court found that not only would no party be harmed, but that Herman Miller and the former stockholders of DWR would be harmed by the Court’s failure to validate the acts. The Court then stated that validation of the acts, under the circumstances, was clearly equitable. Although it articulated at length the manner in which each of the preceding factors in 205(d) militated in favor of validation, the Court’s finding on this last point supports the observation that Section 205 at its core is a statute that allows a court to reach the right result from an equitable standpoint, rather than applying common law principles that would require certain defective corporate acts to be declared void (and thus incapable of cure) in spite of the equities.

In our view, a court applying Section 1.52 of the Model Act, which is the corollary provision to Section 205, would likely reach a similar outcome. As with Section 205 of the DGCL, Section 1.52 of the MBCA grants a court the power to, among other things, determine the validity and effectiveness of any corporate action or defective corporate action as well as the validity and effectiveness of any ratification under Section 1.47 of the Model Act. Unlike Section 205, however, Section 1.52(b) does not expressly enumerate the factors that a court may consider in proceedings brought under such section. Rather, Section 1.52(b) provides that “[i]n connection with an action under this section, the court may . . . take into account any factors or considerations regarding such matters as it deems proper under the circumstances.” Despite the absence of specific factors in Section 1.52(b), we believe a court in a Model Act jurisdiction would likely read Section 1.52(b)’s “equitable considerations” provision in a manner that encompasses the same factors that are expressly enumerated in Section 205(d). The factors in paragraphs (1) through (4) of Section 205(d) are all clearly equitable in nature—as evidenced by the fact that Section 205(d)(5) directs the court to consider “other” factors that it deems “just and equitable.”

Moreover, the Official Comment to Section 1.52, which identifies some factors that a court might take into account in connection
One of the goals of the Corporate Laws Committee is to facilitate the adoption of the 2016 Revision of the Model Act (the “2016 Revision”) and to provide resources and support for corporation law revision efforts. As part of these efforts, the Committee sponsored a panel discussion last April called “Adoption Strategies and Lessons Learned.” Presenters at the program were attorneys who had recently been involved in corporate law revision efforts: Philip Schwartz (Akerman LLP), Co-chair of the Florida task force reviewing Florida’s corporate statute; Glenn Morris (LSU), the Reporter and Chair of the Corporations Committee of the Louisiana State Law Institute which was instrumental in Louisiana’s recent revision of its business corporation law based on the Model Act; and Mark Gentile (Richards, Layton & Finger LLP) a member of the Delaware bar.

Phil Schwartz reported that the Florida task force had been meeting as a committee of the whole since 2014 and was reaching the end of a comprehensive review of the Florida corporate statute and the Model Act. He thanked the Corporate Laws Committee for providing the Florida task force with updated drafts throughout 2015 and 2016 of what became the 2016 Revision so that the task force did not need to wait for the completion of the 2016 Revision before they began their review of the Florida corporate statute.

In Phil’s view, the first order of business for any corporate law revision committee should be to find one or more good reporters who are willing to do the hard work of recording the deliberations of the committee and overseeing the preparation of the draft statute and commentary. He said that it is also important to establish a meeting schedule and stick to it. In the case of the Florida task force, it meets every two or three weeks for two hours by conference call and three times a year in person for a 3-hour meeting. The Florida task force first tackled Chapters 2 through 8 of the Model Act, then turned to Chapter 1, and then returned to review Chapters 2 through 8 again because of the need to make sure that the changes in Chapter 1 flowed through those other chapters. It then tackled Chapters 10, 14, 15 and 16. Phil reported that the task force was then working through the changes to Chapter 11 (which will include the conversion and domestication provisions in Chapter 9 of the Model Act), and will thereafter complete Chapters 12 and 13 and finalize the proposed statutory revision. Since the panel discussion last year, the Florida task force has completed drafting the proposed statute, based largely on the Model Act.
Act, and has presented it to the Florida legislature. If it is adopted during the 2019 legislative session, it will become effective on January 1, 2020.]

The Florida task force drafted the section-by-section commentary as it was revising the substantive provisions to make sure that the reasons for the changes were recorded for posterity. Phil also discussed the involvement in the project of the Florida Department of State and several other sections of the Florida Bar, and emphasized the importance of getting good “buy-in” from all stakeholders. He also reported that, in addition to looking at the Model Act for guidance on proposed changes, the task force was, in appropriate situations, harmonizing the provisions in the proposed Florida corporate statute with provisions of Florida’s revised limited liability company act (which was adopted in 2013). Finally, he reported that the task force intended to propose a delayed effective date for the bill, and that once the bill is adopted, the task force plans a series of seminars around the state to introduce the statutory revision.

Glenn Morris described the work of the Corporations Committee of the Louisiana State Law Institute, which resulted in the adoption of the Louisiana Business Corporation Act (“LBCA”) based on the Model Act. The LBCA became effective in 2015 and was the first modernization of the Louisiana business corporation law since 1968. It was based on the 1984 revision of the Model Act and included all of the amendments that had been adopted since the 1984 revision up to 2015, but predated publication of the 2016 Revision. The LBCA brought Louisiana into the mainstream of American corporation law. Earlier efforts to update the prior corporation law by inserting Model Act provisions had sometimes created unintended technical problems and interpretative issues. The Committee included representatives of the Secretary of State’s office, ten corporation law practitioners from various regions of Louisiana, and four corporate law professors, one from each of the state’s four law schools. The LBCA included modifications that were designed: (i) to adapt the Model Act to Louisiana’s legal system and terminology, (ii) to retain some of the desirable features of the existing law, and (iii) to make appropriate corrections and improvements in the Model Act provisions. The Committee had wide representation of stakeholders and the buy-in of the Secretary of State’s office, which had a staff member present at the meetings of the Committee and assisted with technical drafting issues.

The Committee proposed an 18-month delayed effective date but found that it would have the unintended effect of delaying the actual passage, so the proposal was withdrawn. In Glenn’s view, it was easier to do a complete revision than to make piecemeal changes. The Louisiana effort took four years and resulted in unanimous approval by the Louisiana State Legislature.

Mark Gentile gave his perspective on the work of the Corporation Law Council of the Delaware Bar Association, which is responsible for formulating and recommending to the Delaware General Assembly amendments to the DGCL after approval by the Delaware State Bar Association. He praised the collaborative relationship between the ABA Corporate Laws Committee and the Corporation Law Council, citing in particular the work of the Corporate Laws Committee on majority voting for directors and the impact of the Delaware provisions for the ratification of defective corporate acts on the drafting of the comparable Model Act provisions and also noted the impact of the Washington Corporation Act Revision Committee on Section 102(b)(7) of the DGCL.

Stanley Keller (Locke Lord LLP) addressed some of the transitional issues that may arise in the adoption of significant substantive changes. He recommended that transitional rules be considered throughout the review process and noted that transitional provisions will often affect the drafting of revisions and the approach to changes in default rules. He noted that consideration be given to the scope of the savings provisions allowing reorganizations and other transactions and pending civil actions and other proceedings to be completed in accordance with the existing statute as if it had not been amended and repealed and any accrued right to be enforced under the prior law.

The Corporate Laws Committee will hold a follow-up panel discussion on the 2016 Revision adoption efforts on Thursday morning, September 12, 2019, at the Annual Meeting of the Business Law Section in Washington, D.C. Please mark your calendars.

2 Id. at 983.
3 See Model Act § 17.03.
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The Committee is seeking articles and notes for future issues of the newsletter which are circulated to our Committee members and all State Liaisons. Please send your submission to John Lawrence at jlawrence@goodwin.com.

Articles should be 1500 words or less and on any corporate law topic of interest to practitioners from Model Act decisions or developments to interesting state corporate law developments. We appreciate your help in making this newsletter a success.