THE MODEL BUSINESS CORPORATION ACT AND CORPORATE GOVERNANCE: AN ENABLING STATUTE MOVES TOWARD NORMATIVE STANDARDS

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I
INTRODUCTION

The Model Business Corporation Act (MBCA) was first published in 1950 as a typical, if forward looking, enabling statute with a close family resemblance to the Delaware General Corporation Law and other state statutes of the time. With the governance failures and accounting frauds of the early part of this decade—leading to the enactment of the Sarbanes-Oxley Act of 2002—and the financial meltdown at the end of the decade, the drafting body and custodian of the MBCA, the Committee on Corporate Laws of the American Bar Association Section of Business Law (Committee), has moved, at times fitfully, but quite clearly, from the traditional enabling statute, with most governance choices left to private ordering, to the accommodation, if not embrace, of normative governance rules.

MBCA developments have often lagged behind those in Delaware—where the bar and legislature are closely attuned to corporate governance concerns, but with a strong director- and management-centric bias because of the economic importance to that state of its predominant role as a domicile for public companies. At times, however, as with amendments adopted in 2005, the MBCA has moved ahead of Delaware to break new ground. As in Delaware, the changes have been more evolutionary than revolutionary, and the Committee has remained committed to keeping the statute primarily an enabling vehicle, giving wide range for private ordering.[1] In fact, prior to 2001

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1. *See* 2010 COMM. ON CORPORATE LAWS OF THE ABA SECTION OF BUS. LAW, REPORT ON THE ROLES OF BOARDS OF DIRECTORS AND SHAREHOLDERS OF PUBLICLY OWNED CORPORATIONS 2 (2010), *available at* http://www.abanet.org/media/nosearch/task_force_report.pdf [hereinafter REPORT ON THE ROLES] ("The Committee also believes that providing statutory flexibility for private

(pre-Enron Age), before the public and political focus on corporate governance and the rebalancing of the relationship between shareholders, directors, and managers that began with the failures of Enron and WorldCom, governance changes in the MBCA, as in Delaware law, were infrequent and focused primarily on defining the role of directors and limiting their liability. Following the pre-Enron Age, the Committee made a course correction in the MBCA—responding to public concern, investor–activist calls for greater director accountability, and the threat of federally imposed normative governance standards—with a series of amendments that expanded the descriptions of directorial duties and provided specific authority for shareholders to become more directly involved in director elections.

II

CHANGES REGARDING THE ROLE OF THE BOARD OF DIRECTORS

Section 8.01(b) of the MBCA sets forth the general role of the board of directors at public corporations and currently provides that "the business and affairs of the corporation shall be managed by or under the direction . . . of its board of directors."[2] The Committee has made two key changes to this section in the past seventy years—one in 1974 and the other in 2005—the latter clearly in response to changing external circumstances. These changes reflect the different focuses of the Committee in the pre- and post-Enron Ages.

A. 1974 Amendments

In 1974, the Committee added the language "or under the direction of" to section 8.01(b) of the MBCA to recognize the limited roles and responsibilities of boards of directors, particularly at public corporations. Prior to the 1974 amendments, section 8.01(b) provided that "the business and affairs of a corporation shall be managed by a board of directors," and could be read as requiring active day-to-day involvement by directors in management. By 1974, it was recognized that, at least for public companies, this language did not accurately describe the role of directors. In adopting the 1974 amendments, the Committee noted that "many commentators had recently voiced concern that [the prior] language may be interpreted to mean that directors must become involved in the detailed administration of the corporation's affairs" and therefore, made this change "to adapt to current corporation life."[3] The purpose of the change was to "eliminate any ambiguity as to the director's role in

ordering by boards and/or shareholders within the centralized model generally is preferable to a more prescriptive one-size-fits-all approach.").

2. MODEL BUS. CORP. ACT § 8.01(b) (2008).

3. *Report of the Committee on Corporate Laws: Changes in the Model Business Corporation Act*, 30 BUS. LAW. 501, 504–05 (1975).

formulating major management policy as opposed to direct involvement in day-to-day management in publicly-held corporations."[4]

The 1974 amendments to section 8.01(b) of the MBCA were indicative of the Committee's focus during the pre-Enron Age on protecting directors from unreasonable expectations and resultant inappropriate liabilities. Thus, according to the Committee's commentary, the 1974 revised language "clearly implies that the board has the power to probe to any depth but has a responsibility to do so only to the extent that the standard of care requires."[5] Notably, the change was made at the same time that a statutory definition of the duty of care was added to the MBCA.[6]

B. 2005 Amendments

In contrast to 1974, when the Committee revisited section 8.01 in the post-Enron Age, its focus moved from director protection from liability to spelling out oversight duties. The 2005 amendments revised section 8.01(b) to make clear that "the business and affairs of the corporation shall be managed by . . . *and subject to the oversight*, of its board of directors"[7] and added a new section 8.01(c). In direct response to the post-Enron environment, the 2005 amendments, for the first time in MBCA history, set out specific director oversight responsibilities.[8] This shift in focus also was evidenced by contemporaneous changes made to the Corporate Director's Guidebook (Guidebook) (which is published by the Committee). Comparing the third edition of the Guidebook (published in 2001) to the fourth edition (published in 2004), the description of director oversight became much more concrete and active,[9] consistent with an emphasis on oversight throughout the entire 2004

4. MODEL BUS. CORP. ACT ANN. § 8.01 hist. background at 8–10 (2008).

5. *Id.*

6. *See id.*

7. *See id.* § 8.01(b) (emphasis added).

8. *See id.* § 8.01(c). These responsibilities include "attention to: (1) business performance and plans; (2) major risks to which the corporation is or may be exposed; (3) the performance and compensation of senior officers; (4) policies and practices to foster the corporation's compliance with law and ethical conduct; (5) preparation of the corporation's financial statements; (6) the effectiveness of the corporation's internal controls; (7) arrangements for providing adequate and timely information to directors; and (8) the composition of the board and its committees, taking into account the important role of independent directors." *Id.*

9. *Compare Corporate Director's Guidebook Third Edition*, 56 BUS. LAW. 1571, 1578 (2001) ("The oversight function—often performed largely by board committees such as audit and compensation—does not, in general, involve specifically required decisions or approvals but rather concerns periodic attention to corporate systems and controls, policy issues and other recurring matters, as well as discrete attention to matters suggesting a need for inquiry."), *with Corporate Director's Guidebook Fourth Edition*, 59 BUS. LAW. 1057, 1063–64 (2004) ("The oversight function concerns ongoing monitoring of the corporation's business and affairs and, in particular, attention to corporate business performance, plans and strategies, risk assessment and management, compliance with legal obligations and corporate policies, and the quality of financial and other reports to shareholders, as well as attention to matters suggesting a need for inquiry or investigation.").

Guidebook.[10] By 2004, the Guidebook emphasized that, although directors need not be managers, their core role of oversight must be an active one.

The 2005 amendments are directly attributable to the impact of the financial scandals that erupted at the beginning of the decade,[11] the substantial regulatory reforms imposed by the Sarbanes-Oxley Act of 2002, and investor–activists' calls for greater board oversight. In March 2002, the President of the American Bar Association appointed a Task Force on Corporate Responsibility (Task Force), charged with examining "systemic issues relating to corporate responsibility arising out of the unexpected and traumatic bankruptcy of Enron and other Enron-like situations."[12] A year later, after a study and a series of public hearings, the Task Force issued a report. The report concluded that board oversight had not been fully effective because independent directors were "overly dependent" on, and "overly passive" with respect to senior management and had "failed to devote adequate time and attention to discharge their oversight responsibilities."[13] The Task Force's report called for directors to "abandon the passive role many have been content to play, and replace it with a new culture stressing constructive skepticism and an active, independent oversight role."[14] Many of the Task Force's more than twenty recommendations addressed this proposed culture shift by suggesting ways to bolster the independence and resources of, and information flow to, non-employee directors.[15] The Task Force specifically called for standards that would require directors to "engage in active, independent and informed oversight of the corporation's business and affairs, including its senior management."[16] The Task Force's report recommended that the MBCA be amended to "clearly delineate the oversight responsibility of directors generally"[17] and identified specific oversight responsibilities that should be considered by the MBCA and other state corporate laws.[18] The Task Force's

10. *Compare Corporate Director's Guidebook Third Edition*, *supra* note 9, at 1577 ("The most important responsibility of directors is to maintain focus on the successful operation of the business of the corporation."), *with Corporate Director's Guidebook Fourth Edition*, *supra* note 9, at 1062 ("A primary responsibility of directors is to oversee the operation of the business and affairs of the corporation.").

11. *See* MODEL BUS. CORP. ACT intro. at xvii (2008).

12. REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON CORPORATE RESPONSIBILITY 2 (2003), *available at* http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf [hereinafter TASK FORCE REPORT]. Many of the members of the Task Force were also members, or former members, of the Committee, including James H. Cheek III, the Task Force Chair, and the lead author of this article.

13. *Id.* at 25.

14. *Id.* at 29.

15. *Id.* at 28, 31–33, 62–72.

16. *Id.* at 31.

17. *Id.* at 32.

18. *Id.* at 32–33, n.64. These responsibilities include, "selecting, evaluating and compensating the chief executive officer and other members of senior management; reviewing, approving, and monitoring fundamental financial and business strategies and the performance of the company relative to those strategies; assessing major risks facing the company; and ensuring that reasonable processes

normative approach was adopted—with a catalog of oversight responsibilities strikingly similar to that in the Task Force's report—in 2005, in then new section 8.01(c) of the MBCA.[19] In this regard, the MBCA moved ahead of, and contrasts strongly with, the Delaware statute, which does not enumerate director oversight responsibilities, but leaves the specifics of directorial duty to case law development.[20]

III

CHANGES TO STANDARDS OF CONDUCT AND LIABILITY

The evolution of governance approaches in the MBCA also can be seen in comparing pre- to post-Enron-Age amendments related to director liability. Sections 8.30 and 8.31 of the MBCA distinguish between standards of conduct (section 8.30) and standards of liability (section 8.31) for directors.[21] This approach differs from that taken in Delaware, where standards of conduct and of liability are not viewed separately and have developed mainly through case law.[22]

A. 1998 Amendments to Standards

The Committee amended section 8.30 and introduced section 8.31 in 1998—three years before the Enron scandal. The 1998 amendments were a reaction to judicial decisions imposing liability on directors and reflected the Committee's desire to protect directors from inappropriate judicially-imposed liability.

Prior to the 1998 amendments, the duty of care was incorporated in section 8.30(a), which stated that "[a] director shall discharge his duties . . . with the care an ordinarily prudent person in a like position would exercise under similar circumstances."[23] Some courts interpreted this formulation as establishing a simple negligence standard for director liability; members of the Committee were concerned that the statute gave insufficient recognition to the common law business judgment rule.[24] After a two-year study of case law

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are in place to maintain the integrity of the company and the corresponding accountability of senior management, including processes relating to integrity of financial reporting, compliance with law and corporate codes of legal and ethical conduct, and processes designed to prevent improper related party transactions." *Id.*

19. *See* MODEL BUS. CORP. ACT § 8.30(c) (2008) (enumerating specific director oversight responsibilities).

20. *See* DEL. CODE ANN. tit. 8, § 141 (2001).

21. *See* MODEL BUS. CORP. ACT §§ 8.30 (standards of conduct), 8.31 (standards of liability) (2008).

22. *See* MODEL BUS. CORP. ACT ANN. § 8.31 hist. background at 245 (2008) ("[S]ection 8.31 is an entirely new provision that had no counterpart in any existing statute . . . ."). Notwithstanding the difference in approach, the MBCA's standards are substantively rooted in judicial formulations of common-law standards. *See id.* ("Although section 8.31 is an innovation in terms of statutory provisions, its substantive standards are firmly based on the common-law standards developed and applied by courts over the years.").

23. MODEL BUS. CORP. ACT ANN. § 8.30 cmt. at 8-190 (2008).

24. *Id.* at 8-206 to 8-207; *see also* R. Franklin Balotti & Joseph Hinsey IV, *Director Care, Conduct and Liability: The Model Business Corporation Act Solution*, 56 BUS. LAW. 35, 48 (2000).

regarding director conduct and liability, the Committee changed the formulation of the duty of care to take out the reference to the objective "ordinarily prudent person"[25] and substituted a more subjective standard: "the care that a person in a like position would reasonably believe appropriate under similar circumstances."[26]

In addition, the 1998 amendments eliminated old section 8.30(d), which provided that a director was not liable if he or she complied with section 8.30, and added new section 8.31 to set forth a separate, higher threshold for director liability.[27] The Committee wanted to clarify the distinction between standards of conduct and liability because of a "growing tendency by some courts to confuse standards of conduct with standards of liability."[28] Section 8.31 of the MBCA, which had no pre-existing statutory precedent, provides that directors will not be liable to the corporation or shareholders as a result of their decisions or actions as directors unless the plaintiff establishes that certain statutory safe harbors[29] from liability do not apply and that the director (1) did not act in good faith or did not reasonably believe the action to be in the best interests of the company, (2) was not informed, (3) lacked objectivity, (4) failed to devote attention to the oversight of the business, or (5) received a financial benefit to which the director was not entitled.[30]

While some of the provisions of section 8.31(a)(2) are similar to elements of the business judgment rule, the Committee stated that the new provision was not intended to codify the business judgment rule, but rather, was meant to provide "guidance as to [the rule's] application in dealing with director liability claims," leaving room for applications of the rule to continue to evolve in the courts.[31] Nonetheless, by adopting new vocabulary and distinguishing between standards of conduct and standards of liability, the Committee appears to have intended to increase the level of director insulation from liability by encouraging the courts to take an expansive view of the protections offered by the rule.

The 1998 amendments to the MBCA were certainly driven in part by court decisions that were perceived to expand the scope of the directors' duty of care dangerously close to simple negligence. In particular, the 1985 Delaware Supreme Court decision in *Smith v. Van Gorkom* held directors liable for breach of the duty of care when they did not inform themselves of all

25. MODEL BUS. CORP. ACT ANN. § 8.30 cmt. at 8-190 (2008).

26. MODEL BUS. CORP. ACT § 8.30(b) (2008).

27. *See* MODEL BUS. CORP. ACT. ANN. §§ 8.30 cmt. at 8-207, 8.31 cmt. at 8-228 (2008).

28. MODEL BUS. CORP. ACT intro. at xv (2008).

29. The statutory safe harbors from liability include (1) a liability-eliminating provision that may be included in the company's articles of incorporation pursuant to § 2.02(b)(4) of the MBCA, (2) protection from liability in a conflict of interest matter if the board follows procedures specified in § 8.61(b)(1) and (2) of the MBCA, and (3) protection for a disclaimer of the corporation's interest in a business opportunity under § 8.70 of the MBCA. MODEL BUS. CORP. ACT § 8.31(a)(1) (2008).

30. *See id.* § 8.31.

31. MODEL BUS. CORP. ACT ANN. § 8.31(a) cmt. at 8-234 (2008).

"information . . . reasonably available to [them] and relevant to their decision" when recommending a merger.[32] In addition, in 1996, the Delaware Chancery Court significantly revised prior formulations of directors' oversight duties. Under previous formulations, directors would be liable only for failing to respond to "obvious danger signs of employee wrongdoing" or "repos[ing] confidence in an obviously untrustworthy employee" in meeting a subjective standard of care that "ordinarily careful and prudent men would use in similar circumstances."[33] In contrast to this formulation, in 1996, Chancellor Allen wrote in *In re Caremark Int'l Derivative Litigation* that directors' oversight duties included an affirmative, proactive obligation to make good faith efforts to assure that there is an adequate "corporate information and reporting system" in place to monitor the corporation's compliance with applicable laws.[34]

As a result of such decisions, and what members of the Committee perceived to be confusion in some courts between aspirational good governance standards and bases for imposing liability, the Committee determined—after intense debate—to codify two separate, quite detailed standards. The result was heightened protection of directors. The amendments confirmed and clarified the scope of the ability of directors to rely on, and delegate authority to, others,[35] and section 8.31 explicitly incorporated preemptive provisions whereby a plaintiff asserting director liability must first hurdle enumerated statutory safe harbors.[36] Among the referenced safe harbors, following the example of Delaware in section 102(b)(7) of the Delaware General Corporation Law (which was adopted in 1986 after the *Van Gorkom* case),[37] the MBCA explicitly allows for elimination or limitation of director liability for monetary damages, with certain exceptions, if shareholders approve such a provision in the corporate charter.[38]

B. 2005 Amendments to Standards

In contrast to 1998, in the post-Enron Age, when the Committee again looked at director liability in 2005, it moved to enhance directors' standards of conduct by adding section 8.30(c), codifying a director's obligation to disclose to the board information known to the director to be material to the board's

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32. Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985); *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (holding that directors must, before acting, inform themselves of "all material information reasonably available to them").

33. Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963).

34. *In re* Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (explaining that failure to implement a corporate information and reporting system, such that the board would be able to reach informed judgments concerning the corporation's compliance with the law and its business performance, could result in a breach of the duty of care).

35. *See* MODEL BUS. CORP. ACT §§ 8.30(b), (c) (2008); *see also* Balotti & Hinsey, *supra* note 24, at 50–51.

36. *See* MODEL BUS. CORP. ACT § 8.31(a)(2) (2008).

37. *See* 65 Del. Laws 289 (1986).

38. *See* MODEL BUS. CORP. ACT § 2.02(b)(4) (2008); DEL. CODE ANN. tit. 8, § 102(b)(7) (2001); *see also* Balotti & Hinsey, *supra* note 24, at 56.

decision-making and oversight functions.[39] The 2005 amendments also added new section 8.42(b), which similarly provides for an officer's obligation to inform superior officers or the board of directors (depending on to whom the officer reports) about material information and material violations of law known to her.[40]

These new normative standards imposing a duty of candor stem directly from the Task Force's 2003 recommendation that directors should "disclose to the board of directors information and analysis known to them that is relevant to the board's decision making and oversight responsibilities" and senior executives should "disclose, to a supervising officer, the general counsel, or the board of directors or committees of the board, information and analysis relevant to such persons' decision making and oversight responsibilities."[41] Once again, moving ahead of Delaware, the 2005 amendments codify, for the first time in a state corporate statute, a duty of directors and officers to be candid in their dealings with one another.[42]

IV

THE MODEL ACT AND MAJORITY VOTING

Since the major amendments in 2005, the Committee has continued to take other, less normative actions reflecting the change in the corporate governance environment. For example, the Committee moved, the following year, to respond to increased activist calls for election of directors by a majority of those voting, rather than a plurality, in uncontested elections. Section 7.28 of the MBCA, like the vast majority of state statutes, has long set forth the default rule that directors are elected by a plurality of votes cast unless otherwise provided in the certificate of incorporation.[43] Before the 2006 majority voting amendments, the MBCA only permitted directors and shareholders acting together to implement a majority voting regime by amending the certificate of incorporation.[44] In 2006, after extensive consideration and solicitation of public comment, the Committee approved amendments to the MBCA to enable corporations to more easily modify the plurality voting default standard for director elections. The Committee did so by modifying sections 8.05 and 8.07 and adding new section 10.22 to the MBCA, providing that companies can elect to be governed by a (rather convoluted and densely drafted) majority-voting regime for director elections by a simple director- or shareholder-adopted amendment of the corporate by-laws.[45] Under a by-law adopted pursuant to the new section 10.22 regime, all director nominees who receive at least a plurality

39. MODEL BUS. CORP. ACT § 8.30(c) (2008).
40. *Id.* § 8.42(b).
41. TASK FORCE REPORT, *supra* note 12, at 31.
42. *See* MODEL BUS. CORP. ACT intro. at xxii (2008).
43. *Id.* § 7.28(a).
44. MODEL BUS. CORP. ACT intro. at xiv (2008).
45. MODEL BUS. CORP. ACT §§ 8.05(b), 8.05(e), 8.07, 10.22 (2008).

vote will be elected, but the terms of candidates who do not receive a majority vote will expire on the earlier of ninety days following the election or the date the board selects a different individual to fill the board seat.[46]

The 2006 amendments to the MBCA were made in response to "widespread interest in the director election process" and the "desire of some corporations and shareholder groups" to change from a plurality to a majority voting system.[47] In this regard, the Committee, consistent with its historically cautious approach, was a follower rather than a leader. The majority voting movement had been gathering momentum in the years prior to the amendment. In 2005 and 2006, shareholder proposals asking that publicly traded companies implement majority voting in uncontested director elections were numerous and received significant shareholder support. In 2005, 84 proposals were submitted and averaged 44% support while in 2006, 134 proposals were submitted and averaged 49% percent support.[48] Similarly, in 2005 and 2006, an increasing number of companies were adopting some form of majority voting (either through majority voting by-laws or director resignation policies).[49] In part, the majority voting movement grew out of the failure of the Securities and Exchange Commission (SEC) to move forward with its 2003 proposal[50] to give shareholders access to companies' proxy statements to nominate directors as a means to enhance the accountability of boards of directors.[51]

Led by former Delaware Chief Justice, E. Norman Veasey, the Committee acted contemporaneously with the Delaware legislature to address the majority voting movement. In its customary deliberate, consensus-building fashion, before adopting the 2006 amendments, the Committee issued a "white paper"[52] and a report summarizing arguments for and against moving to a majority voting standard and soliciting public comments on three potential proposals, including (1) adoption of a majority voting standard as the default rule for director elections, (2) modification of the default plurality rule to require that a director receive a minimum plurality vote to be elected, and (3) modification of the plurality voting rule to specifically authorize votes against directors with consequences if a director receives more votes against election than for

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46. *Id.* § 10.22.

47. MODEL BUS. CORP. ACT ANN. § 10.22 hist. background at 10-103 (2008).

48. *See* DAVID MORRISON & OZAN SARACOGLU, ISS 2007 BACKGROUND REPORT: THE ELECTION OF DIRECTORS, BOARD INDEPENDENCE AND RELATED ISSUES 5 (2007).

49. *See id. at* 6 (2007); Claudia H. Allen, *Study of Majority Voting in Director Elections*, NEAL, GERBER & EISENBERG LLP, ii–iii (Nov. 12, 2007), http://www.ngelaw.com/files/upload/majoritystudy111207.pdf.

50. *See* Security Holder Director Nominations, Exchange Act Release No. 48,626, 68 Fed. Reg. 60,784 (Oct. 14, 2003).

51. *See Report of the Committee on Corporate Laws on Voting By Shareholders for the Election of Directors*, 61 BUS. LAW. 401, 407 n.20 (2006) [hereinafter *Report of the CCL on Voting*].

52. A "white paper" generally refers to an authoritative, often detailed, report that is focused on a particular issue.

election.[53] Ultimately, the Committee decided not to change the statutory default plurality voting regime,[54] but instead to adopt section 10.22 and change other MBCA provisions to allow individual corporations to engage in private ordering by choosing whether to adopt majority voting.[55] The 2006 amendments also modified section 8.07 of the MBCA (director resignations) to explicitly permit director resignations conditioned upon the occurrence of specified subsequent events (such as a majority withheld or negative vote coupled with board acceptance of a resignation) and expressly permit irrevocable resignations upon failing to receive a specified vote.[56] The change to section 8.07 is similar to the response of the Delaware legislature to the majority voting movement, which amended section 141(b) of the Delaware General Corporation Law to provide that a director resignation can be effective upon the occurrence of a future event and can be irrevocable.[57]

Although these changes are consistent with the MBCA's approach as an enabling statute that encourages private ordering, in section 10.22 of the MBCA, unlike Delaware, the Committee sought to channel where the private decision on majority voting can lead by providing a specified statutory format that must be followed.[58] This evidences the Committee's conservative approach: they do not abandon the plurality voting statutory default standard and seek to avoid risks associated with failed elections by imposing the limits on voluntary actions in section 10.22.[59] The voting standard in section 10.22—which provides that directors are not elected if they get "more votes against than for election"[60] as opposed to providing that directors are not elected unless they receive a

53. *See* Committee on Corporate Laws Discussion Paper on Voting By Shareholders for the Election of Directors (June 22, 2005), *available at* http://www.abanet.org/buslaw/committees/CL270000pub/directorvoting/20050621000000.pdf; *see also Report of the CCL on Voting*, *supra* note 51, at 408.

54. *See Report of the CCL on Voting*, *supra* note 51, at 412 (discussing the reasons for retaining the standard plurality voting regime as the default standard).

55. *See* MODEL BUS. CORP. ACT ANN. § 8.05 hist. background at 8-55 (2008) ("Sections 8.05(b) and (e) were amended in 2006 to provide for changes in the election process that will be necessary if a corporation elects to modify the vote required to elect directors by adopting a bylaw pursuant to section 10.22.").

56. *See id.* § 8.07 hist. background at 8-69 ("The section was amended in 2006 to accommodate boards that may wish [to] institute policies whereby directors irrevocably agree to resign upon failure to receive a specified vote for reelection to the board.").

57. *See* 75 Del. Laws 306 (2006); Press Release, General Assembly Approves 2006 Amendments to Corporate Laws (July 21, 2006), *available at* http://corp.delaware.gov/2006amend.shtml ("By permitting a corporation to enforce a director resignation conditioned upon the director failing to achieve a specified vote for reelection, e.g., more votes for than against, coupled with board acceptance of the resignation, these provisions permit corporations and individual directors to agree voluntarily, and give effect in a manner subsequently enforceable by the corporation, to voting standards for the election of directors which differ from the plurality default standard in Section 216."); *see also* EDWARD P. WELCH, ANDREW J. TUREZYN & ROBERT S. SAUNDERS, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 141.5.2 (2009) [hereinafter FOLK ON THE DGCL].

58. *See Report of the CCL on Voting*, *supra* note 51, at 413, 414.

59. *See id.* at 414, 416.

60. MODEL BUS. CORP. ACT § 10.22(a)(2) (2008).

majority of votes outstanding or represented at the meeting—has the additional advantage of avoiding some of the negative effects arising from the elimination of broker voting in uncontested elections,[61] as effected by the SEC's approval of amendments to New York Stock Exchange Rule 452 in 2009.[62]

V

THE MODEL ACT AND PROXY VOTING

Even with the movement toward majority voting in uncontested director elections, shareholder activists and members of Congress have continued to call for more mechanisms to increase director accountability to shareholders and enhance the ability of shareholder groups to influence corporate decisions. Beginning with their strong advocacy for the SEC's 2003 proposal to give large shareholders and shareholder groups direct access to the corporate proxy to nominate candidates in opposition to members of the board-nominated slate,[63] activists have focused on the "proxy access" vehicle as their major proposed tool for enhancing shareholder influence. While the Committee majority remained committed to the director-centric corporate model in its custody of the MBCA, the Committee did not ignore the proxy access push, which began in 2003, was again before the SEC in 2007, and was reignited after the 2008 Presidential and Congressional elections, when a new SEC majority issued for comment a revised form of the 2003 proposal in May 2009.[64] This proposal drew over 500 comment letters,[65] and the comment period was re-opened to allow further comments.[66] The SEC adopted final proxy access rules in August 2010,[67] following express authorization by Congress to create such a federal proxy access right.[68] But in October 2010, the SEC stayed the effectiveness of these

61. *See Report of the CCL on Voting*, *supra* note 51, at 418.

62. *See* Order Approving Proposed Rule Change, as Modified by Amendment No. 4, To Amend NYSE Rule 452 and Corresponding Listed Company Manual Section 402.08 To Eliminate Broker Discretionary Voting for the Election of Directors, Exchange Act Release No. 60,215, 74 Fed. Reg. 33,293 (July 1, 2009).

63. *See* Security Holder Director Nominations, *supra* note 50.

64. The SEC held an open meeting on May 20, 2009 to consider the proxy access rulemaking proposal and issued a formal release on June 10, 2009. *See* Facilitating Shareholder Director Nominations, Exchange Act Release No. 60,089, 74 Fed. Reg. 29,024 (June 10, 2009).

65. *See* Melissa Klein Aguilar, *Comment Period Ends for Proxy Access; Now What?*, COMPLIANCE WEEK (Jan. 26, 2010), http://www.complianceweek.com/article/5770/comment-period-ends-for-proxy-access-now-what-.

66. *See* Press Release, SEC Re-Opens Public Comment Period for Shareholder Director Nomination Proposal (Dec. 14, 2009), *available at* http://www.sec.gov/news/press/2009/2009-265.htm.

67. *See* Facilitating Shareholder Director Nominations, Exchange Act Release No. 62,764, 75 Fed. Reg. 56,668 (Aug. 25, 2010).

68. Reflective of strong political interest, the financial reform legislation signed into law on July 21, 2010 contains a provision that authorizes, but does not require, the SEC to adopt proxy access rules. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 § 971, 124 Stat. 1376, 1915.

rules pending the outcome of a legal challenge to the rules by the Business Roundtable and U.S. Chamber of Commerce.[69]

In April 2009, the Delaware legislature added section 112 to the Delaware General Corporation Law to clarify that directors or shareholders may adopt by-laws that provide for inclusion of shareholder nominees in company proxy materials.[70] The Delaware legislature also added section 113 to allow adoption of by-laws that provide for reimbursement of shareholders' proxy solicitation expenses, even in contests in which proponents are only partially successful.[71] In this regard, Delaware was a leader among state corporate statutes in responding to the SEC's proxy access proposal; the Committee did not make similar amendments to the MBCA until after Delaware acted.

In December 2009, the Committee followed Delaware's lead by amending section 2.06 of the MBCA to expressly permit director- or shareholder-adopted by-laws that provide for (1) shareholder access to management's proxy statement and proxy card to nominate director candidates, and (2) reimbursement of reasonable expenses incurred in nominating and promoting director candidates opposed to the board slate.[72] According to Herbert S. Wander, the Chair of the Committee, "These amendments are part of the [C]ommittee's continuous efforts to maintain the Model Act's vibrancy and to ensure that state corporate laws are fully responsive to the needs of corporations and their investors."[73] The Committee stated that the 2009 changes were made in recognition that "a governance model in which the board has broad authority and oversight responsibility gives shareholders a compelling interest in the quality of the board selection process" and the direction election process is the "ultimate accountability mechanism."[74] Thus, the Committee maintained its commitment to a director-centric governance model, but embraced activist rhetoric and concerns by saying that shareholders should have the ability to participate more actively in the selection process for the people who will direct the management of the corporation they own.[75]

Nonetheless, the Committee has taken a more gingerly approach than the SEC's 2009 proxy access proposal and 2010 rules, embracing the value of more direct shareholder involvement in director nominations, but, unlike the SEC, not prescribing an access scheme.[76] In this regard, similar to the majority voting

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69. *See* In the Matter of the Motion of Business Roundtable and the Chamber of Commerce for the United States of America For Stay of Effect of Commission's Facilitating Shareholder Director Nominations Rules, Order Granting Stay, Exchange Act Release No. 63,031 (Oct. 4, 2010).

70. DEL. CODE ANN. tit. 8, § 112 (2001); *see also* FOLK ON THE DGCL, *supra* note 57, at § 112.1.

71. DEL. CODE ANN. tit. 8, § 113 (2001); *see also* FOLK ON THE DGCL, *supra* note 57, at § 113.1.

72. MODEL BUS. CORP. ACT § 2.06(c) (2008) (amended 2009).

73. *See* Press Release, Corporate Laws Committee Adopts New Model Business Corporation Act Amendments to Provide For Proxy Access and Expense Reimbursement (Dec. 17, 2009), *available at* http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=848.

74. *See* REPORT ON THE ROLES, *supra* note 1, at 6.

75. *Id.*

76. *See id.* at 10.

amendments, the Committee's approach to proxy access and reimbursement of proxy expenses fosters private ordering by individual corporations and rejects the notion that there should be a "one-size-fits-all" approach to proxy access or that proxy access should be mandatory.[77]

VI

CONCLUSION

Looking back on the past decade, from the pre-Enron Age at the end of the last century to today, one sees an evolution in the MBCA's approach to corporate governance. At the beginning of the decade, the MBCA primarily was an enabling statute that dealt summarily with the role of shareholders in governance decisions, other than decisions involving fundamental changes in ownership or capital structure. Scant attention was paid to how shareholders nominated and elected directors or to the specifics of director oversight duties. Amendments to the MBCA were much occupied with defining the role and limiting the liability of board members. As the decade ended, however, responding to strong external forces, the MBCA now embodies substantial normative standards as to director duty and specifically accommodates shareholder initiatives regarding how directors are elected and how elections are conducted. The Committee has sometimes been a leader, and sometimes a somewhat reluctant follower, in bringing about this statutory evolution. The new course direction indicated by the 2005, 2006, and 2009 changes to the MBCA is likely to continue.

77. *See id.* at 9. This is consistent with the views embodied in the comment letter of the ABA Business Law Section Committee on Federal Regulation of Securities to the SEC on its proxy access proposal. *See* Letter from ABA Bus. Law Section Comm. on Fed. Regulation of Sec. to the Sec. and Exch. Comm'n (Aug. 31, 2009), *available at* http://www.abanet.org/buslaw/committees/CL410000pub/comments/20090831000000.pdf.