RATIFICATION OF VOID OR VOIDABLE ENTITY ACTIONS UNDER TEXAS AND DELAWARE STATUTES AND COMMON LAW

By

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BACKGROUND, EDUCATION AND PRACTICE

Byron F. Egan is a partner of Jackson Walker LLP in Dallas. He is engaged in a corporate, partnership, securities, mergers and acquisitions ("***M&A***") and financing practice. Mr. Egan has extensive experience in business entity formation and governance matters, M&A and financing transactions in a wide variety of industries including energy, financial and technology. In addition to handling transactions, he advises boards of directors and their audit, compensation and special committees with respect to fiduciary duty and other corporate governance issues, the Sarbanes-Oxley Act, special investigation and other issues.

Involvement: Mr. Egan is Senior Vice Chair and Chair of Executive Council of the M&A Committee of the American Bar Association and served as Co-Chair of its Asset Acquisition Agreement Task Force, which wrote the Model Asset Purchase Agreement with Commentary. He has been Chair of the Texas Business Law Foundation, the Business Law Section of the State Bar of Texas and that section's Corporation Law Committee. On behalf of these groups, he has been instrumental in the drafting and enactment of many Texas business entity and other statutes. He is also a member of the American Law Institute.

Honors: For more than twenty-five years, Mr. Egan has been listed in The Best Lawyers in America under Corporate, M&A or Securities Law. He is a 2018 recipient of the Texas Lawyer Lifetime Achievement Award, a 2018 recipient of the Distinguished Alumni Award of the Highland Park Independent School District, and a 2015 recipient of the Texas Bar Foundation's Dan Rugeley Price Memorial Award, which is presented annually to a lawyer who has an unreserved commitment to clients and to the legal profession. A four-time winner of the Burton Award for distinguished legal writing, in 2009 his article entitled "Director Duties: Process and Proof" was awarded the Franklin Jones Outstanding CLE Article Award and an earlier version of that article was honored by the State Bar Corporate Counsel Section's Award for the Most Requested Article in the Last Five Years. Mr. Egan has been recognized as one of the top corporate and M&A lawyers in Texas by a number of publications, including Corporate Counsel Magazine, Texas Lawyer, Texas Monthly, The M&A Journal (which profiled him in 2005) and Who's Who Legal. See www.jw.com for additional information regarding his civic and other activities.

Education: Mr. Egan received his B.A. and J.D. degrees from the University of Texas. After law school, he served as a law clerk for Judge Irving L. Goldberg on the United States Court of Appeals for the Fifth Circuit.

Publications: Mr. Egan writes and speaks about the areas in which his law practice is focused, and is a frequent author and lecturer regarding M&A, governance of corporations, partnerships and limited liability companies, securities laws, and financing techniques. He is the author of the

treatise EGAN ON ENTITIES: Corporations, Partnerships and Limited Liability Companies in Texas (3rd ed. 2020) (https://bit.ly/3lKhO0M), which addresses the formation, governance and sale of business entities, including an analysis of the fiduciary duties of their governing persons in a variety of situations. In addition, Mr. Egan has written or co-authored the following law journal articles: *Corporate Governance*: Delaware Supreme Court Holds Directors' Fiduciary Duties Require Monitoring Mission-Critical Risks or What's he Scoop? Bluebell Shareholder Serves Caremark Claim to Board of Directors, XXXVII Corporate Counsel Review 271 (November 2019); Fiduciary Duties of Corporate Directors and Officers in Texas, 43 Texas Journal of Business Law 45 (Spring 2009); Responsibilities of Officers and Directors under Texas and Delaware Law, XXVI Corporate Counsel Review 1 (May 2007); *Entity Choice and Formation*: Joint Venture Formation, 44 Texas Journal of Business Law 129 (2012); Choice of Entity Decision Tree After Margin Tax and Texas Business Organizations Code, 42 Texas Journal of Business Law 171 (Spring 2007); Choice of Entity Alternatives, 39 Texas Journal of Business Law 379 (Winter 2004); Choice of State of Incorporation – Texas Versus Delaware: Is it Now Time to Rethink Traditional Notions, 54 SMU Law Review 249 (Winter 2001); *M&A*: Earnouts in M&A Transactions, XXXIX Corporate Counsel Review (November 2020); Confidentiality Agreements are Contracts with Long Teeth, 46 Texas Journal of Business Law 1 (Fall 2014); Private Company Acquisitions: A Mock Negotiation, 116 Penn St. L. Rev. 743 (2012); Asset Acquisitions: Assuming and Avoiding Liabilities, 116 Penn St. L. Rev. 913 (2012); Asset Acquisitions: A Colloquy, X U. Miami Business Law Review 145 (Winter/Spring 2002); *Securities Law*: Major Themes of the Sarbanes-Oxley Act, 42 Texas Journal of Business Law 339 (Winter 2008); Communicating with Auditors After the Sarbanes-Oxley Act, 41 Texas Journal of Business Law 131 (Fall 2005); The Sarbanes-Oxley Act and Its Expanding Reach, 40 Texas Journal of Business Law 305 (Winter 2005); Congress Takes Action: The Sarbanes-Oxley Act, XXII Corporate Counsel Review 1 (May 2003); and *Legislation*: The Role of the Business Law Section and the Texas Business Law Foundation in the Development of Texas Business Law, 41 Texas Journal of Business Law 41 (Spring 2005); Texas Chancery Courts – The Missing Link to More Texas Entities, Texas Bar Journal, Opinion Section, February 2016 Issue.

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I. INTRODUCTION

"***Ratification***" refers to the affirmance of a prior act done by another whereby the act is to be given effect as if done with prior authority[1], and is recognized in both Texas and Delaware at common law and by statute. Both the Texas Business Organization Code (as amended, the "***TBOC***") and the business entity statutes of Delaware provide for the ratification of void or voidable acts by certain entities organized thereunder.[2]

As discussed below, an action which was within the power and authority of the acting person but which suffered from a failure in the authorization process is generally subject to ratification under Texas and Delaware common law. An action which was beyond the power and authority of the authorizing person is a "***void***" or "***ultra vires***" act and could not be ratified under the common law,[3] but statutes in Texas and Delaware now authorize processes for the ratification of void corporate actions.

Byron F. Egan is a partner of Jackson Walker L.L.P. in Dallas, Texas. Mr. Egan is a member of the ABA Business Law Section's Mergers & Acquisitions Committee, serves as Senior Vice Chair of the Committee and Chair of its Executive Council and served as Co-Chair of its Asset Acquisition Agreement Task Force which prepared the ABA Model Asset Purchase Agreement with Commentary.

Mr. Egan wishes to acknowledge contributions in preparing this paper of Gavin Justiss of Jackson Walker L.L.P. in Dallas, TX.

See BYRON F. EGAN, *EGAN ON ENTITIES: Corporations, Partnerships and Limited Liability Companies in Texas* (3rd Ed. 2020) ("***EGAN ON ENTITIES***") which contains substantially more information on the subjects treated in this paper. For information as to how to purchase *EGAN ON ENTITIES: Corporations, Partnerships and Limited Liability Companies in Texas* (3rd Ed. 2020), go to https://bit.ly/3lKhO0M or contact the author at began@jw.com.

1 RESTATEMENT (THIRD) OF AGENCY: RATIFICATION DEFINED § 4.01 (2006).

2 The Texas Legislature enacted the Texas Business Organizations Code (the "***TBOC***") to codify the Texas statutes relating to for-profit and nonprofit private sector entities. The TBOC is applicable to entities formed or converting to another entity form under Texas law after January 1, 2006. Entities in existence on January 1, 2006 could continue to be governed by the Texas source statutes until January 1, 2010, after which time they must conform to the TBOC.

3 *See Abdullatif v. Choudhri*, 561 S.W.3d 590, 623 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (collecting Texas Supreme Court authority spanning the past two centuries and holding that void actions are null and not susceptible to ratification or confirmation); *CompoSecure, LLC v. CardUX, LLC*, 206 A.3d 807, 816-17 (Del. 2018) (upholding the common law rule is that void acts are ultra vires and generally cannot be ratified).

Like Texas, Delaware has a body of statutory and case law relating to corporations as well as alternative entities, including general partnerships, limited partnerships ("***LPs***") and limited liability companies ("***LLCs***"). Those statutes include the Delaware General Corporation Law (as amended, the "***DGCL***"),[4] the Delaware Revised Uniform Partnership Act ("***DRPA***"),[5] the Delaware Revised Limited Partnership Act (***"DRLPA***"),[6] and the Delaware Limited Liability Company Act (the "***DLLCA***").[7]

II. COMMON LAW RATIFICATION

At common law ratification by the principal of its agent's act may be express or implied[8] and relates back to the time of the original act.[9] Both the board of directors (the "***Board***") and the shareholders may ratify the actions of the corporation.

The principle is well established at common law that the Board may ratify any act or contract of any other body or agency of the corporation, such as a committee, which they had the power and authority to authorize and might have authorized in the first place, but which was a voidable action due to a failure in its authorization.[10] In *Laird Hill Salt Water Disposal, Ltd. v. East Texas Salt Water Disposal, Inc.*, a Texas Court of Appeals held that the Board could later ratify the actions of its executive committee via a later dated resolution.[11] The defendant corporation's executive committee initiated condemnation proceedings against the plaintiff before the defendant corporation's Board passed a resolution authorizing such action.[12] The Texas Court of Appeals explained that the defendant corporation's Board could properly delegate its duties to the executive committee, including initiating condemnation proceedings, and could later ratify the actions of the executive committee because it could have authorized them initially.[13] As a result, the timing of the Board's resolution was not fatal as the defendant corporation's actions were permissible and subject to subsequent ratification by Board action.[14]

Shareholders may also ratify the actions of the Board under Texas common law:

> [I]t is often said that shareholders "ratify" transactions between a corporation and its directors, or between the corporation and a third party in which directors have a

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4 DEL. CODE ANN. Tit. 8, §§ 101 *et seq.* (West 2006 and Supp. 2020).

5 DEL. CODE ANN. Tit. 6, §§ 15-101 *et seq.* (West 2006 and Supp. 2020).

6 DEL. CODE ANN. Tit. 6, §§ 17-101 *et seq.* (West 2006 and Supp. 2020).

7 DEL. CODE ANN. Tit. 6, §§ 18-101 *et seq.* (West 2006 and Supp. 2020).

8 *See First Nat'l Bank v. Wu*, 167 S.W.3d 842, 846 (Tex. App.—Houston [14th Dist.] 2005), *opinion supplemented on overruling of reh'g* (June 2, 2005), *review granted, judgment vacated, and remanded by agreement* (Sept. 23, 2005) (differentiating express and implied ratification).

9 *Laird Hill Salt Water Disposal, Ltd. v. East Tex. Salt Water Disposal, Inc.*, 351 S.W.3d 81, 84 (Tex. App.—Tyler 2011, pet. denied) (citing *Swain v. Wiley College*, 74 S.W.3d 143, 150 (Tex. App.—Texarkana 2002, no pet.)).

10 *Id.* at 90.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

> personal interest. For example, a director would have such an interest in a contract between the corporation and another corporation in which the director serves as an officer. All of a corporation's directors would have such an interest in a plan under which they will receive options to purchase stock issued by the corporation. Valid shareholder ratification, consisting of a vote to approve such a transaction following disclosure of the director's interest and other material facts, binds the corporation to the transaction, in most instances without judicial assessment of its substantive merits.[15]

Ratification is effective, however, only when there has been full disclosure of the material facts to the Board or the shareholders, as the case may be.[16] Further, the action to be ratified must have been within the power of the governing person which authorized the action and must not have been ***ultra vires*** or otherwise beyond the authority of the actor. Thus, actions that are voidable because of a failure in the authorizing process are ratifiable, but void or *ultra vires* acts were not ratifiable. In *BPX Operating Co. v. Strickhausen*,[17] a lease provided that BPX could not pool the tract without the express written consent of the lessor. BPX wrote to the lessor requesting the lessor's consent to pool her tract and was requested to provide further information, but never received consent to pool. BPX proceeded to pool without consent and sent royalties to lessor as if she had consented to the pooling. BPX, when negotiations for a settlement failed and the lessor sued BPX, responded that lessor had ratified the pooling by accepting and cashing the royalty checks. In ruling for the lessor and holding that cashing the checks was not determinative of ratification, the Texas Supreme Court held:

> Ratification is the adoption or confirmation by a person with knowledge of all material facts of a prior act which did not then legally bind him and which he had the right to repudiate. It is but an agreement, express or implied, by one to be bound by the act of another performed for him. Ratification extends to the entire transaction. In other words, a party cannot ratify those parts of the transaction which are beneficial and disavow those which are detrimental. Ratification may occur by express act or word, or it may be inferred from a party's course of conduct.
>
> Ratification is often treated as a mixed question of law and fact. When the facts are uncontroverted, however, the court may decide the question of ratification as a

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15 RESTATEMENT (THIRD) OF AGENCY: RATIFICATION DEFINED § 4.01, cmt. c. (2006).

16 *DeNucci v. Matthews*, 463 S.W.3d 200 (Tex. App.—Austin 2015); *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 21 (Tex. App.—San Antonio 2006, pet. denied) ("Transactions between corporate fiduciaries and their corporation are capable of ratification by the shareholders . . . . Ratification by any means, however, is effective only when the officer has fully disclosed all material facts of the transactions to the board of directors or shareholders."); *First Nat'l Bank v. Wu*, 167 S.W.3d 842, 846 (Tex. App.—Houston [14th Dist.] 2005), *opinion supplemented on overruling of reh'g* (June 2, 2005), *review granted, judgment vacated, and remanded by agreement* (Sept. 23, 2005) (citing *Spangler v. Jones*, 861 S.W.2d 392, 394-96 (Tex. App.—Dallas 1993, writ denied), *disagreed with by Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998)); s*ee also* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 5.02 (American Law Institute 2006); *General Dynamics v. Torres*, 915 S.W.2d 45, 50 (Tex. App.—El Paso 1995, writ denied).

17 629 S.W.3d 189, 193 (Tex. 2021).

matter of law. Whether a party has ratified a contract may be determined as a matter of law if the evidence is not controverted or is incontrovertible.

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Whether two parties have formed a contract is, of course, a question of the parties' intent. In order to qualify as a contract, the document or documents must evidence the parties' intent to be bound. Likewise, whether one party has ratified changes to a contract is also a matter of intent. To constitute a ratification, it must appear that the acts relied upon were done with a full knowledge of all the facts, and with intent to adopt the unauthorized act in question. By the term ratified … is meant the approval by act, word, or conduct, with full knowledge of the facts, of the prior act, with the intention of giving validity to such prior act. It is settled law that ratification involves the intention to ratify.

Express ratification—in writing, for example—typically makes the parties' intentions clear. When implied ratification is alleged, determining the parties' intentions can become more complicated. A party's subjective state of mind is immaterial to a claim of implied ratification. Courts instead look to objective evidence of intent, such as the party's conduct. Ratification may be inferred by a party's course of conduct and need not be shown by express word or deed. As with most objective inquiries, determining a party's objective intent requires and examination of the totality of the circumstances.

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When analyzing a claim of implied ratification, we are mindful that the liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed. To avoid undue interference with a party's right to reject contract terms to which he does not agree, many Texas courts have held that implied ratification should be found only if the party's actions clearly evidence an intention to ratify. We agree that parties seeking to establish implied ratification or ratification by conduct must point to words or actions that evidence an intention to ratify.[18]

In *CompoSecure LLC v. CardUX, LLC*[19], a provision in an LLC agreement for a Delaware LLC provided a transaction between the LLC and an affiliate of a manager was "void" and of no force or effort whatsoever unless it received approval from both the Board and its investors and members. The Delaware Supreme Court held that if the transaction failed under the related party provision, the transaction was void and not subject to ratification.[20]

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[18] *BPX Operating Co. v. Strickhausen*, 629 S.W.3d 189, 197-98 (Tex. 2021) (cleaned up).

[19] 206 A.3d 807, 816-17 (Del. 2018).

[20] *CompoSecure*, 206 A.3d at 822-24.

III. TEXAS BUSINESS ORGANIZATIONS CODE[21]

A. For Profit Corporations.

Subchapter R[22] of Chapter 21 of the TBOC supplements the common law of ratification by Board or shareholder action discussed above by establishing specific non-exclusive[23] procedures for Board, shareholder, or district court ratification of both void and voidable corporate actions or share issuances. The Subchapter R provisions were modeled after DGCL §§ 204 and 205.[24]

Ratification by Board. Ratification of "defective corporate action,"[25] including the issuance of putative shares,[26] requires that the Board first adopt a resolution stating (a) the defective act or acts to be ratified, (b) the date of each defective act, (c) if the defective corporate act or acts involved the issuance of putative shares, the number and type of putative shares issued and the date or dates on which the putative shares were purportedly issued, (d) the nature of the failure of authorization with respect to each defective corporate act to be ratified, and (e) that the Board approves the ratification of the defective corporate act or acts.[27] In the absence of actual fraud in the transaction, the ratification judgment of the Board is conclusive, unless otherwise determined by a district court in a proceeding brought under Subchapter R.[28]

Shareholder Approval. The defective corporate act or acts ratified by the Board must be submitted to shareholders for approval if shareholder approval of the act or acts would have been required initially under the applicable governing documents of the corporation, any plan or agreement to which the corporation is a party or the TBOC.[29] In addition, shareholder approval will always be required if the defective corporate act results from a failure to comply with

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21 The TBOC was enacted in 2006 to codify Texas' entity statutes and has been amended in every regular session of the Texas Legislature since that time. *See* EGAN ON ENTITIES § 1.1.3 and 1.2.

22 TBOC §§ 21.901 – 21.917, as adopted in the 2015 Legislative Session and amended in the 2017 and 2019 Legislative Sessions.

23 TBOC § 21.913.

24 *See infra* notes 42-55.

25 TBOC § 21.901(2) provides that "defective corporate act: means (A) an overissue; (B) an election or appointment of directors that is void or voidable due to a failure of authorizations; or (C) any act of transaction purportedly taken by or on behalf of the corporation that is, and at the time the act or transaction was purportedly taken would have been, within the power of a corporation to take under the corporate statute, without regard to the failure of authorization identified in Section 21.903(a)(4), but is void or voidable due to a failure of authorization."

26 TBOC § 21.901(6) provides that "'[p]utative shares' means the shares of any class or series of the corporation, including shares issued on exercise of options, rights, warrants, or other securities convertible into shares of the corporation, or interests with respect to the shares that were created or issued pursuant to a defective corporate act, that: (A) would constitute valid shares, if not for a failure of authorization; or (B) cannot be determined by the board of directors to be valid shares." TBOC § 21.913(a) permits ratification of acts or transactions by a corporation before the corporation exists.

27 TBOC § 21.903(b) provides that a "resolution may also state that, notwithstanding shareholder approval of the ratification of a defective corporate act that is a subject of the resolution, the board of directors may, with respect to the defective corporate act, abandon the ratification of the defective corporate act at any time before the validation effective time without further shareholder action."

28 TBOC § 21.912.

29 TBOC § 21.905(1)(A).

Subchapter M of TBOC Chapter 21 relating to business combination transactions with affiliated shareholders.[30] The procedures for submission of a ratified defective corporate act to shareholders and the voting requirements are specified in Subchapter R.[31] Notice of the time, place, if any, and purpose of the meeting must be given at least 20 days before the date of the meeting to each holder of record, as of the record date of the meeting, of valid shares and putative shares, whether voting or nonvoting.[32] In addition, notice must be given to each holder of record of valid shares[33] and putative shares, regardless of whether the shares are voting or nonvoting, as of the time of the defective corporate act, except that notice is not required to be given to a holder whose identity or address cannot be ascertained from the corporation's records.[34] The notice must contain copies of the resolutions adopted by the Board and a statement that, on shareholder approval of the ratification of the defective corporate act or putative shares made in accordance with Subchapter R, the holder's rights to challenge the defective corporate act or putative shares are limited to an action claiming that a court of appropriate jurisdiction, in its discretion should declare either that the ratification not take effect or that it take effect only on certain conditions, if that action is filed with the court not later than 120 days after the validation effective time[35] or that the ratification was not accomplished in accordance with Subchapter R.[36] The quorum and voting requirements for ratification at a shareholders meeting are the same as those applicable at the time of such adoption by the shareholders for the type of corporate act or acts to be ratified. Putative shares on the record date are not entitled to be counted for voting or quorum purposes in any vote to approve the ratification of any defective corporate act, regardless of any ratification that becomes effective after the record date.[37]

Certificate of Validation. The filing of a certificate of validation with respect to the defective corporate act with a filing officer is required if the defective corporate act being ratified would have required the filing of a filing instrument or other document with the filing officer.[38] A separate certificate of validation is required for each defective corporate act for which a certificate of validation is required, except that: (1) two or more defective corporate acts may be included in a single certificate of validation if the corporation filed a single filing instrument under another provision of the TBOC to effect the acts, (2) a single certificate of validation may be filed to amend

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30 TBOC § 21.905(1)(B).

31 *See* TBOC §§ 21.901 – 21.917.

32 TBOC § 21.906.

33 TBOC § 21.901(9) provides that "'[v]alid shares' means the shares of any class or series of the corporation that have been authorized and validly issued in accordance with the corporate statute."

34 TBOC § 21.906(a) and (b).

35 TBOC § 21.901(8) provides that "'[v]alidation effective time' or 'effective time of the validation,' with respect to any defective corporate act ratified under this subchapter, means the latest of: (A) the time at which the defective corporate act submitted to the shareholders for approval under Section 21.905 is approved by the shareholders or, if no shareholder approval is required, the time at which the board of directors adopts the resolutions required by Section 21.903; (B) if a certificate of validation is not required to be filed under Section 21.908, the time, if any, specified by the board of directors in the resolutions adopted under Section 21.903, which may not precede the time at which the resolutions are adopted; or (C) the time at which any certificate of validation filed under Section 21.908 takes effect in accordance with Chapter 4."

36 TBOC § 21.906(b).

37 TBOC § 21.907(e).

38 TBOC § 21.908(a).

the certificate of formation of the corporation to establish a new class or series of shares or to increase the number of authorized shares of any class or series of shares, in order to cure multiple previous overissues of the shares of the class or series, or (3) a single certificate of validation may be filed to amend the corporation's certificate of formation to establish new or increase the number of shares of two or more classes or series of shares in order to cure multiple previous overissues of the shares of all the classes and series that are the subjects of the certificate of validation.[39] The certificate of validation must include: (1) each defective corporate act that is subject to the certificate of validation, including the number and type of putative shares issued and date or dates on which the putative shares were purported to have been issued, if the defective corporate act involved the issuance of putative shares, the date of the defective corporate act, and the nature of the failure of authorization with respect to the defective corporate act, (2) a statement that each defective corporate act was ratified in accordance with Subchapter R, including the date on which the Board ratified each defective corporate act and the date, if any, on which the shareholders approved the ratification of each defective corporate act, and (3) as appropriate, with some nuances, the name, title and filing date of any previously filed filing instrument or document related to the defective corporate act and any certificate of correction to the filing instrument.[40]

Effect of Ratification. On and after the validation effective time, the ratified defective corporate act is no longer deemed void or voidable retroactive to the time of the defective corporate act.[41] In addition, on or after the validation effective time, any putative shares purportedly issued pursuant to such defective corporate act ratified in accordance with Subchapter R and described by the resolutions adopted under TBOC §§ 21.903 and 21.904 will no longer be deemed void or voidable and is considered to be an identical share or fraction of a share outstanding as of the time it was purportedly issued.[42]

Notice of Ratification to Shareholders. For each defective corporate act ratified by the Board, notice must be given to all holders of valid shares and putative shares, whether voting or nonvoting, as of the date the Board adopted the resolutions ratifying the defective corporate act or a date not later than the 60th date after the date of adoption.[43] The notice must contain a copy of the resolutions adopted by the Board and a statement that on ratification of the defective corporate act or putative shares made in accordance with Subchapter R, the holder's rights to challenge the defective corporate act or putative shares are limited to an action claiming that a court of appropriate jurisdiction, in its discretion, should declare: (A) that the ratification not take effect or that it take effect only on certain conditions, if the action is filed not later than the 120th day after the later of the applicable validation effective time or the time at which the notice required by TBOC § 21.911 is given or (B) that the ratification was not accomplished in accordance with this subchapter.[44]

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39 TBOC § 21.908(a-1).

40 TBOC § 21.908(b).

41 TBOC § 21.909.

42 TBOC § 21.910.

43 TBOC § 21.911(a).

44 TBOC § 21.911(d).

District Court Validation. A corporation, member of its Board or a shareholder may apply to a district court pursuant to TBOC § 21.914 to determine the validity and effectiveness of various matters relating to any defective corporate act or transaction or to modify or waive any of the procedures set forth in Subchapter R to ratify a defective corporate act. Actions that the district court may take as a result of the application include declaring that putative shares are valid shares, ordering the filing officer to accept an instrument for filing with a prior effective date and time, and validating and declaring effective any defective corporate act or putative shares, among other things.[45]

B. Nonprofit Corporations.

The TBOC does not contain any provision to the effect that the for-profit provisions of the TBOC apply to nonprofit corporations generally, or as to ratification.[46] However, Subchapter J[47] of Chapter 22 of the TBOC contains ratification provisions for nonprofit corporations comparable to those in Subchapter R of Chapter 21 of the TBOC discussed above, although there are numerous differences reflective of the nature and governance of nonprofit corporations. In the 2021 Legislative Session, the TBOC ratification provisions for nonprofit corporations in TBOC § 22.508 were amended to provide that in the case of a defective corporate act ratified under Subchapter J that would have required under any other provision of the TBOC statute the filing of a filing instrument or other document with a filing officer, the corporation shall file a certificate of validation with respect to the defective corporate act in accordance with TBOC Chapter 4, regardless of whether a filing instrument or other document was previously filed with respect to the defective corporate act.

C. Texas Limited Liability Companies.

The TBOC, to date, has no provisions addressing the ratification of void or voidable actions for LLCs. The existing law in Texas thus follows the common law rule that voidable actions can be ratified, but that void limited partnership actions are *ultra vires* and cannot be ratified.[48] As with Texas LPs, the TBOC, to date, has no provisions addressing the ratification of void or voidable actions for limited liability companies. This is in part because existing common law ratification is available and adequate and in part because LLCs are largely governed by the agreements among their owners. The existing law in Texas thus follows the common law rule that void LLC actions are *ultra vires* and cannot be ratified.[49]

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45 TBOC § 21.914(c).

46 The Texas insurance code provides that the TBOC for-profit corporation provisions apply by statute to specified other entities; insurance companies (Tex. Ins. Code § 964.002; banks (Tex. Fin. Code § 3.008); professional associations (TBOC § 302.001); and professional corporations (TBOC § 303.001) where the Insurance Code is silent.

47 TBOC §§ 22.501-22.516.

48 *See Abdullatif v. Choudhri*, 561 S.W.3d 590, 623 (Tex. App.---Houston [14th Dist.] 2018, no pet.) (collecting Texas Supreme Court authority spanning the past two centuries and holding that void actions are null and not susceptible to ratification or confirmation).

49 *See id.* (collecting Texas Supreme Court authority spanning the past two centuries and holding that void actions are null and not susceptible to ratification or confirmation).

D. Texas Limited Partnerships.

As with Texas LLCs, the TBOC, to date, has no provisions addressing the ratification of void or voidable actions for limited partnerships. This is in part because existing common law ratification is available and adequate and in part because LPs are largely governed by the agreements among their owners. The existing law in Texas thus follows the common law rule that void LP actions are *ultra vires* and cannot be ratified.[50]

IV. DELAWARE

A. For Profit Corporations.

To overturn Delaware cases holding that a void act (e.g. an *ultra vires* action or an action that does not comply with law or governing documents) cannot be ratified, and thus given retroactive sanctification and effect,[51] the DGCL was amended to expressly provide that defects in stock issuances and other corporate acts only render such stock and acts voidable and not void, and the acts may be ratified or validated in accordance with the new statutory ratification provisions.[52] DGCL § 204 provides that defective stock and defective corporate acts are not void, but are voidable and may be ratified retroactive to the date the defective corporate act was originally taken or the stock originally issued, thereby curing not only the defective stock or act but also resolving the "domino effect" of such defect on subsequent corporate acts potentially resulting from a defective corporate act taken in the past.[53] The first step in a DGCL § 204 ratification is the adoption by the Board of a resolution that states: (i) the defective corporate act or acts to be ratified, (ii) the date of each defective corporate act, (iii) if the defective corporate act or acts involved a share issuance, the number and type of shares and the date of issue, (iv) the nature of the failure of each authorization, and (v) that the Board approves the ratification of the defective corporate act or acts.[54] Stockholder adoption of the ratification is required if (i) the ratified act would have required stockholder approval either at the time of the defective act or at the time the Board resolution is adopted or (ii) the defective act resulted from a failure to comply with DGCL § 203 (business combinations with interested stockholders), and in each case would require adequate disclosure to the stockholders regarding the actions being ratified and the effect of their action.[55] DGCL § 205 provides for situations where judicial intervention is preferable or necessary – such as when the sitting Board has questionable status, and allows the Court of

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50 *See id.* (collecting Texas Supreme Court authority spanning the past two centuries and holding that void actions are null and not susceptible to ratification or confirmation).

51 *Triplex Shoe Co. v. Rice*, 152 A. 342, 369 (Del. 1930) (stock issued without proper consideration in violation of Charter or DGCL is void; "the act was void and not merely voidable, and . . . is incapable of being cured or validated by an attempted ratification by amendment or other subsequent proceeding"); *see Starr Surgical Co. v. Waggoner*, 588 A.2d 1130, 1131 (Del. 1991); C. Stephen Bigler & Seth Barrett Tillman, *Void or Voidable? – Curing Defects in Stock Issuances Under Deaware Law*, 63 BUS. LAW. 1109 (2008).

52 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).

53 *Id.*

54 DGCL § 205(b).

55 DGCL § 205(c). *Cf. Gantler v. Stephens*, 965 A.2d 695, 712-13 (Del. 2009). Texas courts have also held that ratification of the results of conduct without full knowledge of the conduct cannot constitute ratification of the conduct.

Chancery to validate and declare effective any defective corporate act or stock issuance and order the Delaware Secretary of State to accept an instrument for filing with an effective date specified by the court, which may be prior or subsequent to the date of the order.[56] A defective corporate act includes "any act or transaction purportedly taken by or on behalf of the corporation that is, and at the time … would have been, within the power of a corporation …, but is void or voidable due to a failure of authorization."[57]

In *In re Numoda Corp. S'holders Litig.*,[58] the Chancery Court determined that its power to validate a defective corporate act required first there must be a "corporate act" and explained:

> Delaware law allows boards to act despite some technical defects, such as lack of notice of a board meeting. Even an *ultra vires* act can be a corporate act. However, there must be a difference between corporate acts and informal intentions or discussions. Our law would fall into disarray if it recognized, for example, every conversational agreement of two of three directors as a corporate act. Corporate acts are driven by board meetings, at which directors make formal decisions. The Court looks to organizational documents, official minutes, duly adopted resolutions, and a stock ledger, for example, for evidence of corporate acts.
>
> The new legislation creates a flexible standard that the Court can use to fix a range of defective corporate acts, but the Court exercises its powers carefully. * * * The Court does not now draw a specific limiting bound on its powers under Section 205, but it looks for evidence of a bona fide effort bearing resemblance to a corporate act but for some defect that made it void or voidable.[59]

The Chancery Court in *Numoda* proceeded to review the evidence presented and determine the stock ownership of the corporation by validating specified corporate acts and declining to validate others.

B. Nonprofit Corporations.

Delaware does not have a separate nonprofit corporation statute. Delaware nonprofit corporations typically are formed as nonstock corporations governed by the DGCL, which allows for flexibility with regard to governance and structuring of the organization.[60] Thus, the same ratification rules that apply to Delaware corporations under the DGCL apply equally to Delaware nonprofit corporations through the same provisions; but the key differences are that in the context of nonprofit corporations, all references in the DGCL to stockholders, the board of directors, and stock refer to members of the corporation, the corporation's governing body, and membership interests in the corporation, respectively.[61]

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56 DGCL § 205(b).

57 DGCL § 204(h)(1).

58 9163-VCN, 2015 WL 402265, 2015 Del. Ch. LEXIS 30 (Del. Ch. Jan. 30, 2015).

59 2015 WL 402265, at *9-*10, 2015 Del. Ch. LEXIS 30, at *31-*32.

60 *See* DGCL § 114 (applying the DGCL to nonprofit corporations).

61 DGCL § 114(a)(1)-(4).

C. Delaware Limited Liability Companies.

The ratification of void actions was not allowed in Delaware for LLCs until 2021.[62] But the Delaware Legislature amended the DLLCA in 2021 to expressly allow for this.[63] DLLCA § 18-106(e) permits the members, managers, or authoritative persons under the LLC agreement to ratify any such void or voidable act or transaction to be validly taken, or to amend the LLC agreement in a manner that permits such act or transaction to be validly taken.[64] The provision further indicates that, if the void or voidable act or transaction was the issuance or assignment of any LLC interests, the LLC interests purportedly issued or assigned shall be deemed not to have been issued or assigned for purposes of determining when the void or voidable act or transaction was ratified or waived.[65] Notice requirements are shifted to be given following the completion of such ratification or waiver.[66] The provision is also written so as not to limit or restrict the accomplishment of ratification, and, to the extent there is an objection to such ratification, the Court of Chancery may hear and determine the validity and effectiveness of such ratification.[67]

D. Delaware Limited Partnerships.

Similarly, the ratification of void actions for Delaware LPs was not allowed until 2021.[68] Alongside the DLLCA, the Delaware Legislature also amended the DRLPA in 2021 to allow such ratification.[69] This provision mirrors the related provision under the DLLCA almost to the letter. DRLPA § 17-106(e) permits the partners or authoritative persons under the partnership agreement to ratify any such void or voidable act or transaction to be validly taken, or to amend the partnership agreement in a manner that permits such act or transaction to be validly taken.[70] Any act or transaction ratified, or with respect to which the failure to comply with any requirements or transaction.[71] Any notice requirements are also shifted to be given following the completion of such ratification or waiver.[72] The provision is further written so as not to limit or restrict the

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62 *See CompoSecure, LLC v. CardUX, LLC*, 206 A.3d 807, 816-17 (Del. 2018) (upholding the common law rule is that void acts are *ultra vires* and generally cannot be ratified).

63 DLLCA § 18-106(e) ("Any act or transaction that may be taken by or in respect of a limited liability company under this chapter or a limited liability company agreement, but that is void or voidable when taken, may be ratified …").

64 DLLCA § 18-106(e).

65 *Id.*

66 *Id.*

67 *Id.* The provision outlines that any objection shall take the form of a lawsuit against the LLC and served on its registered agent. *See id.*

68 *See, e.g., CompoSecure*, 206 A.3rd at 816-17 (noting that void acts are *ultra vires* and generally cannot be ratified).

69 DRLPA § 17-106(e) ("any act or transaction that may be taken by or in respect of a limited partnership under this chapter or a limited partnership agreement, but that is void or voidable when taken, may be ratified ...").

70 DRLPA § 17-106(e).

71 *Id.*

72 *Id.*

accomplishment of ratification, and, to the extent there is an objection to such ratification, the Court of Chancery may hear and determine the validity and effectiveness of such ratification.[73]

[73] *Id.* The provision outlines that any objection shall take the form of a lawsuit against the limited partnership and served on its registered agent. *See id.*