

## Changes in the Model Business Corporation Act— Proposed Amendment to Section 14.34

*By the Corporate Laws Committee, ABA Section of Business Law\**

The Corporate Laws Committee of the ABA Section of Business Law (the “Committee”) develops, and from time to time proposes changes in, the Model Business Corporation Act (the “Act” or “Model Act”).

The Committee has approved the changes described in this report on second reading and invites comments from interested persons. **Comments should be addressed to A. Gilchrist Sparks, III, Chair, Corporate Laws Committee, 1201 N. Market Street, Wilmington, Delaware 19801-1147, or sent to him by e-mail at [asparks@mnat.com](mailto:asparks@mnat.com). Comments should be received by September 1, 2012, in order to be considered by the Committee before adoption of the amendments on third reading.**

Section 14.34 of the Act provides that when a shareholder petitions for court-ordered dissolution, the corporation and the other shareholders have the option to purchase the petitioner’s shares with the value to be determined by agreement of the parties or by the court. Section 14.34(g) provides that when the court determines the value of the petitioner’s shares, the corporation retains the option to dissolve rather than consummate the purchase. The proposed amendment eliminates this option. Giving the corporation the option to purchase and then to reverse course and dissolve is perceived as unfair to any petitioning shareholder, which, in turn, may discourage shareholders from exercising their statutory right to seek court-ordered dissolution.

The proposed amendment is set forth below. Changes to the existing provision are marked with deletions shown by ~~strikeout~~.

### 14.34 ELECTION TO PURCHASE IN LIEU OF DISSOLUTION

- (g) The purchase ordered pursuant to subsection (e) shall be made within 10 days after the date the order becomes final ~~unless before that time the corporation files with the court a notice of its intention to adopt articles of dissolution pursuant to Section 14.02 and 14.03, which articles must then be adopted and filed within 50 days thereafter.~~ Upon filing of such

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\* A. Gilchrist Sparks, III, Chair.

articles of dissolution, the corporation shall be dissolved in accordance with the provisions of sections 14.05 through 14.07, and the order entered pursuant to subsection (e) shall no longer be of any force or effect, except that the court may award the petitioning shareholder expenses in accordance with the provisions of the last sentence of subsection (e) and the petitioner may continue to pursue any claims previously asserted on behalf of the corporation.

## OFFICIAL COMMENT

### D. APPEAL AND THE VOLUNTARY DISSOLUTION ALTERNATIVE

In addition to the usual rights of appeal available to any party under the laws of the local jurisdiction, subsection (g) affords the alternative of voluntary dissolution after entry of an order under subsection (e). The purchase ordered pursuant to subsection (e) may be consummated at any time during the 10-day period after the order becomes final, and must be consummated on the 10th day unless the corporation has previously filed a notice of its intention to dissolve voluntarily. Articles of dissolution must be adopted and filed within the next 50 days. An appeal of the order to purchase stays the running of both the 10- and 50 day period until the appeal is disposed of and the order becomes final.

If the corporation elects to adopt and file articles of dissolution, it may not thereafter revoke its dissolution pursuant to Section 14.04 but must proceed in accordance with the provisions of sections 14.05-14.07. If the corporation elects to dissolve, the petitioning shareholder will receive his or her pro rata share of the liquidating proceeds distributed to shareholders without reference to the "value" of the shares as determined by the court under subsection (e). By virtue of subsection (f), the petitioning shareholder would not be entitled to vote on a proposal to adopt articles of dissolution under section 14.02. Once articles of dissolution are filed, however, subsection (g) provides that the order under subsection (e) is "no longer of any force or effect." Accordingly, subsection (f) no longer applies, the petitioner resumes shareholder status and will be entitled to a pro rata share of any liquidating distribution to shareholders. To prevent use of voluntary dissolution to evade responsibilities, subsection (g) further provides that the filing of articles of dissolution does not affect either the court's award of expenses to the petitioner under subsection (e) or the petitioner's standing to pursue derivative claims on behalf of the corporation, provided that the derivative claims had been previously asserted by the petitioner in the section 14.34 proceedings or otherwise.